



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2024/009

Judgment No.: UNDT/2025/008

Date: 14 February 2025

Original: English

**Before:** Judge Francis Belle

**Registry:** New York

**Registrar:** Isaac Endeley

EJIDIKE

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Setondji Roland Adjovi

Anthony Kreil Wilson

**Counsel for Respondent:**

Tamal Mandal, AS/ALD/OHR, UN Secretariat

## **Introduction**

1. The Applicant, a Senior Political Affairs Officer at the Office of the Special Adviser on the Prevention of Genocide (“OSAPG”) in New York, filed an application dated 1 March 2024 contesting: (a) the decision by the Under-Secretary-General and Special Adviser on the Prevention of Genocide (“the USG”) to rate the Applicant’s performance for the 2022-2023 performance cycle as “C – Partially meets expectations”; and (b) the decision by the rebuttal panel to maintain this performance rating (“the contested decisions”).

2. On 3 April 2024, the Respondent filed a reply submitting that the application was not receivable, as the Applicant does not contest a reviewable administrative decision. In the alternative, the Respondent submitted that the application had no merit as the contested decision complied with Administrative Instruction ST/AI/2021/4 (Performance Management and Development System).

3. For the reasons set out below, the application is granted.

## **Factual and procedural background**

4. The Applicant joined OSAPG in November 2021 as a P-5 level Senior Political Affairs Officer. The USG acted as both his first reporting officer (“FRO”) and second reporting officer (“SRO”).

5. On 6 February 2022, the USG announced that, starting on 7 February 2022, the Applicant would “take over the role of Chief of Office”, due to the incumbent of that position going on Special Leave Without Pay.

6. On 1 April 2022, the 2022-2023 performance cycle began.

7. On 6 July 2022, the Applicant emailed the USG a draft workplan in relation to the 2022-2023 performance cycle which began on 1 April 2022.

8. On 7 July 2022, the Applicant and the USG met and discussed the Applicant's workplan. The Applicant and the USG agreed on the workplan, which the former uploaded to Inspira in July 2022.
9. Between August and September 2022, at the request of the USG, the Applicant revised his workplan to reflect changes in his responsibilities in relation to the areas of budget and finance and a new division of tasks between the Applicant and a new P-5 level colleague in OSAPG.
10. On 31 March 2023, the 2022-2023 performance cycle ended.
11. On 23 June 2023, the Applicant and the USG met to discuss the Applicant's performance.
12. On 29 June 2023, the USG gave the Applicant a final rating of "C – Partially meets expectations". The USG included the following comments in the Applicant's performance evaluation:

I acknowledge [the Applicant's] facilitative role in meetings in February 2022 with other [United Nations] agencies in reviewing the material/documents on work done on hate speech before and after he joined the office on November 10th, 2021. This was in preparation for the DC [acronym unknown] and the EC [acronym unknown] held in March 2022.

I also acknowledge the quick adaptation by [the Applicant] in his new role when he joined the OSAPG team that had planned and organized the African scholars' program as a participant in a mid-December 2021 conference in Dakar, Senegal. The workshop produced a master curriculum document (course outline).

[The Applicant], as Chief of Office, has facilitated OSAPG engagement in inter-agency and interdepartmental processes, streamlining roles and responsibilities and providing guidance to colleagues in preparation and implementation of respective work plans. [The Applicant] played a key leadership role in leading the technical assessment mission to DRC [the Democratic Republic of the Congo], which identified risk factors for atrocity crimes and underlined areas of support to the country, [United Nations] Mission, and civil society. I encourage him to go for more missions. He also played a key role in preliminary consultations with

traditional rulers in Nigeria preparatory to OSAPG consultations on the role of traditional leaders in atrocity prevention, which developed a draft action plan.

I also encourage [the Applicant] to inform me in advance on any new initiatives he may be working on.

[The Applicant] holds the delegation for Budget and Finance Sub-Delegation and shares the Human Resources Sub-delegation with a fellow P5. In relations to budget and finance, over delegation has resulted in consequences such as loss of donors to the office. I encourage [the Applicant] to review use of funds regularly, and every month, go beyond sharing the "status of allotments" report from the [Executive Office] and provide advice on budget and use of office funds accordingly. [The Applicant] also had a responsibility under the Human Resources Sub-delegation to recruit and unfortunately, he took a long time in doing it. Subsequently another staff member had to play this role and recruit the staff as required. [The Applicant] participated in several sessions to build his abilities in budget and finance and the human resource function guided by the [Executive Office] team.

At times, [the Applicant] has not been timely in responding or acknowledging emails, following instructions, providing briefs, or sharing information. I encourage [the Applicant] to seek for assistance as reaching out for assistance is not a weakness. [The Applicant] has also not always been receptive to feedback and instruction and has sometimes been condescending or rude. I encourage [the Applicant] to be mindful of his role as a leader and lead by example. [The Applicant] participated in the Executive Training Programme for Supervisors, and I encourage him to take many more such trainings.

13. On 13 July 2023, the Applicant signed his performance document, indicating that he did not agree with the performance assessment by the USG, and that he intended to rebut the rating.

14. On 27 July 2023, the Applicant rebutted his 2022-2023 performance evaluation.

15. On 7 August 2023, the USG submitted a written statement in reply to the Applicant's rebuttal. On 8 September 2023, the Applicant submitted a rejoinder to the USG's written statement.

