

**DECISION OF THE PANEL OF ADJUDICATORS OF THE OSCE WITH
REGARD TO THE EXTERNAL APPEAL BY [REDACTED]
(CASE No: OSCE PoA 1/2023)**

Proceedings

1. The Chairperson of the Panel of Adjudicators (PoA) of the Organization for Security and Co-operation in Europe (OSCE) received on 12 September 2023 a letter from the Chairperson of the Permanent Council of the OSCE transmitting an external appeal by [REDACTED] (Applicant) which the former had received on 1 September 2023.
2. The Chairperson of the Panel, through the Executive Secretary of the Panel, informed the Secretary General of the OSCE (Respondent) and the Applicant on 15 September 2023 of the constitution of the Panel and asked them to forward any further communication to the Panel as per Article 5 of the Rules of Procedure of the Panel to reach the Panel no later than 16 October 2023. The Respondent forwarded [REDACTED] reply on 16 October 2023 which was transmitted to the Applicant, advising [REDACTED] that [REDACTED] has a right to respond. The response of 29 October 2023 was transmitted to the Respondent for information.
3. In accordance with Article VI of the Terms of Reference of the Panel, the Chairperson of the Panel convened the Panel on 4 - 5 December 2023 at the Hofburg premises at Vienna to examine the appeal. The Panel was composed of its Chairperson, Mr. Thomas Laker, and its members Ms. Anna Csorba and Ms. Catherine Quidenus.
4. After examining all the documents submitted to it, the Panel noted that the Applicant's claims, in [REDACTED] own words, include the following:
 - a) "Quash the IRB report (28/03/2023 (IRB filed) and 28/04/2023 (IRB amended)";
 - b) "that the OSCE reimburses all expenses accrued during this Appeal, including printing and mailing costs (if they are imposed on the Appellant)";

- c) "that the OSCE holds accountable and applies disciplinary measures towards the second level and the first level supervisors for using egregious false assertions made against the Appellant that [REDACTED] was involved in espionage on the host country and criminality to retaliate against [REDACTED], as well as to apply the same measures towards the project staff members who made those false egregious assertions in their signed document and which put also the Appellant's safety in jeopardy";
- d) "that the OSCE holds accountable and applies disciplinary measures towards the second level and the first level supervisors for using false statements made by the [REDACTED] representative, never sharing those allegations made by [REDACTED] with the Appellant and soliciting [REDACTED] response to allow the Appellant to defend [REDACTED] before the evaluation process and even after";
- e) "that the OSCE holds accountable and applies disciplinary measures towards the first level supervisor for making false/misleading statements, not sharing [REDACTED] evaluation that [REDACTED] provided to the [REDACTED] with the Appellant during evaluation and even after";
- f) "that the OSCE holds accountable the second level supervisor who was at that time the [REDACTED] for the failure to perform the duties that resulted in non-compliance issues putting the OSCE at risk for hundreds of thousands of dollars of liabilities the consequences of which the Appellant resolved and for which [REDACTED] was retaliated and to provide the assessment of the second level supervisor's performance";
- g) "Make the determination if the performance evaluation process where the lead was assumed by the second level supervisor and failed to meet the requirements of the Staff Instruction No. 15/ 2004 Rev. 2 para 13.1.2 and para 8.2 was in compliance with the OSCE performance evaluation requirements and standards";

- h) "Make a determination on the financial impact on the Appellant of the actions indicated in the points [c] – [g] and putting the failures to perform their duties by the [REDACTED] senior management on the Appellant, thus leading to a less contractual time than initially signed for."

