Introduction

1. On 12 May 2016, the Applicant, a former Security Officer, Security Operations Unit, United Nations Stabilization Mission in Haiti ("MINUSTAH"), filed an application contesting the imposition of a disciplinary sanction consisting of separation from service with compensation in lieu of notice and with termination indemnity, under staff rule 10.2(a)(viii).

2. The sanction was based on a finding that the Applicant had engaged in

restaurant, he left the duffle bag inside the trunk of the car, pressing the zipper against the body of the vehicle, so that if someone were to look inside, they could not see inside the bag.

13. The Applicant stated that he waited at the Executive Villa restaurant for approximately 50 minutes for his food to arrive as there was some mix-up in the kitchen. While he waited, the MP5 submachine gun remained in the trunk of the vehicle. He ate quickly and then decided that he needed to get food for the following day, in case he was called during the night. He left the Executive Villa at about 8:30 p.m. and went straight to a 5 Coins Restaurant on Route des Frères. As he was unable to get food there, he called another 5 Coins Restaurant, on Carrefour Fleuriot, to place an order. He went there at around 8:50 p.m. to pick up the food that he ordered. The Applicant testified that he was aware that the second 5 Coins Restaurant was, security-wise, "not a good place to be during the night, really." He parked his car in front of the restaurant. When he parked the vehicle, he did the same thing as he had in front of the Executive Villa restaurant—he went out, pressed the duffle bag with the MP5 submachine gun against his body so no one could see what was inside, went to the back of the vehicle, and put it in the trunk. The Applicant was inside the 5 Coins Restaurant for about four minutes. The Applicant testified that, in addition to the MP5 submachine gun and ammunition, he was mindful that his own vehicle could also be stolen, which is why, while he waited, he occasionally looked outside at his car and saw nothing suspicious. After the Applicant obtained the food and went back to the vehicle, he noticed that one of the rear windows was broken and that the duffle bag was missing. The Applicant promptly reported the incident. The stolen items were not recovered despite the Applicant's efforts.

Disciplinary process

14.

… Second, I locked the vehicle and securely shut its windows.

… Third, I placed the items in the trunk of the 4x4 vehicle where they would have gone undetected by almost anyone, save for someone who broke into the vehicle and happened to stumble upon the items kept therein.

… Fourth, not only did I place the items at issue in the trunk, but within a bag whose shape and dimensions … concealed the shape of the gun as well as the radio contained within; thus, whoever stole the items could not have known what was in the bag (unless, provided with such information by someone within the UN). To wit, I left the items in the vehicle, but these cannot be deemed to have been "attractive" (as per the SIU report), since nobody would have been able to identify them as such.

… Fifth, I did not spend much tim

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… Add to this, the difficult conditions of service presented by staffing shortages within my then-Unit. At the time, two close protection officers (at minimum; the number assigned would go up when in dangerous zones) were to be assigned to the SRSG whenever she was mobile/traveling by vehicle. However, because of staffing shortages, it was usually just one close protection officer who ended up being assigned to the SRSG. As a result, I frequently worked 12 or 13 hours a day as the sole individual responsible for the SRSG's security (and, of course, my own).

… I operated in an atmosphere of extreme difficulty and stress. This, I say, not to complain or excuse myself, but to contextualize the environment in which I made my mistake.

… With the context I provided, I believe that it is easier to understand the mistake I made. Upon completion of my round of duty on 14 September 2015 at Mission HQ, I chose not to leave the items at issue at HQ, but to take them with me. The plain unvarnished truth is that in the morning, I did not want to add at least 45 minutes (if not, more) to my commute (maximum speed is 60 km in non-residential zone of the city). Leaving the weapons at Mission HQ, would have meant that I would have had to return to the Mission in the morning, and then head to the SRSG's residence (arriving, on most mornings, at least at 6 am as the Protection Officer has to be at the Residence at least one hour before the estimated time of Departure). Given the location of the SRSG's residence, my quarters, and Mission HQ, this would require going one direction, to then go back in the opposite direction in order to arrive at the SRSG's residence … . I was tired (and hungry) and had a momentary lapse in judgment, with an unfortunate result which I regret.