16. On 15 September 2023, the Applicant was interviewed by the rebuttal panel and provided an oral statement.

17. On 24 October 2023, the rebuttal panel issued its report deciding to uphold the rating of partially meets performance expectations.

## **Consideration**

### *Receivability*

18. The Respondent avers that the application is not receivable *ratione materiae*, as the contested decisions are not reviewable administrative decisions within the meaning of art. 2.1(a) of the Dispute Tribunal's Statute. The Respondent states that the Applicant has failed to establish that the contested decisions violate his terms of appointment. The Respondent argues that the Applicant merely speculates that the contested decisions may risk his job security and states that this speculation is not sufficient to show that the contested decisions had a direct and adverse impact on the Applicant's terms of appointment or contract of employment.

19. The Applicant contends that the application is receivable as the contested decisions do have a direct and adverse impact on his terms of appointment or contract of employment. He states that "after over twenty years of working at the United Nations, this is a bad precedent in his record and that is already harmful". He submits that the contested decisions risk the loss of his appointment due to the negative performance rating. In his rejoinder dated 1 March 2024, the Applicant informed the Tribunal that numerous actions have been taken by the USG, which affect his terms of appointment and attest to the risk of his contract being terminated for poor performance. He submits that "after returning from a long sick leave period with progressive work hours, the [USG] decided to extend the cycle until 30 June 2023, i.e. three months into the new cycle, with a tailored workplan that will certainly lead to a second negative performance appraisal. [...] As one could foresee, the Applicant got quickly sick again and was on a fresh leave with a doctor's report that strongly links his health condition to the interaction with the FRO/SRO, recommending that an alternative supervisory relation [be] considered".

20. The Applicant further informed the Tribunal in his closing submission dated 30 December 2024, that although the USG is no longer with the Organization, the contested decisions continue to adversely impact him. He informed the Tribunal that the “acting Special Adviser had invited the Applicant for a meeting [...] on 30 December 2024, with a performance improvement plan to be considered and this is exactly the submission of the Applicant about how the separation of the [UGS] does not end the abuse alleged in this case”.

21. The Tribunal recalls that art. 2 of its Statute provides in its relevant part 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[...]

22. 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, for instance, *Najjar* 2021-UNAT-1084, para. 29; *Lee* 2014-UNAT-481, para. 49).

23. In its recent decision in *Hoxha* 2024-UNAT-1465, the Appeals Tribunal reiterated that “[a] determination as to whether a decision is of an administrative nature or not is to be undertaken on a case-by-case basis having regard to the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision (see also e.g., *Najjar*, para. 29; *Andati-Amwayi* 2010-UNAT-058, para. 19, and *Ngokeng* 2014-UNAT-460, para. 27).

24. In the context of performance management, sec. 15.7 of ST/AI/2021/4 provides that “[t]he rating resulting from an evaluation that has not been rebutted is final and not

subject to appeal”, but that “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”.

25. The Appeals Tribunal has held that negative comments in a staff member’s final performance appraisal can affect the conditions of service of the staff member. In *Handy* 2020-UNAT-1044, the Tribunal stated that negative comments in a staff member’s appraisal which detract from the overall rating of “successfully meets expectations” can constitute a reviewable administrative decision. In particular, the Appeals Tribunal held that negative comments “directly have had an adverse impact on [Mr. Handy’s] moral and ethical stature and professionalism and might be taken into consideration by the Administration at any time as a basis for his performance rating in the course of his career development [...]. The harmful effect of the 2016-2017 ePAS negative comments, which detract from the overall satisfactory rating, on Mr. Handy’s employment status is not purely hypothetical, as the Secretary-General erroneously contends, but direct and tangible” (*Handy*, para. 42).

26. It logically follows from *Handy* that an unsatisfactory performance appraisal (including the negative comments made within it) does also have direct legal consequences for a staff member’s terms of appointment. As such, the decisive factor in determining whether a negative performance appraisal constitutes a reviewable administrative decision is the “direct legal consequences” flowing from that appraisal (see *Handy*, paras. 34, 40; *Ngokeng*, para. 31).

27. In the present case, the Tribunal finds that the negative performance rating materially and adversely affects the Applicant’s rights and has a direct legal effect in that the performance document forms part of the Applicant’s personnel record and as such it may be referred to in the future to initiate administrative actions, such as the non-renewal of the Applicant’s appointment. ST/AI/2021/4 expressly stipulates, at sec. 10, that a number of administrative actions may ensue from a negative performance rating, including the withholding of a within-grade salary increment, the non-renewal of an appointment or the termination of an appointment for unsatisfactory service in

accordance with staff regulation 9.3. The negative performance rating may also have an adverse impact on the Applicant's applications for job openings within the United Nations common system, which request applicants to upload their last two performance documents to the job application.

28. Furthermore, accountability is an important underlying value of the Performance Management and Development System. Section 2.3 of ST/AI/2021/4 states that the purpose of the system is also to improve the delivery of programmes by optimizing individual performance at all levels, which it will achieve by, *inter alia*, “[e]mpowering managers and holding them responsible and accountable for managing their staff”. The USG and the rebuttal panel members in this case are also subject to this this accountability, especially as their performance assessment findings in relation to the Applicant do impact his job security and/or career progression.

29. It follows, contrary to the Respondent's arguments, that a negative performance rating does produce legal consequences for the affected staff member and is reviewable by this Tribunal.

