
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2018/056

Judgment No.: UNDT/2020/030

Date: 27 February 2020

Original: English

Before: Judge Eleanor Donaldson-Honeywell

Registry: New York

Registrar: Nerea Suero Fontecha

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Introduction

1. On 26 January 2018, the Applicant, a Political Affairs Officer at the P-4 level with the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic, filed an application. He thereby contests the decision to subvert the intention of ST/AI/2010/5 (Performance Management and Development System) by awarding him a “successfully meets expectations” rating in his 2016-2017 performance appraisal while inconsistently including “disparaging comments in his evaluation”. He seeks redress because the effect of this decision was to bar him from requesting a Rebuttal Panel to challenge the disparaging comments. The case was initially filed with the Nairobi Registry.

2. On 2 March 2018, the Respondent filed his reply in which he submits that the application is not receivable. The Respondent claims that a satisfactory performance appraisal is not reviewable and that since the disparaging comments had no direct legal consequences for the Applicant’s appointment or his contract of employment, the application is not receivable *ratione materiae*.

3. By Order No. 120 (NBI/2018) dated 16 August 2018, the Tribunal decided to adjudicate the issue of receivability as a preliminary matter and ordered the Applicant to file a reply to the Respondent’s submissions on receivability.

4. On 29 August 2018, the Applicant duly filed his submission maintaining that the application is receivable.

5. On 16 November 2018, the case was transferred to the New York Registry, and on 16 December 2019, it was reassigned to the undersigned Judge.

6. By Order No. 183 (NY/2019) dated 24 December 2019, the Tribunal indicated that it considered the case fully briefed and that the preliminary issue of receivability could be decided on the papers. The parties were therefore ordered to file their closing statements on receivability. They duly did so.

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10. In the narrative overall comments, the FROs stated that (emphasis added to negative comments):

[Name redacted] notes: “During the review period, [the Applicant] displayed considerable analytical ability, knowledge of the environment of the Central African Republic, and various other competencies. He accomplished the above-mentioned tasks in an efficient manner. *However, with his many skills, [the Applicant] could have been highly instrumental in helping the Political Affairs Division achieve astonishing results and flourish, if he had been effectively present in our team. I was his supervisor, but I did not have a full grasp essentially did not participate in our team meetings, and I was not informed about most of his travel. My team could have benefited from his considerable experience and skills if he had been available in French]. [The Applicant] appears quite capable of producing work in line with his assignments and relevant standards, however he is often pulled away from his tasks by the need to address administrative issues, and these circumstances have provoked inappropriate and unprofessional communications with colleagues.*

11. The Applicant’s second reporting officer was, however, more critical of the Applicant’s pd (

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rebutted, then it becomes “final and unappealable”. If a staff member were not to be granted access to judicial review by this Tribunal of whether disparaging comments detracted from the provided ratings of “successfully meets performance expectations”, such comments would be entirely shielded from any scrutiny whatsoever and their legality would never be capable of any review at all. Accordingly, a central purpose of ST/AI/2010/5 namely, ensuring accountability, would be subverted.

25. The need for an ethical approach to performance management notion of
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prospects of being selected for a new job and therefore also for her/his career aspirations.

31. The Respondent, in his closing statement, raises a point that ought more appropriately to have been addressed within the rebuttal process provided for in ST/AI/2010/5. The point raised is that the Applicant's performance evaluation, inclusive of the comments, correctly reflects his shortcomings in professionalism, diversity and communication skills; yet the Applicant failed, in the instant application, to produce evidence in rebuttal. However, it is that very process that the Applicant was deprived of accessing by being awarded a satisfactory "successfully meets performance expectations" appraisal rating. He had no access to rebut the exceedingly disparaging remarks that detracted from his overall rating.

32. In essence, the Respondent argues that the disparaging comments about the Applicant's communication and diversity performance were supported by evidence. The evidence referred to is some email exchanges between

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comments, bordering on character assassination but did so in the context of an overall “successfully meet expectations” rating, they could never be held accountable. The comments would remain on the staff member’s record and be entirely protected from any administrative and/or judicial review.

49. The Respondent’s contention that there is no rule constraining the type of comments made by the SRO is also without merit. As mentioned above, ST/AI/2005/10 provides that the SRO must ensure “consistency between the competency and core values ratings, the comments and the overall rating”. In the present case, it is clear that a decision was made by the SRO not to ensure such consistency. Instead, it is evident from the ePAS that there was a direct contradiction between the SRO’s comments and the ratings given by the FROs. While the FRO rated the Applicant’s overall performance as “successfully meet expectations”, the SRO stated that “the comments and ratings given by the two colleagues who served successively as FROs over this reporting period ... [were not considered as] adequate to describe the professional performance and the behaviour displayed by [the Applicant]”.

50. The SRO, in particular, criticized the ratings of the FROs in the core values of professionalism, integrity and respect for diversity as he found that based on the FROs comments and his own experience with the Applicant, the Applicant’s performance should have been rated as “unsatisfactory” (the lowest rating out of four) instead of “fully competent” (the second rating) in integrity and “requires development” (the third rating) in professionalism and respect for diversity. The SRO’s remaining comments also demonstrate that he did not find that the Applicant’s performance had been successful in any possible way—all the observations were highly negative and unfavorable to the Applicant.

51. The Tribunal further finds that even the gist of the FROs’ narrative comments did not necessarily reflect an overall rating of “successfully meets expectations”. When reading these comments, they were predominantly critical of the Applicant’s performance, especially regarding his attitude and behavior, although the quality of

his work did receive some praise. This is particularly so with regard to the rating of “fully competent” in the core value of integrity as all remarks regarding his performance in the three core values were negative.

52. Accordingly, the Tribunal finds that the narrative comments in the ePAS detracted from overall rating “successfully meets expectations”. The decision to include such comments was *ultra vires* and exposed the Applicant *per se* to adverse career consequences and unfairly deprived him of a right to rebuttal.

Relief

53. In the Applicant’s closing statement, he makes no specific submissions about the relief he seeks. Rather, he complains that due to the overall rating of “successfully meets expectations”, he was unlawfully impeded from initiating a rebuttal process under ST/AI/2010/5 (the Tribunal notes that under sec. 15.1 a staff member can only do so if s/he receives the rating of “partially meets performance expectations” or “does not meet performance expectations”). In the application, the Applicant, however, solely requests that the “the disparaging comments contained in his evaluation be rescinded”.

54. The Tribunal notes that “the very purpose of compensation is to place the staff member in the same position he or she would have been in had the Organization complied with its contractual obligations” (see para. 10 of *Warren* 2010-UNAT-059 as affirmed, for instance, in *Ho* 2017-UNAT-791). The Tribunal finds that a similar

including rescission and specific performance. At the e

submissions regarding the relief he seeks, the Tribunal therefore orders that the Applicant's 2016-17 performance appraisal be amended in a manner to ensure that the narrative comments no longer detract from the provided ratings and that the Applicant is thereafter left with all proper due process rights. The Tribunal's order will, however, reflect that it will be the obligation of the decision makers to decide on how this is to be achieved. In so doing, the important matter to be addressed by the decision-makers is that the appraisal must properly and consistently record an assessment of the Applicant's performance for the given time period.

Conclusion

56. The application is granted. The Administration is ordered to amend the Applicant's 2016-17 ePAS report so that the narrative comments do not detract from the overall rating.

(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 27th day of February 2020

Entered in the Regist