

**DECISION OF THE PANEL OF ADJUDICATORS OF THE OSCE WITH
REGARD TO THE EXTERNAL APPEAL BY [REDACTED]**

(CASE No: OSCE PoA 6/2020)

Proceedings

1. The Chairperson of the Panel of Adjudicators (PoA) of the OSCE received on 11 June 2020 a letter from the Chairperson of the Permanent Council of the OSCE transmitting an external appeal by [REDACTED] (Applicant) which had been forwarded to him on 5 June 2020.
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 12 June 2020 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 13 July 2020. The Respondent forwarded his reply on 8 July 2020 which was transmitted to the Applicant, advising [REDACTED] that [REDACTED] has a right to file a rebuttal which [REDACTED] did on 2 August 2020.
3. Travel restrictions in relation to a viral pandemic prevented the Panel from meeting in person, as foreseen in Article VI of the Terms of Reference of the Panel. Following consultations with the parties, the Panel held deliberations via video-conference on 26 and 27 April 2021. The Panel was composed of its Chairperson, Mr. Thomas Laker, the Deputy Chairperson, Ms. Jenny Schokkenbroek, and its member, Ms. Anna Csorba.
4. After examining all the documents submitted to it, the Panel noted that the Applicant's main relief claimed is re-instatement to [REDACTED] previous position, extension of [REDACTED] appointment at least to 2024, payment of lost earnings, compensation for moral damages, and apologies.
5. The Respondent, pursuant to his reply, is of the view that the contested decision not to extend the Applicant's employment on the basis of [REDACTED] performance issues was taken in accordance with the relevant internal law; therefore, the case should be dismissed.

Summary of facts

6. The Applicant, a former local mission member at the OSCE [REDACTED] [REDACTED] since 1998, served as [REDACTED] from 2015.
7. The Performance Appraisal Report (PAR) for the period from November 2015 to December 2016, *inter alia* concluded that the Applicant needed to improve “most importantly in the area of quality of work, interpersonal skills and communication skills”. [REDACTED] overall rating was “meets some requirements”. The Applicant agreed to this assessment without comments. The Applicant’s appointment was extended to 30 April 2017.
8. From February 2017 to April 2017, a Performance Improvement Plan (PIP) was imposed on the Applicant and extended to end of August 2017. The overall assessment of this first PIP period regarding the question whether the Applicant’s performance had improved during the PIP period reads: “not successful”. Then, the PIP was extended until end of July 2017, and [REDACTED] overall assessment was rated as “successful”. Accordingly, the Applicant’s contract was extended.
9. In an email of 28 September 2018, [REDACTED] first level supervisor complained to the Applicant about alleged lack of performance, in particular with respect to a missing budget request and to two social cohesion related activities. The Applicant was requested to provide written justification for these deficits.
10. Following the absence of a response, on 29 October 2018 a new (second) PIP draft was sent to the Applicant. By email of 31 October 2018, the Applicant was asked whether [REDACTED] had any suggestions to the PIP draft. On the same day, the Applicant answered “No suggestions. Thank you.” The PIP, signed by the Applicant and [REDACTED] supervisors on 1 November 2018, was supposed to end on 31 January 2019. However, it was extended to end of April 2019. This time, the Applicant’s efforts were rated as “not successful”.
11. On 29 May 2019, the Applicant was informed about the decision to not to extend [REDACTED] appointment beyond 5 June 2019, as a result from [REDACTED] unsatisfactory performance.

12. On 22 July 2019, the Applicant submitted a request for internal review. After the establishment of an Internal Review Board (IRB) on 1 August 2019, the Applicant was asked about any concerns regarding its composition. On 4 August 2019, the Applicant answered that [REDACTED] had no objections against the composition of the IRB.
13. On 29 November 2019, the IRB submitted its report, recommending to dismiss the request for internal appeal. On 3 January 2019, the Head of Mission endorsed the recommendation.
14. Pursuant to the Respondent, the Applicant sent a request for external review electronically on 3 March 2019, followed by hard copies on 6 May 2020.

Contentions of parties

15. The Applicant's major contentions are:

- The IRB did not include any member designated by the staff representatives;
- The non-renewal was based on a wrongly initiated and processed PIP and its final review;
- Being the only [REDACTED] in the [REDACTED], [REDACTED] was subject to discrimination, humiliation, harassment and retaliation from [REDACTED] supervisors as from 2015 on.

16. The Respondent's major contentions are:

- The PIP was initiated and processed in accordance with the Organization's internal rules;
- The IRB process was conducted in a fair and impartial manner, and the Applicant was given the opportunity to object to its composition which [REDACTED] did not.