30. The application is therefore receivable.

#### *Applicable law on performance appraisals*

31. The Appeals Tribunal has recalled that in examining the validity of the Administration's exercise of discretion, the Dispute Tribunal's scope of review is limited to determining whether the exercise of such discretion is legal, rational, reasonable and procedurally correct to avoid unfairness, unlawfulness or arbitrariness (see *Abusondous* 2018-UNAT-812, para. 12). In this regard, the Dispute Tribunal can “consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But 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. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General” (see *Sanwidi* 2010-UNAT-084, para. 40).

32. Performance standards generally fall within the prerogative of the Secretary-General and, unless the standards are unfair or irrational, the Dispute Tribunal should not substitute its judgment for that of the Secretary-General. If a performance rating is challenged before the Tribunal, the primary task is to decide whether performance was evaluated in a fair and objective manner and to assess whether an adequate evaluation process was followed to determine if the staff member failed to meet the required standard. There must be a rational objective connection between the information available and the finding of unsatisfactory work performance (see *Sarwar* 2017-UNAT-757 at para. 74). The Appeals Tribunal has stated that the Dispute Tribunal must accord deference to the Administration's appraisal of the performance of staff members, and cannot review *de novo* a staff member's appraisal, or place itself in the role of the decision-maker, based on the performance appraisal (see in *Said* 2015-UNAT-500, para. 40).

33. It is well-established case law that in cases of unsatisfactory performance, the Administration must provide sufficient proof of said poor performance based on a procedurally fair assessment or appraisal establishing the staff member's shortcomings and the reasons for them (*Sarwar*, paras. 71-72).

34. Having reviewed the parties' submissions, the Tribunal notes that, on the one hand, the Applicant raises allegations in respect of the assessment of his performance. On the other hand, the Respondent adduces evidence of performance shortcomings in the Applicant's employment during the 2022-2023 performance cycle and evidence of the lawfulness of the rebuttal panel process.

35. In view of the foregoing, in determining the lawfulness of the contested decisions, the Tribunal will examine the following issues:

- a. Whether the Applicant's performance for the 2022-2023 performance cycle was evaluated in a fair and objective manner; and
- b. Whether the Administration followed proper procedures in making the contested decisions.

*Parties' submissions*

36. The Applicant asserts that his performance appraisal was conducted in an unlawful manner and tainted by ulterior motives. His submissions can be summarized as follows:

a. The Applicant has been subjected to an extensive scheme of harassment and abuse of authority. His supervisor, the USG, has made it clear in various ways that she wishes to get rid of him. The abuse culminated in the performance evaluation for the cycle 2022-2023 where she rated him as only partially meeting expectations.

b. The Applicant challenged that rating on the following grounds: (i) delay in finalizing the workplan; (ii) confusion on the workplan; (iii) change in the assignment; and (iv) lack of constructive discussion about the work and the performance throughout the cycle. During the rebuttal process, the USG made false claims against the Applicant. The rebuttal panel failed to consider the grounds for the challenge and to reach its decision in a timely manner. It also erred in its conclusions that there were no procedural violations of ST/AI/2021/4.

c. The rebuttal panel had a responsibility to determine the veracity of the Applicant's claims and get to the truth of the matter; instead, it abdicated its responsibility and relied on unsubstantiated statements of "[t]he panel believes" without providing any analysis of the evidence in front of it to support those beliefs in its conclusions.

d. The rebuttal panel erred when it claimed that the Applicant's argument was inaccurate regarding the procedural violation of the Applicant being forced to accept the USG performing the function of both FRO/SRO. In 24 years of working in the United Nations common system, the Applicant had never been in such a situation; he always had a discrete and different FRO and SRO who performed their functions with the separation of responsibilities as stipulated in secs. 5.4 and 5.5 of ST/AI/2021/4 and previously in secs. 5.3 and 5.4 of

ST/AI/2010/5. While sec. 5.3 of ST/AI/2010/5 was very specific that “[t]he second reporting officer, [...] shall be the first reporting officer’s supervisor or equivalent”, sec. 5.4 of ST/AI/2021/4 changed this language to “[t]he second reporting officer, [...] should normally be the first reporting officer’s supervisor or the equivalent”. While seemingly giving the Administration leeway to abuse the requirement that the FRO and SRO be different people, this language was tempered by the addition of sec. 5.7 in ST/AI/2021/4, which states that “[a] staff member normally has one second reporting officer at any given time in the reporting cycle. The first reporting officer and the second reporting officer should not be the same person. However, under exceptional circumstances and after consultation with the staff member, there may be only one reporting officer when it is not possible to identify two different individuals to be the first and second reporting officers”). The Applicant is a P-5 level staff member. His FRO/SRO, is a USG. There are 3 levels of staffing appointments between P-5 and USG (the levels of D-1, D-2, and Assistant Secretary-General). There was no reason that a staff member between the D-1 and Assistant Secretary-General levels could not have been identified to obviate the USG abusing the Applicant’s due process rights by performing the functions of FRO and SRO with absolutely no checks and balances as stipulated in secs. 5.4 and 5.5 of ST/AI/2021. How could the USG acting also as SRO claim to hold herself accountable for performing her functions as FRO as required by sec. 5.4 (b) to (e) of ST/AI/2021/4?

e. The above notwithstanding, the language “under exceptional circumstances and after consultation with the staff member” could not have applied because a) the circumstances were not exceptional and b) the Applicant was not consulted in the unilateral decision by the USG to appoint herself as both FRO and SRO. At the time of the 2022-2023 workplan discussions, ST/AI/2021/4 with the revised language in secs. 5.4 and 5.7 was only a few months old; the Applicant was not aware that he could and should have objected to the USG’s actions. The rebuttal panel’s statement in para. 15 of its report that “it is a common arrangement allowed in instances where the Secretary-General

would be the SRO” was based on the false premise that the USG should have appointed herself as the Applicant’s FRO in the first place instead of appointing another staff member at the D-1, D-2 or ASG level as the Applicant’s FRO and herself as SRO to comply with ST/AI/2021/4. Indeed, there was an ASG in the office who could have played the buffer role of FRO in this situation.