Summary of facts

5. The Applicant, [REDACTED] on secondment from [REDACTED], served from 4 February 2021 to 2 December 2021 as [REDACTED]. On 27 October 2021, the Applicant's assignment was terminated as [REDACTED] probation period was considered not to be successful.
6. At the end of June 2021, an exchange of emails between the Applicant and one of [REDACTED] staff, a [REDACTED], regarding information about the consumption of fuel in the project activities took place. In this correspondence, [REDACTED] expressed [REDACTED] concern that the matter concerned national security; also, [REDACTED] expressed [REDACTED] concern that the Applicant lacked trust and confidence in [REDACTED].
7. On 30 June 2021, the Applicant, the Project Staff, and the Applicant's second level supervisor met to discuss the email exchange. After this meeting, also [REDACTED] officer was contacted, and the Applicant, *inter alia*, indicated that the project staff made statements "slandering" [REDACTED].
8. On 6 July 2021, the Applicant's – first and second level – supervisors contacted three members of the project staff to propose a meeting in July 2021 regarding the Applicant's issues.
9. On 19 July 2021, the Applicant's second level supervisor sent a message to the Applicant, telling [REDACTED] that in view of the Applicant's problems with the project staff [REDACTED] would not be able to evaluate [REDACTED] performance as successful and would be extending [REDACTED] probationary period and developing an improvement plan.
10. On 27 July 2021, the Applicant was informed about the initiation of a Performance Improvement Plan (PIP) with an extension of the Applicant's probationary period from 4 August to 3 November 2021.

11. On 30 July 2021, the Applicant received a PIP from [REDACTED] second level supervisor. On the same day, the second level supervisor asked the project staff to provide a joint document outlining their concern. They did so on 2 August 2021 in an Explanatory Note.
12. On 2 September 2021, the Applicant was invited to meet [REDACTED] supervisors for the first PIP review meeting which did not take place due to the Applicant's leave.
13. On 21 September, the Applicant responded to the invitation of 2 September 2021 and expressed [REDACTED] unwillingness to engage in the PIP process, which [REDACTED] considered to be retaliatory in its nature and without factual basis.
14. In the following weeks, as part of an intense exchange of emails, the Applicant
 - expressed that [REDACTED] did not feel physically safe in [REDACTED]
 - provided written feedback to the PIP;
 - outlined [REDACTED] decision to limit [REDACTED] performance to certain duties due to the assertions in the Explanatory Note;
 - declined an invitation to a final performance review discussion.
15. On 25 October 2021, the supervisors signed the PIP document attesting that the Applicant's performance had not improved. On 27 October 2021, the Applicant was informed that [REDACTED] probationary period was not considered satisfactory, and that [REDACTED] assignment would be terminated on 2 December 2021.
16. On 14 November 2021, the Applicant filed a request for internal review of the decision to terminate [REDACTED] employment contract. On the same day, [REDACTED] also filed a formal complaint for alleged retaliation by [REDACTED] Project Staff, Supervisors and the Head [REDACTED].
17. In the following weeks, the Respondent and the Applicant agreed to 'streamline' the multiple proceedings as follows: The complaint was considered to be directed against harassment, rather than retaliation. Further, it was agreed to treat the complaints against the staff and against the supervisors separately. On the other hand, it was also agreed that the request for internal review and the complaint were dealt with together, based

on respective internal provisions in a Staff Instruction on the OSCE Policy on the Professional Working Environment (SI 21 Rev. 2).

18. In this course of action, on 10 August 2022, the Applicant was notified by two separate decisions that both the complaints against the Project Staff as well as against [REDACTED] supervisors were considered to be *prima facie* unsubstantiated. Also the Applicant was informed that [REDACTED] request for internal review would be dealt with by an Internal Review Board (IRB).
19. On 1 September 2022, the Applicant submitted an additional request for internal review regarding the decision to consider the complaint against the Project Staff as *prima facie* unsubstantiated; on 7 September 2022 [REDACTED] did the same with respect to the complaint against [REDACTED] supervisors.
20. In the following weeks, with the consent of the Applicant, all three requests for internal review were forwarded to one and the same IRB. On 7 November 2022, the IRB informed the Applicant that all appeals would be processed collectively, with a single report covering them.
21. Until 21 December 2022, submissions to the IRB, including rejoinders and surrejoinders, were shared between the parties.
22. On 28 March 2023, the IRB submitted its report, followed by an amended report on 27 April 2023.
23. On 23 May 2023, the Respondent upheld the initial decisions and denied the requests for relief. An *ex gratia* payment of 2,500 EUR as an acknowledgement of the processing delays was granted.
24. On 18 July 2023, the Applicant submitted [REDACTED] request for external review by email. On 1 September 2023, the Respondent forwarded it to the OSCE Chairperson-in-Office recommending the transmission to the Panel.

