

**DECISION OF THE PANEL OF ADJUDICATORS OF THE OSCE WITH  
REGARD TO THE EXTERNAL APPEAL BY [REDACTED]  
(CASE No: OSCE PoA 1/2024)**

*Proceedings*

1. The Chairperson of the Panel of Adjudicators (PoA) of the Organization for Security and Co-operation in Europe (OSCE) received on 5 March 2024 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 23 February 2024.
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 7 March 2024 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 8 April 2024. Both parties forwarded communications on 8 April 2024, and the Applicant was advised that [REDACTED] has a right to respond to the Respondent's reply. [REDACTED] response of 29 April 2024 was transmitted to the Respondent for information.
3. In accordance with Article VI of the Terms of Reference of the Panel (ToR), Appendix 2 to the Staff Regulations and Staff Rules (SRSR), the Chairperson of the Panel convened the Panel on 2 - 3 July 2024 at the Hofburg premises at Vienna to examine the appeal. The Panel was composed of its Chairperson, Mr. Thomas Laker, its 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 claims include the following:
  - a) The quash of the contested administrative decision of 25 October 2023;
  - b) Investigation and adjudication of the Applicant's initial complaint;
  - c) Appropriate disciplinary measures to be taken against the alleged offender.

*Summary of facts*

5. The Applicant is currently employed by [REDACTED] as a [REDACTED], since [REDACTED]. Previously the Applicant was employed by the OSCE in other functions since [REDACTED].
6. On 3 November 2021, the Applicant participated in an OSCE virtual meeting dealing *inter alia* with [REDACTED]'s activities regarding the [REDACTED]. Pursuant to the Applicant, [REDACTED] "expressed [REDACTED] sincere regret that [REDACTED] teams ...were not engaged in this task ...I also emphasized that the [REDACTED] approach could not be complete without the [REDACTED] contribution". Later that day, the Applicant received a phone call from a colleague who asked [REDACTED] whether [REDACTED] remarks were of a personal nature which the Applicant denied.
7. Also, a few hours later on 3 November 2021, the Applicant received emails from the [REDACTED] ("Alleged Offender") with regard to organising a meeting to discuss the performance of the Applicant which, according to Annex 6 of the Application, took place on 12 November 2021. One of the Alleged Offender's email of 3 November 2021 reads: "...You are aware that [REDACTED] [...] is your supervisor, but henceforth all your [Performance Management Process] PMPs will also go through me. The discussion we will have on Monday will not only be on coordination, which you as [REDACTED] should be in regular contact with us, not only to expect the reverse, but your performance and attitude towards colleagues, [REDACTED] and other [REDACTED]. I will from now on pay close attention to how work is done in [REDACTED] where we see issues by certain staff members. The progress, success or lack thereof, will be reflected in the PMP." The Applicant's supervisor was copied on this email.
8. On 5 November 2021, the Applicant sent an email to the [REDACTED] [REDACTED], outlining [REDACTED] intention to report the Alleged Offender to the OSCE Office of Internal Oversight for "unethical conduct".
9. On 7 November 2021, the Applicant received a response from [REDACTED] proposing that the Applicant consider exploring informal resolution with the Alleged Offender under

Staff Instruction No. 21/Rev.1 on 'OSCE Policy on the Professional Working Environment' (SI 21), as applicable from 1 November 2013.

10. On 12 November 2021, the announced meeting on the Applicant's performance took place.
11. On 22 November 2021, the Applicant filed a formal complaint pursuant to SI 21, alleging harassment, as defined in paragraphs 6.1 and 6.2 thereof.<sup>1</sup> The allegations submitted by the Applicant related to the email communications between the Applicant and the Alleged Offender on 3 November 2021.
12. On 2 December 2021, following receipt of the Applicant's complaint, ██████ provided the Alleged Offender with a copy of the Applicant's complaint and invited the Alleged Offender to provide a written response within ten working days of receipt. On the same day, the Alleged Offender responded to the Applicant's allegations and also made a counter-allegation of harassment against the Applicant.
13. On 15 March 2022, ██████ contacted both parties in an effort to explore the possibility of resolving their grievances through informal procedures. Both the Applicant and the Alleged Offender declined the proposed informal resolution.
14. On 25 April 2022, following internal consultations and in consultation with the Secretary General, ██████ decided that allegations be investigated pursuant to paragraph 2.9 (a) of Annex 2 of SI 21. On 4 July 2022, ██████ established an investigative team to examine the alleged violations of the Policy on the Professional Working Environment made by both the Applicant and the Alleged Offender in ██████ response.
15. On 23 August 2022, the investigative team submitted its investigation report to ██████. The report concluded that there was "no clear and convincing evidence that [the Alleged Offender] communication to [the Applicant] on and about November 2021 constituted harassment [...]". The investigative team considered some elements with

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<sup>1</sup> The Panel notes that on 1 November 2022, SI 21/Rev 2 took effect, including amendments of the definitions and numbering. However, these amendments have no impact on the outcome.

regard to the counter-allegations. The report, however, did not make any findings on the counter-allegations.