37. The Respondent’s case can be summarized as follows:

a. The contested decisions were lawful. The Applicant’s 2022-2023 performance appraisal and the rebuttal process were conducted in accordance with ST/AI/2021/4.

b. The Applicant was aware of the required performance standards, and he was given a fair opportunity to meet them. Under sec. 6.3 of ST/AI/2021/4, the Applicant and his supervisor worked together on the development of the Applicant’s individual work plan for the 2022-2023 cycle. The 2022-2023 performance cycle began on 1 April 2022. On 6 July 2022, the Applicant emailed the USG a draft workplan. On 7 July 2022, the Applicant and the USG met and discussed the Applicant’s workplan.

c. During the rest of the 2022-2023 performance cycle, the Applicant and his supervisor continued to meet and discuss the Applicant’s workplan, updating it so that it accurately reflected changes in the Applicant’s responsibilities. For example, in August 2022, the Applicant’s budget and finance delegations of authority were changed, and on 22 August 2022, the USG advised him to revise his workplan to reflect the changes.

d. In September 2022, a new P-5 level colleague took up the position of Senior Political Affairs Adviser at OSAPG. The USG set out a new division of tasks between the Applicant and the new colleague, and requested that both the Applicant and the new colleague reflect the tasks in their workplans. The USG made these requests in three meetings she had with both the Applicant and his

new colleague, and repeated these requests in emails dated 22, 23 and 30 September 2022.

e. The USG's requests for the Applicant to update his workplan were in accordance with sec. 7.2 of ST/AI/2021/4, which envisages updates to workplan goals. Such updates form an integral part of performance management. The updates to the Applicant's workplan were discussed and implemented to assist him complete his workplan goals, given certain performance difficulties he was experiencing.

f. Consistent with sec. 8.1 of ST/AI/2021/4, after the performance cycle, the Applicant and the USG met to discuss the Applicant's overall performance. The meeting occurred on 23 June 2023, within the 3-month period stipulated in sec. 8.1 of ST/AI/2021/4, in the USG's office.

g. Then, consistent with sec. 8.3 of ST/AI/2021/4, the USG evaluated the Applicant's performance. On 29 June 2023, the USG finalized her comments regarding the Applicant's performance and gave him an overall rating of "partially meets performance expectations". The rating was consistent with the USG's comments about the Applicant's performance during the 2022-2023 cycle.

h. The Dispute Tribunal has recognized that where "the comments at issue are constructive, reasonable, and have been balanced by other comments that provide a positive perspective supporting the overall rating" (*Abdellaoui* UNDT/2023/113, at para. 54), there is no violation of ST/AI/2021/4. The USG's comments were balanced and constructive, both recognizing the Applicant's professional accomplishments, and identifying areas where there was room for improvement, such as the Applicant's performance relating to budget and finance, recruiting and communication. The USG's comments reflected feedback she had provided the Applicant during the 2022/2023

performance cycle, both in meetings and via email. The USG's comments supported the overall rating.

i. The rebuttal process was regularly conducted. It was conducted according to sec.15 of ST/AI/2021/4, which states that a staff member who receives a rating of "partially meets performance expectations" may initiate a rebuttal procedure. Under sec. 15.3, following the receipt of a written rebuttal statement, the head of entity or their representative shall submit a written statement in reply to the rebuttal statement of the staff member. The panel, which is selected by the staff member under sec. 15.2, shall then hear the staff member and the FRO and SRO. Sec. 15.4 states that the rebuttal panel shall prepare a brief report stating the reasons why the original rating should or should not be maintained. Under sec. 15.5 of ST/AI/2021/4, the performance rating resulting from the rebuttal process shall be binding on the head of entity and on the staff member concerned.

j. The Applicant has identified no error in the rebuttal process. The Applicant and the USG both had an opportunity to submit documents and give oral evidence in support of their positions. On 24 July 2023, the Applicant's rebuttal statement was submitted to the Executive Office. On 25 July 2023, the Applicant's rebuttal statement was provided to the USG. On 7 August 2023, the USG submitted her written statement, which specifically addressed the basis of her comments in the Applicant's 2022-2023 performance evaluation relating to the Applicant's performance in budget and finance, recruiting and communication. On 9 August 2023, the USG's written statement was provided to the Applicant. On 8 September 2023, the Applicant submitted a rejoinder to the USG's written statement.

k. On 14 September 2023, the rebuttal panel, which was selected by the Applicant and compliant with the grade requirements set out in sec.15.3, met and discussed the information provided by both parties and conferred regarding interview questions for the next day. On 15 September 2023, the rebuttal panel

interviewed both the Applicant and the USG. After his interview, the Applicant provided the panel with a document titled “Oral Statement”.