> Furthermore, I immediately alerted my UN superiors as to what had transpired, and equally promptly, informed the Haitian National Police.
>
> … Also relevant, I believe, is my prior record of service to the UN. As reflected in my [performance reports], this unfortunate incident is the sole blemish on an otherwise spotless record. My [performance evaluations] unambiguously reflect the fact that I have successfully performed all job-related activities and responsibilities and have been rated as either fully competent or outstanding as related to my core values and core competencies. I have never been found wanting with regard to my professionalism or my ethics. Representative comments from my prior [performance reports] include, "always willing to go above and beyond [the call of duty]", that I should be "recognized for [my] outstanding work" that my "decisions are always sound," that "I always go the extra mile," and that my "dedication should be recognized" …
>
> … In addition, I have been commended for the high quality of my work and my dedication, in ways not necessarily captured in my [performance report]. For instance, I have been praise[d] for my support to last minute missions, such as the provision/coordination of security for the UNOPS Regional Director who conducted visits to various Mission sites [i.e., locations]… . I have been congratulated and encouraged for my night inspections [i.e., shifts] … . These are but a few relevant examples.
>
> … For the foregoing reasons, I respectfully submit that my conduct was negligent, but not grossly so; and trust that the Administration will treat me with fairness in meting out a reprimand proportionate to my misconduct.

Disciplinary sanction

16. By letter dated 12 February 2016, signed by Ms. Carole Wamuyu Wainaina, Assistant Secretary-General, Office of Human Resources Management, and delivered to the Applicant on 15 February 2016, he was informed of the decision to sanction him for misconduct. The sanction was separation from

the letter. The relevant portions of the letter are reproduced below (emphasis in original):

> I write to convey the outcome of the disciplinary process initiated by allegations of misconduct dated 13 November 2015, in which it was alleged that, on 14 September 2015, you left a hand-held radio and a submachine gun with two magazines and approximately 60 rounds of ammunition, all of which were UN property and had been issued to you in your role as Security Officer, unattended in a UN vehicle that you had been operating and that these items were stolen and have not been recovered. …
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> …
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> In your Comments, you stated that upon completion of your round of duty on 14 September 2015, you chose not to leave the items at issue at MINUSTAH Headquarters and chose to take them with you so as to reduce your commute to work the following morning by at least 45 minutes. You explained that you had to report for duty at the residence of the Special Representative for the Secretary-General (SRSG) on the following morning and you explained that had you left the weapons at Headquarters, you would have had to drive by the residence of the SRSG on your way to retrieve the weapons from Headquarters only to travel back in the direction from which you had come to engage in protection detail with the SRSG. You explained that you were tired and hungry and that you were under a great deal of stress in your position as a Security Officer as Port-au-Prince had become "constantly violent and unstable." You noted that violent crime had increased and that a UN employee had been shot dead in the past year during the course of a violent demonstration. You stated that you had a momentary lapse in judgment.
>
> Additionally, you stated that you "exercised a certain degree of care towards the items in [your] possession by taking some precautions." More specifically, you noted that you monitored your surroundings "to ensure that no suspicious or threatening individuals were visible" and that you placed the items at issue in a bag concealing the contents and placed the bag in the "trunk" of the vehicle you were operating before securing and locking the vehicle. You stated that you were only away from the vehicle for four minutes while you picked up food from a restaurant.

You stated that upon your discovery that the items had been removed from your vehicle, you tried to determine if anyone in the vicinity had any information as to what had happened and you stated that you immediately informed your "UN superiors" and the Haitian National Police.