Considerations

17. As there are no concerns with respect to the admissibility of the application (see Rule 10.02.2 (d) of the Staff Regulations and Staff Rules (SRSR)), the Panel may directly turn to its merits. In this respect, the Panel will assess the procedural as well as the substantive legality of the contested decision.

Procedural legality

18. Pursuant to the Panel's established jurisprudence in disciplinary matters, procedural legality deals with the question whether the decision under review was taken by the competent body and in adherence to the Organization's own rules, including due process (see, e.g., decision of 6 July 2018, OSCE PoA 2/2018, para. 25; decision of 17 December 2020, PoA 2/2020, para. 18). The same applies to the present case, and it encompasses the internal appeals process.

Composition of the Internal Review Board (IRB)

19. The Applicant claims, and the Respondent admits, that the IRB in ■ case was composed without sufficient participation of the staff representatives, as required by Art. II para. 2 (a) and (c) of the Internal Appeals Procedure (see Appendix 12 to the SRSR).
20. The correct designation of members of an IRB is an indispensable prerequisite for the procedural legality and acceptability of its recommendation. The composition of such panel has to comply with the unambiguous provisions of Art. II of the Internal Appeals Procedure. Therefore, in general, any wrongful composition of an IRB is a relevant procedural deficit that might lead to remanding a case to the IRB level for correction and repetition of the Internal Appeals Procedure.
21. However, the Panel takes note that in the present case, the Applicant was given ample opportunity to object to the nomination of IRB members, as prescribed in Art. II para. 6 of the Internal Appeals Procedure. In fact, being informed about the names of the designated members of the IRB on 1 August 2019 and ■ right to object to the

nomination of up to two members within three days, the Applicant responded by email of 4 August 2019, reading that ■■■ did “not have any objections to membership of the IRB”. Further, the Panel notes that the Applicant in ■■■ response of 2 August 2020 repeated that ■■■ does “not object membership of the IRB even now...”.

22. Taken together, since the Applicant was given sufficient opportunity to object to the composition of the IRB and does not complain about it, ■■■ has deliberately waived ■■■ right to complain successfully about the composition of the IRB. In these circumstances, it is not deemed appropriate or necessary to remand the case for repetition of the Internal Appeals Procedure.

Substantive legality

23. Pursuant to Regulation 3.11 (a) of the SRSR, appointments and assignments shall not carry any expectation of extension or conversion to another type of employment. Regulation 3.11(b) (i) prescribes that extension may be granted provided that the staff member’s service is rated as satisfactory. If, at the end of a PIP, the evaluation is “does not meet requirements”, pursuant to para. 11.4.12 of Staff Instruction No. 15/2004 Rev. 2 on Performance Management in the OSCE (SI 15), such evaluation shall be considered unsatisfactory performance, and serve, *inter alia*, as a basis for non-extension of the appointment. Further, para. 11.4 of SI 15 provides that if a staff member’s supervisor determines that performance issues persist, a PIP must be initiated.
24. It follows from the above that prior to a decision not to extend a staff member’s appointment based on unsatisfactory performance, a proper, i.e. duly initiated and processed PIP must be conducted. Accordingly, the Panel will assess whether the respective requirements were met in turn.

Performance Improvement Plan (PIP)

25. Pursuant to para. 11.4 of SI 15, performance issues must be addressed immediately when they arise; in such case, supervisors shall, as a first course of action, discuss the issue with the staff member and allow for an initial informal opportunity to improve any underperformance.

26. In the present case, the Applicant's supervisor sent an email to the Applicant on 28 September 2018, alleging poor performance regarding the Applicant's tasks to submit a budget request as well as the lack of implementation of two approved social related activities. The Applicant was asked to consider this message as a warning, in addition, ■ was requested to provide written justification for the shortcomings mentioned above, including "a set of measures you propose to rectify the situation".
27. At the outset, the Panel notes that para. 11.4 of SI 15 does not prescribe the way in which the issue of underperformance, as a first course of action, has to be discussed. Although it might have been more appropriate to discuss the present problems orally, the Panel is satisfied with the written approach of the Applicant's supervisor. The Panel takes further note that the issues of alleged underperformance were clearly identified, and that the Applicant was given the opportunity to improve the situation by submitting propositions to rectify the situation. Therefore, the required stage of addressing the issue of underperformance informally before taking formal action, has passed in an adequate manner.
28. Since the Applicant failed to react to this message within a month of time and, therefore, the performance issue persisted, there was no other way than to initiate a PIP, as requested by para. 11.4 of the SI 15. The Panel notes that, pursuant to the PIP document, on 29 October 2018 a meeting with the Appellant was organized in order to initiate a PIP (see paras. 11.4.1 and 11.4.3 of SI 15 respectively).
29. The Panel takes note that the proposed PIP was sent to the Applicant on 31 October 2018, including the offer to submit any suggestions. The Applicant answered by email of the same day that ■ had no suggestions, and, on 1 November 2018, returned the PIP document with ■ signature which then was signed by ■ first and ■ second level supervisor. Accordingly, in this regard, the Applicant as well as the first and the second level supervisor all recorded their agreement to the proposed PIP, as required by para. 11.4.4 of SI 15. The Panel holds that the Applicant, having abstained from making suggestions, is not entitled to now complain about objectives of the PIP ■ considers to be unrealistic or otherwise tainted.
30. The Panel takes note that the agreed PIP includes, *inter alia*, clear and detailed objectives, progress report dates, as well as performance review dates and other