Contentions of the parties

25. The Applicant's major contentions are:

- The appeal is admissible since it clearly identifies the Secretary General's letter dated 23 May 2023 as the contested decision;
- The performance evaluation was based on false allegations from the project staff;
- Even if the Organization had adhered to its own rules, gross human rights violations are possible;
- The contract was not continued without indicating that any wrongdoing was commuted by the Applicant;
- Relying on false allegations within the performance evaluation process amounts to a *prima facie* case of harassment.

26. The Respondent's major contentions are:

- The appeal is not admissible since the Applicant failed to specify the decisions for which [REDACTED] is seeking review;
- Although the PIP was initiated only one week prior to the end of the probationary period, it was initiated as a good faith effort to ensure the Applicant's employment at [REDACTED];
- All decisions were taken in accordance with the OSCE's internal law.

Considerations

Admissibility of claims

27. At the outset, the Panel reiterates Staff Regulation 10.01 pursuant to which the OSCE's internal appeals procedure is limited to "administrative decisions concerning alleged non-observance of their letter of appointment or terms of assignment, or of any provisions governing their working conditions". Accordingly, Staff Regulation 10.02 provides for "a right of final appeal to a Panel of Adjudicators against an administrative

decision directly affecting him/her”. These limitations of jurisdiction are repeated in Article 1 para. 1 of its Terms of Reference (Appendix 2 to the Staff Regulations and Staff Rules - SRSR), stating that the Panel shall be competent to decide on final appeals “against administrative decisions”.

28. Further, the Panel recalls its established jurisprudence, based on a respective tradition in international administrative law, according to which an administrative decision may be defined as a unilateral decision taken by the administration in a precise individual case which produces direct consequences to the legal order (see decisions of 14 July 2017, OSCE PoA 1/2017, para. 15; of 22 November 2019, OSCE PoA 31/2019 and 36/2019, para. 18).
29. In the present case, in the application form under section ‘2. Impugned Decision’, the Applicant indicates as ‘Date of the text of the impugned decision’ “28/03/2023 (IRB filed), 28/04/2023 (IRB amended), 23/05/2023 (SG letter)”.
30. The Panel emphasises that the IRB report does not qualify as an administrative decision as its findings and recommendations have no direct consequences to the legal order. Pursuant to Article VIII, para. 2 of the Internal Appeals Procedure (see Appendix 12 of the SRSR), it has no binding effect upon the Secretary General’s assessment. Considering its limited impact, an IRB report cannot be the subject of an external review. Therefore, the claim to “quash” the IRB report (see above para. 4 a)) is not admissible.
31. Also, the Secretary General’s letter of 23 May 2023 contains rather the “final decision” at the end of the internal appeals procedure (see Article 12 of Appendix 12 to the SRSR) than “an administrative decision” within the meaning of Staff Regulation 10.02. Rather, the latter is the initial administrative decision of the Organization which, being contested, forms part of the internal appeals procedure, and, when necessary, then the external appeals procedure. Insofar, the applicant failed to correctly indicate the administrative decision(s) [REDACTED] wants to be reviewed by the Panel.
32. However, in the present case, the applicant’s submissions need to be interpreted within the framework of [REDACTED] efforts and actions regarding various administrative decisions. In this respect, the Panel notes that the applicant filed three individual requests for internal

review: On 14 November 2021, █████ requested internal review of the termination decision of 27 October 2021, and on 1 and 7 September 2022, █████ requested internal review of the (two) decisions of 10 August 2022 not to continue with investigations regarding █████ complaints of harassment against project staff on the one hand, and against █████ supervisors on the other hand. In each of the (three) requests, the applicant correctly and precisely identified the administrative decisions █████ was contesting.