16. On 31 January 2023, the Applicant submitted an addendum to [REDACTED] complaint, related to allegations the Alleged Offender had raised in [REDACTED] counter-allegations.
17. On 13 March 2023, pursuant to Staff Regulation 9.03 (a) (i) and (b), and paragraph 2.13 of Annex 2 to SI 21/Rev1, [REDACTED] decided, based on a preponderance of evidence, to fully exonerate both the Applicant and the Alleged Offender from the allegations of harassment. This is the contested decision.<sup>2</sup>
18. On 12 April 2023, the Applicant submitted a request for internal review of the decision by [REDACTED]. On 25 April 2023, an Internal Review Board (IRB) was established in [REDACTED] to consider the Applicant's request for internal review.
19. Due to a perceived conflict of interest of one IRB member, a new composition of the IRB was proposed. On 13 June 2023, the Applicant's view on this composition was solicited. The Applicant did not express any objections to the new IRB composition on the same date.
20. In July and August 2023, the parties exchanged their views before the IRB, and – following two requests for extension – on 25 September 2023, the IRB submitted its final report, finding that there was insufficient evidence to support a finding of harassment by the Alleged Offender.
21. On 25 October 2023, [REDACTED], in consultation with the Secretary General, endorsed the recommendations of the IRB and upheld the decision of 13 March 2023.
22. On 24 December 2023, the Applicant submitted [REDACTED] request for external review.

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<sup>2</sup> Since the Alleged Offender did not take action with respect to the counter-allegations, the present decision will not deal with any of the issues raised therein.

*Contentions of the parties*

23. The Applicant's major contentions are:

- The contested decision is fundamentally flawed as it fails to correctly establish and distinguish the facts, recognise and analyse the evidence, and overlooks the circumstances;
- The process took more than two years and was unacceptably delayed.

24. The Respondent's major contentions are:

- The Applicant has failed to discharge the burden of proof and to establish ■■■ case;
- The internal rules of the Organization were adhered to, and the Applicant's due process rights were respected;
- There was no excessive delay in the proceedings.

*Considerations*

*Admissibility*

25. 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 ToR, stating that the Panel shall be competent to decide on final appeals "against administrative decisions".

26. 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).
27. 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' "25/10/2023".
28. The Panel notes that the Secretary General's letter of 25 October 2023 contains the final decision at the end of the Internal Appeals Procedure (see Article 12 of Appendix 12 to the SRSR) rather than "an administrative decision" within the meaning of Staff Regulation 10.02. Indeed, it 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 ■ wants to be reviewed by the Panel. However, since the Applicant's submissions are clearly related to the initial decision of 13 March 2023, the Panel sees no need to consider the appeal as inadmissible.
29. For purposes of clarification, the Panel reiterates 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.

#### *Scope of review*

30. The Panel takes note that the initial complaint of 22 November 2021 was limited to the alleged harassment within the email communication from the Alleged Offender on 3 November 2021. Accordingly, the investigation as well as the contested decision of 13 March 2023 focused on these incidents. Later incidents, as described in the Applicant's



addendum of 31 January 2023, do not form part of the contested decision nor, therefore, of the present external review.

### *Merits*

#### *Rescission of the administrative decision of 13 March 2023*

#### *Legal background*

31. The Panel takes note that SI 21, Rev. 1, on the ‘OSCE Policy on the Professional Working Environment’ includes detailed definitions of the respective policy as well as procedures to be followed should allegations of violations of this policy be reported.
32. With respect to the present case, paragraph 6 of SI 21 provides the following definition of harassment:

“6.1 Harassment is any improper and unwelcome conduct on the part of one or more OSCE officials or non-OSCE staff that has caused or might reasonably be expected or be perceived to cause offence or humiliation to another colleague.

6.2 Harassment may be present in the form of words, gestures, or other actions that annoy, alarm, abuse, demean, intimidate, belittle or cause humiliation or embarrassment to another person, or cause an intimidating, hostile or offensive work environment. ... Harassment could amount to an abuse of authority, when engaged in by any official or non-OSCE staff who is in a position of influence or power of the recipient of such actions. It may be deliberate, unsolicited or coercive. Harassment normally happens over a period of time and therefore implies a series of incidents. However, depending on its nature, a one-time incident could exceptionally fall within the definition.”