feedback options. Regarding the Applicant's allegations, that "there were no regular feedback in the meetings" and that ■■■ "was left alone with ego" of ■■■ first level supervisor, the Panel further notes, that the Applicant ■■■ admits that meetings "were done over the phone and via email". Insofar, no violation of the requirements of para. 11.4.5 of SI 15 can be found.

31. The Panel notes that, pursuant to para. 11.4.8 of SI 15, performance may be evaluated only as either "successful, or "needs improvement", or "does not meet requirements". As the PIP period was – in accordance with para. 11.4.7 of SI 15 – extended for three additional months, a second review discussion did not take place before 2 April 2019, and the final review ends, on the basis of a detailed description of the Applicant's shortcomings, with an overall assessment "not successful" – apparently as a contrast to the positive assessment of "successful", as used in the quoted provision. However, this lack of correct use of 'rating notes' does not allow for any doubts that this assessment fully corresponds to the rating of "does not meet requirements" within the meaning of SI 15. Although such misuse of terminology should be avoided, the Panel sees no reason in the present case to consider the PIP assessment as tainted in a relevant regard.
32. It follows from the above that the PIP was initiated and processed in accordance with the respective internal rules of the OSCE, except for a minor error in language. The Applicant's criticism of its subjects could and should have been submitted at an earlier stage. There is no proof of insufficient support or lack of feedback during the PIP period. The Panel regrets to learn that the Applicant lost both ■■■ parents in recent years, but this sad fact cannot be considered as relevant within the present context.

Discrimination, humiliation, harassment and retaliation

33. Regarding the Applicant's allegations of being discriminated against, humiliated, harassed and retaliated, the Panel emphasizes that such concerns generally need to be addressed in the appropriate legal framework of Staff Instruction No. 21/Rev. 1 – OSCE Policy on the Professional Working Environment (SI 21). In its Annexes 1 and 2, SI 21 provides detailed information and advice about informal and formal procedures for addressing violations of the professional working environment. To the best of the Panel's knowledge, the Applicant seems to have never used the respective tools.

34. Apart from the above, the respective allegations were presented in a vague, albeit unstructured and voluminous way, which makes it impossible to identify specific acts within the period of time at stake, i.e. the timeframe of the PIP. Thus, it is unclear what kind of retaliation the Applicant might have suffered for reporting two alleged cases of misconduct which seem to have happened in 2015/2016. The same applies to the rather vague statement of being discriminated against because of being the only [REDACTED] [REDACTED] where [REDACTED] was deployed as from 2015. Also, comprehensive descriptions of specific incidents of harassment and/ or humiliation are missing, e.g., regarding an episode with a mission Doctor.


35. In sum, the Applicant's allegations are neither substantiated nor can they be considered as relevant for the initiation, processing, and evaluation of the crucial PIP.

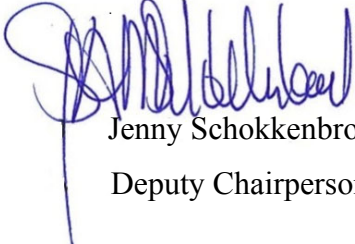
Non-extension


36. As shown above (see para. 23), it is an indispensable prerequisite for each extension of an appointment that the respective staff member's services are rated as satisfactory. Therefore, given the outcome of the PIP in the Applicant's case, there was no option to extend [REDACTED] appointment, regardless of [REDACTED] long years of service for the Organization. The Panel notes that as from 2016 on, a decline of the Applicant's performance had become visible in [REDACTED] rating, and that a first PIP from February to April 2017 had had to be extended. In this respect, there have been sufficient indications to the Applicant that [REDACTED] performance needed improvement which did not happen.

37. In light of the above, the application is rejected in its entirety.

Done on 27 April 2021


Thomas Laker
Chairperson


Jenny Schokkenbroek
Deputy Chairperson


Anna Csorba
Member