33. Considering the record in its totality, the Panel concludes that the Applicant seeks external review of the decisions

- to consider █████ allegations of harassment against █████ supervisors and members of the project staff as *prima facie* unsubstantiated;
- to terminate █████ assignment.

Within these limitations, the appeal is admissible.

Merits of claims

34. At the outset, the Panel takes note of Article VIII, para. 4 of its Terms of Reference (see Appendix 2 to the SRSR) pursuant to which “[i]f the Panel finds the application is well founded it shall recommend the rescission of the impugned decision or the performance by the OSCE of the obligation invoked.” As the appeal contains different claims, the Panel will address them in turn.

Imposition of disciplinary measures

35. The Panel emphasizes that, pursuant to general principles of international civil service law, the imposition of disciplinary measures lies within the discretion of the competent officials of the Organization (see Ullrich, *The Law of the International Civil Service*, Berlin 2018, 418 – 426). Thus, Rule 9.06.4 of the SRSR provides that the “Secretary General or the respective head of institution/mission shall decide on the disciplinary measure to be taken, if any. Since the Disciplinary Committee acts as an advisory board, its recommendation shall not be binding”.

36. It follows from the broad scope of the Organization’s discretion in the field of disciplinary measures that external/judicial review is generally limited to the rights of

an addressee of disciplinary measures. In contrast, the Panel may not decide whether or not a disciplinary measure needs to be taken at all. Accordingly, the Organization cannot be ordered to impose a disciplinary measure on staff members. Therefore, the respective claims "that the OSCE ... applies disciplinary measures" towards the applicant's supervisors and project staff members (see above para. 4 c) to f)) must fail.

Termination of contract

37. At the outset, the Panel recalls that the rules of many international organizations grant broad discretion to the employer regarding the termination of contractual relations during a probationary period, as it is the very purpose of such a period to test whether the new staff member fits into the organization and fulfills its respective expectations.
38. In line with this principle, the OSCE's internal rules provide that in case of unsatisfactory performance during the probationary period, the probationary period can either be extended or the appointment/assignment can be terminated (see Staff Rule 3.09.1 (b)). The Panel takes note that the OSCE, in the present case, decided to extend the probationary period rather than to immediately terminate the Applicant's assignment.
39. The Panel is aware of the Applicant's impression that [REDACTED] efforts to fulfill [REDACTED] obligations were undermined by members of the project staff as well by outside partners, and that [REDACTED] did not receive sufficient support from [REDACTED] supervisors. However, pursuant to established jurisprudence of international administrative tribunals, performance standards generally fall within the prerogative of the administration unless the standards are manifestly unfair or irrational. It is not the role of judicial/external review to consider the correctness of the decision made by the competent supervisors, nor to substitute it for its own decision (e.g. *Sarwar* 2017-UNAT-1034, para. 74). The role of such review is limited to determining whether the proper procedures have been applied (e.g. *Said* 2015-UNAT-500, para. 40).
40. It follows from these general rules that the Panel has to limit its review to the question whether the OSCE's rules with respect to the termination within the probationary period have been adhered to, whereas it is not in a position to verify the Applicant's complaints about the allegedly incorrect assessment of [REDACTED] performance.