You stated that while you recognized the gravity of your conduct, you did "not believe that it was a deviation so flagrant or outrageous that it constituted a wilful and *extreme* or *reckless* failure to abide by the reasonable person standard." … You also stated that this was "the sole blemish on an otherwise spotless record" and that your conduct was negligent but not grossly so.

Based on the entire dossier, the Under-Secretary-General for Management has concluded that it is established, by clear and convincing evidence, that on 14 September 2015, you left a hand-held radio and a submachine gun with two magazines and approximately 60 rounds of ammunition, all of which were UN property and had been issued to you in your role as Security Officer, unattended in a UN vehicle that you had been operating and that these items were stolen and were not recovered.

Despite your contentions that your conduct amounted to negligence, the fact remains that you did not comply with policies regarding property of the Organization, which you acknowledged having received read, and understood, and your failure to comply with these policies resulted in the loss of a deadly weapon with ammunition in an area that you knew to be extremely volatile with a recent history of violence. The fact that a semi-automatic weapon and corresponding ammunition is no longer in the control of the Organization and that this has occurred as a Security Officer's attempt to reduce his commute time is unconscionable.

The Under-Secretary-General for Management has further concluded that your actions were wilful, namely your failing to store the MP5 according to the MINUSTAH Security Section Weapons Policy at the conclusion of your work duties for the day and your leaving the MP5 unattended in a vehicle.

The Under-Secretary-General for Management has noted that you were, throughout the investigation and subsequent disciplinary process, afforded due process in accordance with the regulations, rules, policies and practices of the Organization. In particular, you were interviewed, told of the allegations against you, and given the· opportunity to provide your version of events; you were given the opportunity to provide your comments on

> formal allegations of misconduct; you were provided with all of the documentation on which the allegations against you were based; and you were provided an extension of time in which to submit comments on the allegations.
>
> In determining the appropriate sanction, the Under-Secretary-General for Management has considered the past practice of the Organization in cases in which staff members did not comply with policies regarding property of the Organization. The Under-Secretary-General for Management has also considered whether any mitigating or aggravating factors apply to your case. In this regard, the Under-Secretary-General for Management has taken into account, as mitigating factors, your admission of your conduct and cooperation throughout the investigation.
>
> The Under-Secretary-General for Management has decided to, pursuant to Staff Rule 10.1(b), require that you reimburse the Organization in an amount equivalent to USD669.05, the full assessed value of the loss to the Organization attributable to the items lost and impose on you the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity; in accordance with Staff Rule 10.2(a)(viii) with effect from your receipt of this letter.
>
> In accordance with Staff Rule 10.3(c), you may submit an application challenging the imposition of this disciplinary measure directly to the UNDT, in accordance with Chapter XI of the Staff Rules.

17. The Applicant was separated from the Organization on 16 February 2016.

Parties' submissions

18. The Applicant's submissions may be summarized as follows:

a. The sole issue to be determined in this case is whether the disciplinary measure was proportionate to the offence committed by the Applicant. The Applicant does not contest the facts on which the disciplinary measure was based or that these facts legally amount to misconduct;

exit their vehicles. As not all UN vehicles had a weapons holder, staff members resorted to their own ways to secure or at least disguise their weapons when weapons had to be left in their respective vehicles. What the Applicant did on the day in question was not an unusual practice in the Mission;

f. It was not unreasonable, in these circumstances, that the Applicant had a momentary lapse of judgment, due to exhaustion and stress, and took the weapons with him after he completed his duties for the day, rather than leave them at Headquarters. In light of these circumstances, the Applicant should not be penalized so severely for his momentary lapse of judgment.

19. The Respondent's submissions may be summarized as follows:

a. The imposed disciplinary measure was proportionate and appropriate. The Applicant was aware

c.

Nations passenger flight on behalf of a colleague without authorization and failed to follow any of the applicable safety and screening procedures when doing so (ST/IC/2015/22 (Practice of the Secretary-General in disciplinary matters and cases of criminal behavior, 1 July 2014 to 30 June 2015), para. 41).