l. In a report dated 24 October 2023, the rebuttal panel provided its reasons for maintaining the original rating of “Partially meets expectations”. It concluded that “the staff member’s procedural argument that he was not made aware of the performance expectations [...] cannot be maintained” and that “[t]he panel believes that not sufficient substantive reasons were put forward”. The rebuttal panel’s decision was reasonable and complied with sec. 15 of ST/AI/2021/4.

m. The Applicant’s claims that (a) he has been “[subjected] to an extensive scheme of harassment and abuse of authority” which “culminated in the performance evaluation” and (b) that there was a “procedural violation” because the USG served as both his FRO and SRO have no merit. The burden of proof when it comes to showing that a decision is tainted with improper motives rests with the Applicant. He presents no evidence supporting his allegations of harassment and abuse of authority, which he seems to assert are constituted by the performance rating itself. Relevant caselaw and statutory provisions make it clear that “disagreement on work performance or on other work-related issues is normally not considered prohibited conduct”, and that the existence of friction between the Applicant and his supervisor is not enough to establish bias.

n. The Applicant’s argument that the USG serving as both his FRO and SRO constitutes a procedural flaw also lacks merit. Sec. 5.8 of ST/AI/2021/4 states that “under exceptional circumstances and after consultation with the staff member, there may be only one reporting officer when it is not possible to identify two different individuals to be the first and second reporting officers”.

o. There were exceptional circumstances in OSAPG that resulted in the USG serving as both the Applicant’s FRO and SRO. As is clear from the

OSAPG organogram, only the USG could have supervised the Applicant. The Assistant Secretary-General Special Adviser on Responsibility to Protect in the OSAPG who the Applicant contends should have performed the role of his FRO, thus allowing the USG to be his SRO, has a one-dollar-a-year contract, does not have a compact with the Secretary-General or a workplan, and does not supervise staff.

p. The USG consulted the Applicant about serving as both his FRO and SRO. Per the Applicant's own evidence, on 8 July 2022, the USG created the Applicant's performance document as both FRO and SRO. The Applicant never expressed dissent about his reporting line before receiving his final rating.

*Whether the Applicant's performance was evaluated in a fair and objective manner*

38. The Tribunal recognizes that its role is not to review *de novo* the Administration's evaluation of the Applicant's performance but rather to determine whether the rules and procedures governing performance evaluation were complied with (see, for instance, *Sanwidi* and *Abusondous*). In this respect, the Tribunal recalls that sec. 2.1 of ST/AI/2021/4 provides that the key goals of the Performance Management and Development System are to establish a framework that allows for the fair and equitable evaluation of the performance of staff members and to foster a culture of regular feedback.

39. Section 7 of ST/AI/2021/4 sets forth the legal framework for performance conversations and milestone discussions providing that (emphasis added):

7.1 During the year, the first reporting officer and the staff member should have *ongoing performance conversations*, whether verbally or in writing, which should be used to acknowledge good performance and *address any shortcomings*.

7.2 *The first reporting officer should conduct milestone discussions at regular intervals agreed upon with the staff member*. Such discussions should include progress made and an explanation of any updates to the workplan goals, key results and achievements. The first reporting officer should also note progress made in demonstrating the

competencies and in implementing the personal and professional development plan. The staff member may note the progress made towards the goals set in the workplan, the competencies and the personal and professional development plan. *Documentation of the milestone discussions is the responsibility of the first reporting officer.*

40. Section 10 of ST/AI/2021/4 sets forth the legal framework for identifying and addressing performance shortcomings and unsatisfactory performance providing that (emphasis added):

10.1 During the performance cycle, the first reporting officer should continually evaluate performance. *When a performance shortcoming is identified during the performance cycle, the first reporting officer, in consultation with the second reporting officer, should proactively assist the staff member in remedying the shortcoming.* Remedial measures may include counselling, transfer to more suitable functions, additional training and/or the institution of a time-bound performance improvement plan, which should include clear targets for improvement and a provision for coaching and supervision by the first reporting officer in conjunction with performance conversations, which should be held on a regular basis.

10.2 *If the performance shortcoming was not rectified following the remedial measures indicated in section 10.1 and if, at the end of the performance cycle, performance is appraised overall as “partially meets performance expectations”, a written performance improvement plan shall be prepared by the first reporting officer. This shall be done in consultation with the staff member and the second reporting officer. The performance improvement plan may cover up to a six-month period.*

41. It follows that staff members and their FRO should have ongoing performance conversations, whether verbally or in writing, throughout a performance cycle. The FRO is required to conduct milestone discussions at regular intervals agreed upon with the staff member and has the responsibility for the documentation of the milestone discussions under sec. 7 of ST/AI/2021/4.

42. During the performance cycle, the FRO has a further obligation under sec. 10 for (a) identifying performance shortcomings and (b) proactively assisting the staff member in remedying shortcomings. Only if the staff member has then not been able

to rectify identified shortcomings may his or her performance be rated as “partially meets performance expectations”.

43. The Applicant’s main argument is that the USG did not comply with the legal framework mentioned above. In particular, the Applicant maintains that the USG failed to inform him during the 2022-2023 performance cycle that she had identified a performance shortcoming, and she failed in proactively assisting him with remedying any alleged shortcoming.

