



Judgment NO.: UNDT/2011/211  
Date: 14 December 2011

## **Introduction**

1. By an application filed on 25 January 2011 which was registered under Case No. UNDT/GVA/2011/004, the Applicant challenges a series of decisions taken in relation to his performance appraisal for the period from 1 April 2009 to 31 March 2010 (“2009-2010 performance appraisal”), namely:
  - a. The decision to carry out a single appraisal;
  - b. The decision to take into consideration events which post-dated 31 March 2010;
  - c. The failure to answer his queries concerning the applicable procedure;
  - d. The decision not to allow him to rebut his performance appraisal.
2. He asks the Tribunal to rescind these decisions and to expunge his official 1



view of the fact that the 2009-2010 performance cycle was to end on 31 March 2010, end-of-cycle appraisals ought to be completed by 16 April 2010.

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18. By an email of 1 December 2010, the Officer-in-Charge of DTA informed the Applicant that the option proposed in his email of 26 November had been rejected. He stated that ST/AI/2002/3 was applicable to the 2009-2010 performance cycle, that despite many requests and instructions the Applicant had repeatedly refused to use the e-PAS and that it had accordingly been decided to proceed with the written performance appraisal. He also stated that the deadline for the Applicant to submit his comments had been extended to 10 December 2010.

19. In the course of the management evaluation, the Administration of UNODC indicated in January 2011 that it would remove the written performance

23. On 9 February 2011, the Applicant was provided with another version of his revised written appraisal and, on 10 February 2011, the Officer-in-Charge of DTA asked him to provide his comments by 21 February 2011.

24. On 11 February 2011, the Chief of TPB wrote to the Applicant, explaining that she had prepared yet another version of his revised written appraisal, asking

30. On 12 May 2011, the Applicant transmitted to the Director of the Division for Management and the Officer-in-Charge of HRMS the names of the three members whom he had selected to sit on his rebuttal panel.

### **Parties' submissions**

31. The Applicant's principal contentions are:

- a. In evaluating the Applicant's 2009-2010 performance in a single appraisal conducted outside of the e-PAS, the Administration failed to follow its own procedure;
- b. The Applicant's appointment was not governed by ST/AI/2002/3 since, at the time his mid-point performance review took place, he was serving under a three-month appointment;
- c. The Administration erred in taking into consideration matters which occurred after 1 April 2010 for the purpose of evaluating his 2009-2010 performance;
- d. Contrary to what his reporting officers stated in their exchanges with the Applicant, the latter did not refuse to participate in the e-PAS but simply insisted that the relevant procedures be followed. However, the Administration failed to respond to his queries regarding the applicable provisions;
- e. The contention that the right to rebuttal is linked to the e-PAS is untrue, and the Tribunal has stressed the importance of rebuttal procedures;
- f. Even though he received relatively positive ratings, the Respondent treated him with bad faith. The contrast between his individual and overall ratings is indicative of abuse of authority on the part of his reporting officers. They simply intended to damage the Applicant's reputation and career and the comments they made in his appraisal are unsubstantiated, arbitrary and disrespectful;

g. The Applicant has been subjected to harassment, as evidenced by the fact that his reporting officers made some remarks which were inconsistent with the ratings they gave him in the context of his 2009-2010 performance;

h. He has also been subjected to retaliation on the part of his reporting officers because he reported misconduct. He has been working in a hostile working environment, which resulted in a deterioration of his health condition;

i. In failing to respond to his request for management evaluation within the 45-day period specified in the Staff Rules, the Respondent acted in breach of relevant procedural rules.

32. The Respondent's principal contentions are:

a. During the management evaluation, the Administration removed from his official status file the writt

from its responsibility under staff regulation 1.3 and staff rule 1.3 to evaluate his performance;

d. The Applicant has not substantiated his claim for reimbursement of the costs incurred in relation to his health condition and, in any event, he has failed to exhaust internal remedies as he did not follow the established procedure under appendix D to the Staff Rules.

33. The Respondent asks the Tribunal to issue an order urging the Applicant to withdraw and resubmit his claims in view of the outcome of the management evaluation and to expunge from the Applicant's submissions the e-PASes of two of his former subordinates. He also asks the Tribunal to award costs against the Applicant, taking into account his "continued misrepresentation of facts and his repeated challenge to every action taken by the Respondent".

### **Issues**

34. In his application, the Applicant contests a series of decisions most of which raise receivability issues, though on different grounds. The Tribunal will examine each decision in turn, namely the decision to carry out a single appraisal, the decision to take into consideration events post-dating 31 March 2010, the decision not to allow him to rebut his performance appraisal and the failure to answer his queries concerning the applicable procedure. It will also rule on the Applicant's allegations of bad faith, abuse of authority, harassment and retaliation. Lastly, it will address his claim that the management evaluation was procedurally flawed.

### **Consideration**

35. Article 2.1 of the Tribunal's Statute provides that it is competent to hear and pass judgment on an application filed by an individual against the Secretary-General to appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or contract of employment.

36. According to settled case law, an “administrative decision” is a unilateral decision taken by the Administration in a precise individual case which produces direct legal consequences to the legal order (see *Tabari* 2010-UNAT-030 and *Schook* 2010-UNAT-013, relying on Judgment No. 1157 of the former UN Administrative Tribunal in *Andronov* (2003)).

37. In cases where the Administration rescinds the contested decision during the proceedings before the Tribunal, the applicant’s allegations may become

caused him any injury and the Tribunal recalls that, as per article 10.7 of its Statute, it may not award punitive or exemplary damages.

41. The Applicant argues that the Administration erred in evaluating his 2009-2010 performance in a single appraisal and in applying ST/AI/2002/3 to this appraisal.

42. In the opinion of the Tribunal, it would be inconsistent with its standard of review to allow the Tribunal to interfere with the review of a performance appraisal before a final rating resulting

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51. Finally, the Applicant submits that the Respondent acted in breach of the relevant procedural rules as he failed to respond to his request for management evaluation within the 45-day period specified in the Staff Rules.

52. It is true that staff rule 11.2(d) provides that “[t]he Secretary-General’s response, reflecting the outcome of the management evaluation, shall be

**Conclusion**

56. In view of the foregoing, the Tribunal DECIDES:

The application is rejected.

*(Signed)*

Judge Thomas Laker

Dated this 14<sup>th</sup> day of December 2011

Entered in the Register on this 14<sup>th</sup> day of December 2011

*(Signed)*

Anne Coutin, Officer-in-Charge, Geneva Registry