Applicable law

20. Staff regulation 1.2(q) states:

> **Regulation 1.2**
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> …
>
> **Use of property and assets**
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> (q) Staff members shall use the property and assets of the Organization only for official purposes and shall exercise reasonable care when utilizing such property and assets;

21. Staff rule 1.7 states:

> **Rule 1.7**
>
> **Financial responsibility**
>
> Staff members shall exercise reasonable care in any matter affecting the financial interests of the Organization, its physical and human resources, property and assets.

22. Staff rule 10.2(a) states:

> **Rule 10.2**
>
> **Disciplinary measures**
>
> (a) Disciplinary measures may take one or more of the following forms only:
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> (i) Written censure;
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> (ii) Loss of one or more steps in grade;

(iii) Deferment, for a specified period, of eligibility for salary increment;

(iv) Suspension without pay for a specified period;

(v) Fine;

(vi) Deferment, for a specified period, of eligibility for consideration for promotion;

(vii) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;

(viii) Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;

(ix) Dismissal.

23. MINUSTAH Internal Circular No. DMS/011/2015 (Use of MINUSTAH Vehicles) states:

17. At other times, vehicles users are to ensure that all practical security precautions are taken to prevent damage or theft. The following security actions should be adhered to:

…

c. When parked, remove personal and attractive items from the vehicle and lock the doors.

24. Annex B of the MINUSTAH Weapons Policy states:

Annex B

…

FIREARMS SAFETY POLICY & RULES

GENERAL

1. The knowledge of safety rules, in and of themselves may not prevent an accident. It is the employment of these safety rules that prevents accidents. All UN Security Officers, who are issued weapons cannot guess and/or forget. They must know and utilize proper safety procedures at all times.

2. The use of strict self-discipline while on and off the range will minimize the possibility of an accidental discharge. The lack of

discipline, a moment of indecision, or a moment of inattention can bring about serious injury or death as a result. Security Officers are not exempt from responsibility should such a mistake be committed. Firearms do not possess intelligence, so the responsibility for their safe use falls solely with the handler. Therefore, Officers must remember that the possession of a firearm is a tremendous responsibility.

…

FIREARM SAFETY RULES

6. These simple rules are to be strictly adhered to:

…

> Always store your firearm unloaded in the authorized weapons safe, when it is not in use. Effective immediately, it is now mandatory as well as the responsibility of each UN Security Officer to request and acquire this firearm safe for the safeguarding of his/her weapon. The safe and secure storage of your assigned firearm is one of your most important responsibilities.

25. Annex D of the MINUSTAH Weapons Policy states:

Annex D

…

CARRIAGE OF WEAPONS

GENERAL

1. Each Security Officer who is assigned a handgun, or any other UN authorised firearm, is personally responsible for the safe

USE OF "PHYSICAL DEADLY FORCE" – ALTERNATIVES

6. Security Officers are on duty on a twenty-four (24) hour basis and may be required to physically work past, what are considered "normal" working hours. Given the prevailing security situation, all Security Officers are required to maintain possession of their assigned weapons, even when not on scheduled/regular assignments. At such times and where issued, OC Spray, ASP's and handcuffs, (with keys), must also be carried in order that all reasonable alternatives exist to the "Use of Physical Deadly Force Policy".

26. Annex E of the MINUSTAH Weapons Policy states (emphasis in original):

Annex E

…

USE OF MP5

GENERAL

1. The guidelines stated within this SOP at Annexes A, B, C & D, also apply to the use of MP5.

STORAGE OF MP5

2. However, MP5s are to be stored within the appropriate designated safes within Security Section offices, when not specifically required for duty.

3. MP5s WILL NOT be taken to the assigned Security Officers residences and WILL NOT be retained by Security Officers, when that officer is not engaged on/assigned to, specific security duties.