44. The Respondent states that there is no violation of ST/AI/2021/4 as the USG’s performance assessment reflected the feedback she had provided to the Applicant during the 2022-2023 performance cycle, in regard to his under-performance. In support of his claim, the Respondent provided the Tribunal with copies of “various communications between the Applicant and the USG during the 2022-2023 performance cycle regarding budget and finance, recruiting and communication”. Below are the communications submitted as evidence of the USG’s performance feedback:

- (a) Email from USG to Applicant dated 12 May 2022: “The monthly meetings I had asked for to discuss budgets would have pointed us out to this situation much earlier. I note that this is the first such breakdown I am receiving from you. Without this breakdown, it [is] impossible to plan or provide policy guidance from my side. Going forward, on the 10th day of every month, you will send a similar breakdown”.
- (b) Email from USG to Applicant dated 23 June 2022: “Kindly let me know today, before you leave the office, when you plan to fill this position”.
- (c) Email from the USG to Applicant dated 29 June 2022: “This is a practice expected by any Chief of Office. Kindly send an email of the monthly expenditure/status reports and then going forward send it on every last day of the month”.
- (d) Emails between USG to Applicant dated 2 and 7 July 2022: “I do think you could have told me about this conversation after you spoke with [KM (name redacted for privacy reasons)], before [CS

(name redacted for privacy reasons)] wrote “My friend, [KM], reminded me that I have yet to contact you – after she spoke with you last week.: You shall therefore [Applicant], not meet [CS] and not make any commitments on behalf of the office, that includes meetings”. The Applicant replied, “I am not aware I should brief on corridor encounters but it is noted”.

- (e) Email from Applicant to USG/OSAPG dated 20 July 2022: “The [Regular Budget] operational budget is 99% depleted”.
- (f) Email from USG to Applicant dated 23 July 2022: “I have discussed with [SC (name redacted for privacy reasons)]. She will proceed with the recruitment of this position and keep us both in copy”.
- (g) Email from Applicant to USG dated 22 August 2022: “We initiated the recruitment process but stopped due to funding challenges”.
- (h) Email from USG to Applicant dated 14 October 2022: “I asked you formally via email...to prepare to defend our budget at the 5th Committee. This is a very serious undertaking. If it’s not done well, we could lose these two positions the P4 and P2 that we have spent so much energy working on”.
- (i) Email from USG to Applicant dated 6 February 2023: “Last year in 2022, the office ran out of money before the second half of the year could set in...On the first Tuesday of every month, send a monthly update of both [Regular Budget] and [Extra-budgetary resources] budgets...”
- (j) Email from USG to [MW (name redacted for privacy reasons)] with Applicant copied dated 29 March 2023: “You continue to do much of the heavy lifting...It is clear that the technical team is not briefed and we must make amends...There is urgency, even as I speak to the controller, to repair relationships at the technical level as this should have been discussed before it got to email level. I am greatly concerned about the decision to revise the 2024 budget”.
- (k) Applicant’s submission in his application to the Dispute Tribunal dated 1 March 2024: “I managed staff contracts and recruitment under the guidance of the FRO/SRO”.

45. The Tribunal further reviewed additional email exchanges provided by the Respondent which contained discussions about the Applicant’s work plan and

referenced division of tasks between the Applicant and his colleague. Below are examples of the email exchanges:

- (a) Email from Applicant to USG dated 6 July 2022: “Dear USG [...], Good morning. Please find attached my draft workplan, for your consideration. Best regards”.
- (b) Email from USG to Applicant dated 7 July 2022: “Dear [Applicant], I asked you to come and have a discussion on the workplan you submitted, which I approved below. I am traveling tonight and needed to leave the office by three o’clock. I am waiting for you to come”.
- (c) Email from USG to Applicant dated 22 August 2022: “Dear [Applicant], Kindly review your work-plan in line with the updated delegations of authority you signed on 04/08/2022 and send it to me by end of day today (New York time)”.
- (d) Email from USG to Applicant, with SC copied, dated 23 September 2022: “Dear [Applicant], As per my email of August 17, 2022, [SC], as P5, heads the office’s programme implementation in line with the OSAPG mandate. The summary of programme implementation you have attached for the purposes of Performance Monitoring Application falls under [SC], not you. This distribution of tasks should make it easy for you to carry out other roles. We shall discuss this as an agenda at our next senior management meeting. [SC] is also still serving as office [Officer-in-Charge] and I am glad you told me you are in communication”.
- (e) Email from USG to Applicant, with SC copied, dated 30 September 2022: “Dear [Applicant], I am now concerned that you have not handed over this role to [SC]. As per my email of Friday, 23rd September 2022, in response to you forwarding the same document, in which I referenced my email of August 17th 2022, I told you [SC], as P5 heads the office’s programme implementation in line with the OSAPG mandate. I have had three meetings with both you and [SC] during which I outlined the roles you are to play. The office is facing two major crises. One is financial - I have tasked you to handle it. The other is leadership on programme implementation. I have tasked [SC] to lead on this. [SC] is also [Officer-in-Charge]. [SC] will submit this document. I will take it very seriously if you do not adhere to the emails (three of them now) and the discussions we just had on work between division between yourself and [SC] as the two P5’s of this office”.