33. Further, paragraph 6.9 of SI 21 reads:

“OSCE officials must have reasonable grounds before making a complaint under this Staff Instruction. While unwelcome behaviour is seen from the perspective of the complainant, the standard for judging whether behaviour is inappropriate

is not purely subjective. The OSCE employs a standard based on reasonableness. Whether conduct constitutes inappropriate behaviour will be based on an assessment of the facts and circumstances in which they occur, taking into account the particular sensitivities required in the OSCE multicultural environment.”

34. Annex 2 to SI 21 includes, *inter alia*, the steps to be taken after receipt of a formal complaint. The Panel notes that, in the present case, in accordance with Paragraph 2.9 a) of the said Annex, ██████████ had decided that the Applicant’s allegations should be investigated. Paragraph 2.13 of Annex 2 prescribes that after the receipt of an investigation report, Staff Regulation 9.03 shall apply, reading

“(a) Following the response of the staff/mission member to the allegations raised against him/her and the investigation if one has been conducted, the following courses of action may be taken:

- (i) Full exoneration from the allegations;
- (ii) Partial exoneration from the allegations;
- (iii) Submission of the case to the Disciplinary Committee in accordance with Regulation 9.06, unless the staff/mission member decides in writing to waive his/her right for the review of his/her case by the Disciplinary Committee;
- (iv) Dismissal in accordance with Rule 9.04.2.”

██████████ *determination*

35. ██████████ decision of 13 March 2023 is fully based upon the investigation report of 23 August 2022: Noting “that the IT found that [the Alleged Offender’s] actions did not rise to the level of harassment as set out in SI 21, and, based on the preponderance of evidence, I have therefore ... fully exonerated [the Alleged Offender]”.

36. The Panel reiterates that decisions in disciplinary matters as well as pursuant to Staff Regulation 9.03 are based on the exercise of discretion, and that the Panel will not lightly interfere by replacing the administration’s assessment by its own preference (see decision of 23 November 2018, OSCE PoA 1/2018, para. 21). However, any such



discretion is not unfettered, and it is for the Tribunal to check whether general criteria for the correct use of discretion were observed. In this respect, for example, all relevant facts and circumstances of a case have to be taken into account. Where relevant facts are overlooked or neglected, a discretionary decision is based on an incomplete reasoning and cannot stand. In line with this general requirement, paragraph 6.9 of SI 21 states that whether conduct constitutes inappropriate behaviour “will be based on an assessment of the facts and circumstances in which they occur”.

37. In the case at stake, the Panel notes that the sequence and impact of incidents are not fully represented in the investigation report upon which the contested decision is based.
38. First of all, the report does not mention the undisputed fact that, prior to the email exchange with the Alleged Offender, the Applicant had expressed concerns in the video meeting on 3 November 2021 with respect to the (lack of) participation in certain activities, thus criticizing the approach taken by [REDACTED] (see above para. 6).
39. Second, the report does not clearly state that the phone call the Applicant received after the video meeting came from a colleague to whom the Alleged Offender had, pursuant to the investigation report, “delegated some... tasks ...of providing feedback”.
40. Third, the report does not mention the undisputed fact that the Applicant had only received two emails from the Alleged Offender prior to the exchange in November 2021, with no relation to performance issues.
41. Fourth, the report ignores the fact that the Applicant already by email of 5 November 2021 to [REDACTED], i.e. two days after the email exchange, expressed [REDACTED] intention to report the Alleged Offender for unethical conduct (see above para. 8).
42. Fifth, the report does not indicate the wording of the Alleged Offender’s immediate reaction in [REDACTED] email of 3 November 2021 (16.27 hrs.), which emphasized that “henceforth all your PMPs will also go through me”, and underlining that the meeting of 12 November 2021 would relate to the Applicant’s “performance and attitude towards colleagues, [REDACTED] and other [REDACTED]”, closing with the statement that “progress, success or the lack thereof, will be reflected in the PMP.”