4. All MP5s assigned to vehicle patrols are to be property secured in authorized weapon holders within the vehicle. This is to ensure the safety and security of the weapon from both accidental discharges as well as the safekeeping of the weapon.

5. Should further information be required on this matter, guidance may be taken from the [Chief Security Advisor] or the Deputy Chief Security Officer.

Consideration

Main issue

27. The Applicant does not contest the facts on which the disciplinary measure was based or whether the established facts legally amount to misconduct. The Applicant has not raised any procedural claims regarding the disciplinary process. He contests solely the proportionality of the imposed disciplinary sanction. Accordingly, that is the only issue before the Tribunal.

Scope of judicial review

28. The jurisprudence on proportionality of disciplinary measures is well-settled. The Tribunal will give due deference to the Secretary-General unless
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vehicle, Mr. Rizea would chain his weapon under the driver's seat inside of the vehicle. He explained that, having served in the military for over 20 years, he had learned that a lot of things can happen, which is why he did his best to secure the weapon. He also testified that he chose to reside at the United Nations compound close to the Mission headquarters so as to minimize the time needed to get to work.

Mr. Reischoffer's evidence

33. Mr. Reischoffer has been working as a Supervisor of the Close Protection Unit since July 2013. He testified that on 14 September 2015, the Applicant finished his shift at 3 p.m. Mr. Reischoffer was not aware why the Applicant remained at the base until 7 p.m., given that his shift ended four hours earlier. The

protection. Mr. Reischoffer testified that the Applicant was using a soft-skin vehicle (Nissan Patrol) that was not intended for storing weapons.

36. Mr. Reischoffer explained that the role of the Operations Response Unit (Mr. Rizea's Unit) was different from the Close Protection Unit (the Applicant's Unit). The Close Protection Unit follows the Security Weapons Policy of the Security Section, whereas the Operations Response Unit Security Officers also have special procedures authorizing them to carry rifles and MP5 submachine guns when they are on standby to respond to emergencies. The Close Protection Unit Security Officers were not allowed to take their MP5 submachine guns home, as per the existing policies. Mr. Reischoffer testified that the only exception to this was if the next day they were to go to a firearms training.

37. Mr. Reischoffer acknowledged on cross-examination that sec. 6 of Annex D of the Section Weapons Policy allowed for weapons to be carried in certain situations outside of duty hours. However, Mr. Reischoffer noted that MP5 submachine guns were also covered by an additional separate policy (referring to Annex E of MINUSTAH Weapons Policy).

38. Mr. Reischoffer testified that there were certain places to which Close Protection Unit Security Officers could not bring their weapons, such as government premises. However, his evidence was that even then, Close Protection Unit Officers would not leave their weapons unattended in their vehicles but would instead leave the firearms with other Close Protection Unit Officers who remained outside.

Whether the sanction was proportionate

39. The Applicant submits that the imposed sanction was disproportionate because the Administration failed to take some mitigating factors into account—namely, his excellent service record and the difficult and stressful working

conditions. Some of the Applicant's submissions and evidence at the hearing may have touched on issues beyond the question of proportionality, but it was nevertheless helpful to the Tribunal's understanding of the background and surrounding circumstances.

40. Having reviewed the record placed before it, the Tribunal finds that both the difficult and stressful work environment and the Applicant's service record were brought to the Administration's attention during the disciplinary process and were noted. The Applicant discussed his service record in his 28 December 2015 response to the allegations of misconduct, and the Administration's letter of 12 February 2016 specifically referred to the Applicant's argument concerning his good service record, which it never contested. Further, both the Applicant's response of 28 December 2015 and the letter of 12 February 2016 referred to the Applicant's claims regarding the stressful working environment, which is a matter of public record and also was not contested by the Administration. However, it is worth noting that, inasmuch as working in a dangerous and stressful environment may be viewed as a mitigating factor, it was also one of the reasons for the presence of security personnel in the Mission.