46. The Tribunal has reviewed each of the communications referenced by the Respondent as evidence in detail and finds that the communications taken individually or collectively appropriately failed to identify the Applicant's alleged performance shortcomings or to proactively assist him in remedying the shortcomings. In the Tribunal's view, the Respondent has failed to show that the USG engaged the Applicant in a proper performance discussion or provided sufficient feedback of a performance shortcoming as required by secs. 7.1, 7.2 and 10.1 of ST/AI/2021/4 for the following reasons.

47. First, the Tribunal considers that communications under sec. 10.1 which are aimed at identifying and addressing performance shortcomings and unsatisfactory performance are to be direct and constitute a clear message to the staff member that the FRO identifies a performance shortcoming. The contents of the 11 emails do not clearly identify a performance shortcoming. The communications within the 11 emails seem to be routine discussions on work matters and may rather fall under the category of performance conversations as required by sec. 7 of ST/AI/2021/4 as they do touch on the Applicant's performance in his tasks. The Tribunal notes that although the USG, in her statement to the rebuttal panel dated 7 August 2023, refers to various other performance communications with the Applicant, including WhatsApp messages, the Respondent does not provide any documentary evidence of any such exchanges for the Tribunal's review. Further, WhatsApp is not an official or formal electronic channel of communication at the United Nations but rather a type of social media platform used for private purpose; instead, other such channels are available, for instance, the official United Nations email or even MS Teams.

48. Second, it is explicitly stipulated in sec. 7.2 of ST/AI/2021/4 that the FRO is under the obligation of documenting milestone discussions, just as all performance communications under sec. 10.1, whether verbal or written, should also be appropriately documented by the FRO. This formality is especially important as a finding of unsatisfactory performance may lead to termination or non-renewal of a staff member's appointment. The Tribunal notes that milestone is defined in the Oxford

English dictionary as “[a] stone or (usually short) pillar set up beside a road indicating the distance in miles from that point to a particular place”. The Tribunal finds no evidence of a discussion between the USG and the Applicant which could be classified as a performance milestone discussion, one which sets out clear targets and indicates the Applicant’s performance in relation to that target.

49. Third, sec 10.1 further requires the FRO, in consultation with the SRO, to proactively assist the staff member in remedying the shortcoming. This provision requires an FRO to engage in consultation with another manager if necessary. In the Tribunal’s view, the requirement of “consultation” seems to be the commonsense intention of sec. 10.1 in order to ensure responsibility, accountability and a system of check and balances for managers as envisaged by sec. 2.3(c) of ST/AI/2021/4. The Tribunal considers that an FRO who was acting as both FRO and SRO would still be required to “consult” another appropriate manager in addressing a staff member’s performance shortcomings. The Tribunal finds no evidence that the UGS, who was acting as both FRO and SRO, engaged in consultation with another appropriate manager. On the contrary, the USG admits in her statement to the rebuttal panel dated 7 August 2023 that she refrained from consulting the United Nation’s Ombudsman in order to not reveal “[...] how wrong her judgement had been [in recruiting the Applicant]. [The USG] therefore kept hoping he would change, and prove her right, that he was the right candidate to support a USG with such a sensitive mandate as a P5 Chief of Office. She had communicated to him severally on WhatsApp, pointing out his shortcomings and his exceptionally rude manner”.

50. Fourth, sec. 10.1 states that remedial measures may include counselling, transfer to more suitable functions, additional training and/or the institution of a time-bound performance improvement plan, which should include clear targets for improvement and a provision for coaching. The Tribunal finds no evidence that any such remedial measures were put into place by the USG. In particular, the Respondent does not state that the USG at any time during the 2022-2023 performance period secured counselling or suggested transfer to more suitable functions, to the Applicant

at any time, or training (which the Applicant did in fact undergo in management) or set a time-bound performance improvement plan providing clear targets for improvement in the areas of budget and finance, recruiting and communication.

51. In terms of the rebuttal process, the Tribunal notes that under sec. 15 of ST/AI/2021/4, a staff member who receives a rating of “partially meets performance expectations” may initiate a rebuttal procedure. Section 15.4 states that the rebuttal panel shall prepare a brief report stating the reasons why the original rating should or should not be maintained. The Tribunal finds that the rebuttal findings do not properly reflect the evidence submitted to the rebuttal panel. The Tribunal refers to the Respondent’s submissions stating that in the rebuttal panel’s report dated 24 October 2023, the panel provided its reasons for maintaining the original rating of “partially meets expectations”, concluding that “the staff member’s procedural argument that he was not made aware of the performance expectations cannot be maintained” and “the panel believes that not sufficient substantive reasons were put forward”. The Tribunal finds that this conclusion is problematic as it fails to set out in detail the basis of the statement that the rebuttal panel’s decision was reasonable and complied with the provisions of sec. 15.