43. Finally, the Panel takes note of the report stating that “[w]itnesses of the performance meeting on 12 November 2021 considered that [the Alleged Offender] lacked decorum during the meeting.”
44. In light of the facts as described above, the Panel finds it difficult, if not impossible, to assume – as does the investigation report – that the fact that the Alleged Offender asked for a meeting on performance issues just “on 3 November, 2021 after the portfolio meeting seemed to be a coincidence of timing.”
45. In this regard, the Panel reiterates the following sequence of events: On 3 November 2021, the Appellant criticizes the ██████’s approach in a specific subject matter during a video conference. A few hours later ██████ gets a phone call from a colleague, to whom the Alleged Offender has delegated tasks of giving feedback. Again a few hours later, the Alleged Offender, being the competent official for the subject matter at ██████, calls the Appellant to a performance meeting outside the regular PMP circle by email. The former does so, although ██████ had been only twice in such contact with the Applicant before, with no performance related matters. In addition, the Alleged Offender is not competent to deal with the Appellant’s PMP, as ██████ is not one of the Appellant’s two supervisors. In the email, the Alleged Offender clearly emphasizes ██████ own influence on the Appellant’s PMP and leaves no doubt that potential lack of progress and/or success will be reflected in the Appellant’s upcoming PMPs.
46. Pursuant the Panel’s view, a causal link between the successive incidents as described above has to be considered: without having criticized ██████, it is more than surprising that the Appellant, on the same day, would have been called by a ██████ official to a performance related meeting, during which the latter lacked decorum. Since the specific circumstances are hardly and only in part reflected in the investigation report, the Panel is unable to share its conclusion that “[t]here was no evidence to support that the comments made by [the Applicant] during the portfolio meeting on 3 November, 2021 was the reason for [the Alleged Offender] initiating this performance discussion.”
47. The Panel cannot but conclude that the exercise of discretion in the present case is based upon an incomplete assessment of relevant facts and circumstances. Had ██████ taken into account the full picture, ██████ might have come to a different decision regarding the

options offered by Staff Regulation 9.03. In particular, ■ might have considered that the Alleged Offender's email of 3 November 2021 reflected undue pressure on the Applicant and, thus, could constitute harassment to be dealt with by a disciplinary committee.

48. As the ■'s discretionary decision to fully exonerate the Alleged Offender is based on an insufficient assessment of the relevant facts, it needs to be rescinded.

*Investigation and adjudication of the Applicant's initial complaint*

49. The Panel notes that the Applicant requests the investigation and adjudication of the Applicant's initial complaint (see above para 4 b)). However, it is not within the Panel's jurisdiction to determine the administration's discretionary decision, as foreseen in Staff Regulation 9.03 (see above para. 34). In such cases, the Panel's power is limited to the rescission of the contested decision, thus remanding the case to the administration for a new determination in light of the Panel's decision.

*Imposition of disciplinary measures*

50. The Panel reiterates 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".
51. 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 (see decision of 5 December 2023, OSCE PoA 1/2023, para. 36). Therefore, the respective claim that

appropriate disciplinary measures be taken against the Alleged Offender (see above 4 c)) must fail.

#### *Delay*

52. The Panel notes that nearly one and a half year elapsed from the submission of the Applicant's complaint in November 2021 until the notification of the contested decision in March 2023. Even considering the special circumstances the Respondent raises, such a long period of time does not meet the requirements of paragraph 8.1 of SI 21, pursuant to which complaints "shall be dealt with promptly".

53. The Panel further notes that more than six months passed by between the submission of the request for internal review on 12 April 2023 and ██████'s final decision of 25 October 2023. Additional delays occurred during these proceedings before the IRB, since the IRB was not composed within the time-line established in Article II paragraph 1 a) of Appendix 12 to the SRSR, and the report was not submitted within the time-line established in Article V paragraph 7 of the said Appendix.

54. In this respect, the Panel notes that the Applicant does not ask for financial compensation. In light of the general principle of *ne ultra petitur*, the Panel is prevented from granting such compensation. However, the Respondent is reminded of ██████ practice to grant an *ex gratia* payment for "delays in processing" (see, e.g., decision of 5 December 2023, OSCE PoA 1/2023, paras. 23 and 49).

#### *Remedies*

55. It follows from the above that only the Applicant's claim to rescind the contested decision of 13 March 2023 (see above para. 4 a)) is well founded. Therefore, in accordance with Article VIII, paragraph 4 of the Panel's ToR, the Panel recommends the rescission of the impugned decision. However, the Panel is obliged to "also fix the amount of compensation to be paid to the applicant should the impugned decision not be rescinded", as foreseen in the same provision.

56. The Panel notes that, pursuant to paragraphs 5.1 and 5.2 of SI 21, *inter alia*, the “OSCE is committed to providing a working environment free of harassment .... [and] shall not tolerate any behaviour that constitutes harassment...”. This promise needs implementation. Further, the Panel reiterates that the legal exercise of discretionary powers depends on full consideration of all relevant facts and circumstances which should be reflected in the decision at stake. Failure in regard to these aspects impact on the Panel’s considerations of *in lieu* compensation.

*Conclusion*

57. In light of the above, the Panel recommends to rescind the decision of 13 March 2023.

Should the impugned decision not be rescinded, the amount of compensation to be paid to the Applicant is fixed at five thousand (5000) EUR.

All other claims are rejected.

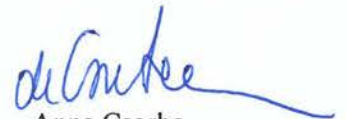
Done in Vienna on 3 July 2024



Thomas Laker  
Chairperson



Jenny Schokkenbroek  
Deputy - Chairperson



Anna Csorba  
Member