41. The evidence in this case suggests that it was indeed a practice among at least some security personnel to carry weapons with them in their vehicles. This was corroborated by Mr. Rizea. However, it should be noted that Mr. Rizea was a member of a separate unit—Operations Response Unit—which was providing emergency response and vehicle patrols, so it was necessary for them to carry their weapons in their cars when performing their specific security tasks. It is unclear why, given his role and functions, Mr. Rizea's vehicle was not equipped with a weapon-holder. However, Mr. Rizea testified that he took precautions in the form of chaining his weapon to the driver seat so as to avoid its loss. In contrast, the Applicant was not a member of the Operations Response Unit nor did he take the same precautions as Mr. Rizea.

42. It also appears from the Applicant's oral testimony that the lines between being "off duty," "on duty," and "on standby," may also have been blurred, at least in the minds of some of the Security Officers who felt they could be called back to work on short notice. For instance, the Applicant testified that, in his view, while in the Mission area, he was always on duty, even after the conclusion of his shift. When asked why he did not make this point during the disciplinary proceedings, the Applicant replied that he assumed that everyone understood that he was on duty at the time of the incident. This, however, was contradicted by the Applicant's own oral evidence and Mr. Reischoffer's testimony, and is also contrary to the record before the Tribunal. For example, at para. 29 of the Applicant's own response to the allegations of misconduct, dated 28 December 2015, he stated that "[u]pon *completion of my round of duty on 14 September 2015* at Mission HQ [Headquarters], I chose not to leave the items at issue at HQ, but to take them with me" (emphasis added). The finding that the Applicant was off duty at the time of the incident was also included in the letter of 12 February 2016, which finding the Applicant did not dispute.

43. The oral testimony heard by the Tribunal suggests that there were two main issues with the Applicant's conduct. Firstly, the Applicant should not have driven home with the MP5 submachine gun in his car as he was not performing any specific security duty that night (see Annex E to the MINUSTAH Weapons Policy). Mr. Reischoffer testified that the Applicant was scheduled to return on duty only the following morning and was thus required to secure his MP5 submachine gun in a safe prior to leaving the base. Secondly, having left the base on the night of 14 September 2015 with the MP5 submachine gun in a "soft-skin" vehicle, which he knew was not intended for the safekeeping of weapons, the Applicant should not have created a situation whereby the MP5 submachine gun was left unattended.

44. Undoubtedly, the environment in which the Applicant operated was stressful and demanding. The Applicant has a good service record and performed well under difficult circumstances throughout his career with the Organization. However, the person or persons who broke into the vehicle and took possession of the MP5 submachine gun and other items were able to do so as a result of the Applicant's actions on the evening of 14 September 2015. In light of the circumstances, it is apparent that the Applicant's actions that led to the loss of such dangerous property resulted in a serious breach of trust between him and the Organization.

45. It is not the role of the Dispute Tribunal to substitute a decision that it may have otherwise made, had it been in the shoes of the decision-maker. The Tribunal finds that the Organization's decision that it was no longer possible to employ the Applicant in his position as a Security Officer was within the range of reasonable conclusions that were available to the Administration in this situation. This decision is not shocking to the conscience of this Tribunal.

46. The Tribunal considered the authorities relied upon by the parties and the surrounding circumstances, including the information provided by the Applicant during the disciplinary process and all the relevant mitigating factors. The Tribunal also noted the past practices of the Secretary-General in similar types of cases, as referred to by the Respondent and not contested by the Applicant. On the totality of the evidence, the Tribunal finds that the sanction of separation with termination indemnity and payment in lieu of notice was not manifestly unreasonable, unnecessarily harsh, obviously absurd or flagrantly fueoNreasonb4.arbitr

Conclusion

48. The application is rejected.

(*Signed*)

Judge Alexander W. Hunter, Jr.

Dated this 26th day of September 2016

Entered in the Register on this 26th day of September 2016

(*Signed*)

Hafida Lahiouel, Registrar, New York