52. As an example, the Tribunal notes that the USG stated in the performance evaluation that “[the Applicant] also had a responsibility under the Human Resources Sub-delegation to recruit and unfortunately, he took a long time in doing it. Subsequently another staff member had to play this role and recruit the staff as required”. Having reviewed the record, the Tribunal finds insufficient evidence to support the USG’s evaluation. The conclusion did not reflect upon any basis, in terms of reference to time for stating that the Applicant’s recruiting efforts took too long. No information is provided as to what time span is required or is standard for completing a recruitment. No detail is provided in relation to circumstances or conditions in which the Applicant was required to complete the recruitment. The USG’s conclusion that the recruitment took too long and had to be completed by another officer is not reasonable unless some criteria are established for that finding with reference to the criteria. No

such standard is stated. Further, it should also be noted that the day after the USG referred the recruitment to another officer, the Applicant sent an email to the USG stating: “[w]e initiated the recruitment process but stopped due to funding challenges”. This statement from the Applicant is not refuted by the USG or the Respondent at any time and was apparently totally disregarded. The Applicant provided the rebuttal panel his rejoinder on 4 September 2023, which included a copy of an email from the USG to the Executive Office (with the Applicant in copy) that another staff member was taking over the Applicant’s role as hiring manager for a vacant post because the other staff member previously held the vacant position and therefore “she is best placed person to find a replacement”. The Tribunal finds this email contradicts and undermines the USG’s assertions that recruitment processes were delayed by the Applicant’s performance shortcomings and he was appropriately informed of this shortcoming. The Tribunal also finds that the statement that the recruitment took too long as part of the critique of the Applicant’s performance is therefore not reasonable nor based on any clear evidence before the Tribunal.

53. The Tribunal considers that the USG’s conclusion and the rebuttal panel’s agreement with it are not reasonable. In its seminal judgment in *Sanwidi*, the Appeals Tribunal states at para. 42 “[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”. This was therefore not the situation in the present case.

*Did exceptional circumstances justify the USG acting as both the SRO and FRO?*

54. The Applicant avers that it was procedurally flawed for the USG to act as both his FRO and SRO in the circumstances and that he was not consulted on the arrangement as required by sec. 5.8 of ST/AI/2021/4.

55. While the norm is for each staff member to have a separate FRO and SRO, the Tribunal is aware that there are situations where this is not possible and that sec. 5.8 of ST/AI/2021/4 allows for the same person to act in both capacities under “exceptional

circumstances and after consultation with the staff member”. This appears to have been the case at OSAPG, where the USG served as both the FRO and SRO of the Applicant. The Respondent submits that there were exceptional circumstances in OSAPG that resulted in the USG serving as both the Applicant’s FRO and SRO as only the USG could have supervised the Applicant. The Respondent states that the Assistant Secretary-General Special Adviser on Responsibility to Protect in the OSAPG who the Applicant contends should have performed the role of his FRO, thus allowing the USG to be his SRO, has a one-dollar-a-year contract, does not have a compact with the Secretary-General or a workplan, and does not supervise staff.

56. While the Tribunal takes note of this circumstance, given the apparent history of contentious relations between the USG and the Applicant, it would have been preferable for the USG to consult with the Office of Human Resources or another relevant office regarding the best way to proceed with the Applicant's performance evaluation. Unfortunately, there is no evidence that this was even considered.

57. In addition, while it may be that at the time of the commencement of the performance review period there was only the USG available to act as both FRO and SRO. The Tribunal is of the view that by the time the performance review was completed it would have been clear that issues were arising that could be cause for concern in a performance assessment. Circumstances had changed during the assessment period but those circumstances in themselves did not justify proceeding without a separate FRO and SRO.

58. The Tribunal finds little merit in the Respondent’s argument that it was appropriate or lawful for the USG to assume the roles of FRO and SRO as the Applicant was consulted and failed to object to the arrangement. The Applicant, who was caught up in his tasks and, as established above, not notified that the USG would consider that he was failing to meet performance expectations, would not have been focused on the need to insist on two separate reporting officers for increased accountability and oversight. The Respondent argues that the Applicant was clearly on notice that the USG was his FRO and SRO from the time when he uploaded his workplan. The Applicant

does not contest this, but rather states that he was not *consulted* on the arrangement. The Tribunal agrees that a notification on a workplan is not a consultation. Consultation is defined in the Oxford English dictionary as “[t]he action of consulting or taking counsel together; deliberation, conference”. The Tribunal finds no evidence on the record to indicate that the USG consulted the Applicant in any meaningful way on this matter.

59. Having reviewed the chronology of communications between the USG and the Applicant, as presented by the Respondent, the Tribunal is not satisfied that a good enough effort was made to conduct the Applicant's performance evaluation in a fair manner or in full compliance with the relevant provisions. For example, the record does not contain sufficient documentation of the required performance discussions between the USG and the Applicant or of any feedback that would have put the Applicant on notice regarding any perceived performance shortcomings on his part.

60. The Tribunal therefore finds that even if there were some areas of the Applicant's performance in need of improvement, such as not responding quickly to emails and his communication style, the contested decisions to issue an assessment of “partially meets expectations” and to maintain that performance assessment were unreasonably arrived at by the USG and the rebuttal panel. Based on the evidence on file, the lawfulness of the contested decisions is not supported by even a minimal showing of regularity by the Administration or a preponderance of evidence. The Tribunal finds that the contested decisions were partially based on conclusions in the assessment process which failed to account for aspects of the factual circumstances (for instance, lack of evidence of performance conversations and milestone discussions, lack of evidence of the USG identifying and addressing performance shortcomings, lack of funds and no established standard for completion of recruitment, lack of meaningful consultation in relation to the USG acting as the Applicant's FRO and SRO).

**Conclusion**

61. In view of the foregoing, the Tribunal finds that the contested decisions were unlawful and rescinds the performance assessment.

*(Signed)*

Judge Francis Belle

Dated this 14<sup>th</sup> day of February 2025

Entered in the Register on this 14<sup>th</sup> day of February 2025

*(Signed)*

Isaac Endeley, Registrar, New York