41. The Panel takes note of the difficult working climate between the Applicant and outside partners as well as [REDACTED] own project staff towards the end of [REDACTED] probationary period. These tensions are reflected, for example, in [REDACTED] own email of 21 June 2021, addressed to one project staff member, where the Applicant alleges that “there were already instances before of the behavior that could be regarded as insubordination and it has to stop”. One day later, in a further email of 22 June 2021, addressed to the same project staff member, the Applicant complains about the addressee’s “rebellious attitude”, not only [REDACTED] tone being “not acceptable”, but also “again escalating the situation including with inflammatory statements such as the type of direct accusation” as well as “misogynist statements”.
42. Given these tensions, it is deemed neither manifestly unfair nor irrational that the Applicant’s supervisors, having received additional information from members of the project staff about the situation in early July 2021, considered an extension of the Applicant’s probationary period. Thus, [REDACTED] first level supervisor asked the second level supervisor to do so on 13 July 2021, and the latter, in [REDACTED] email of 19 July 2021 to the Applicant, considered the necessity of an extension, including the preparation of a PIP.
43. However, the Applicant’s negative performance appraisal was hardly “supported by documented evidence” as foreseen in para. 13.1.2 of SI 15. Since it was only end of June/beginning of July 2021, i.e. towards the end of the Applicant’s probationary period, that the Applicant’s difficulties became known to the supervisors’ level, the Panel takes note that in the circumstances of this case, it was difficult to obtain such “documented evidence” within the time frame at hand.
44. Pursuant to para. 10.4 (i) of SI 15, a PIP must be “initiated” at least two weeks before the probationary period is due to expire. The Panel notes with concern that, in the present case, the Applicant’s probation period ended on 3 August 2021, whereas the PIP itself was technically initiated on 27 July 2021, i.e. only one week rather than the obligatory two weeks before the end of the probationary period.
45. However, the Panel also notes that the Applicant was informed about the initiation of a PIP already by message of Monday, 19 July 2021, i.e. two weeks before the end of the probationary period, when [REDACTED] second level supervisor clearly stated the Applicant’s

probationary period “has to be extended for the three month period and in no way terminated and an improvement plan prepared in close coordination with you.” In addition, the Panel notes that the Applicant responded to the said announcement on the same day, stating, *inter alia*, that [REDACTED] “was fully aware that [REDACTED] was in the probation period and that [REDACTED] contract could be easily not extended beyond 6 months and [REDACTED] had zero expectation that it would be.”

46. It follows from the above that, indeed, the Applicant was alerted about the future process in a timely manner, and that [REDACTED] expressed awareness of [REDACTED] contractual status. Given these specific circumstances, the Panel, while regretting the delay of the technical initiation of the PIP, does not consider the process as flawed in such a way that its result could no longer be taken into account.
47. The Panel also regrets that the PIP had no success. It is noted that the Applicant did not participate substantially in the PIP process, *inter alia*, by not meeting with [REDACTED] supervisors for the PIP reviews [REDACTED] had been invited to. Again, it is not for the Panel to review the performance assessment of the Applicant’s supervisors. In light of the supervisors’ joint statement “that the situation remains unchanged” and their recommendation “to act in line with Staff Rule 3.09.1”, the Applicant’s assignment had to be terminated (see Paragraph 10.4 (i) of SI 15).
48. Finally, the Panel could find no proof of harassment and/or retaliation that could have influenced [REDACTED] performance appraisal. Therefore, the claims directed against the performance appraisal and the termination of contract (see above para. 4 g) and h)) are without merits.

Relief

49. The Panel is satisfied that the Respondent has acknowledged that the initial processing of the first appeal lasted longer than it should be (about 18 months) and, therefore, granted an *ex gratia* payment of 2,500 EUR for the “delays in processing”. Under these circumstances, additional compensation is not deemed to be necessary.

Costs

50. Pursuant to Article VIII para. 5 of its Terms of Reference, the Panel may award costs to be reimbursed only to a successful applicant. As the appeal has no success, the Applicant's request for reimbursement of costs (see above para. 4 b)) cannot be granted.

Conclusion

51. In light of the above, the appeal is rejected in its entirety.

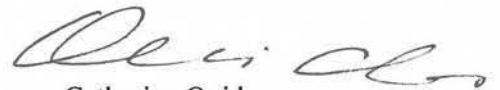
Done in Vienna on 5 December 2023



Thomas Laker
Chairperson



Anna Csorba
Member



Catherine Quidenus
Member