



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2020/002

Judgment No.: UNDT/2021/005

Date: 2 February 2021

Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

DELSOL

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Katrina Waiters, UNFPA

Introduction

1. On 15 January 2020, the Applicant, a former staff member of the United Nations Population Fund (“UNFPA”) appealed his performance appraisal and development report (“PAD”) for the year 2018.

2. On 16 February 2020, the Respondent filed his reply stating that the application is without merit.

3. For the reasons below, the Tribunal finds that the performance appraisal respected the applicable process and was therefore lawful. The application is therefore rejected.

Facts

4. The Applicant received ratings of “partially achieved” for the workplan and development outputs in his 2016 PAD. In his 2017 PAD, he received the rating of “partially achieved” for the workplan output. The Applicant did not appeal these reports.

5. The Applicant’s 2018 PAD was completed on 21 May 2019 in which he received ratings of “developing proficiency” for the core competencies and the functional competencies.

6. The Applicant submitted a request for rebuttal of his 2018 PAD on 22 May 2019 and resubmitted a corrected rebuttal request on 21 June 2019.

7. On 12 August 2019, the rebuttal panel decided to retain the ratings of developing proficiency in the 2018 PAD. Following the Applicant’s request for management evaluation, the Administration confirmed the 2018 PAD.

8. On 29 August 2019, the Administration notified the Applicant of its decision not to extend his appointment beyond its expiry date of 31 October 2019 because of unsatisfactory service.

Consideration

Legal framework

9. The Appeals Tribunal stated in *Ncube* 2017-UNAT-721, paras. 17-18, that where performance is the reason provided for the decision not to extend the applicant's appointment, the Administration is required to provide a performance-related justification for its decision. The Appeals Tribunal clarified that informal feedback to the staff member is not sufficient to justify a non-renewal decision for poor performance and the Administration should follow the applicable framework for performance appraisal. The purposes and goals of the performance appraisal system include the protection of the Organization's efficiency and the staff member's accountability.

10. In *Sarwar* 2017-UNAT-757, para. 74, the Appeals Tribunal reiterated its long-standing jurisprudence stating that in reviewing the Administration's appraisal of a staff member's performance, the Dispute Tribunal may not review such appraisal *de novo*, substituting its judgment for that of the Administration.

Discussion

11. The Applicant alleges several procedural irregularities in the rebuttal panel's review of the 2018 PAD which the Tribunal will address in turn.

Evidence reviewed by the rebuttal panel

12. The Applicant states that the panel failed to share with him the observations gathered from his supervisor and two other staff members. He claims that to be the result of an existing trend of mobbing him.

13. The Respondent responds that the panel interviewed the Applicant, his supervisor and two “multi-rater sources” for the Applicant’s work plan outputs, one of whom Applicant asked to be interviewed. The Respondent states that this follows UNFPA’s rebuttal and related remedies regarding performance appraisal and development manual (“rebuttal manual”).

14. The Tribunal recalls that in *Ross* 2019-UNAT-944 (para. 25), the Appeals Tribunal found that allegations of improper motive ought to be substantiated with evidence which should be presented to the Dispute Tribunal.

15. In the present case, the Applicant does not provide any evidence that the panel was motivated by “a trend of mobbing”. The record shows that the Applicant filed a complaint of misconduct against his supervisor only after the 2018 PAD was completed.

16. Moreover, the evidence on record shows that the panel interviewed the Applicant, his supervisor, two colleagues of the Applicant, identified by both the Applicant and his supervisor, and unsuccessfully attempted to interview another colleague identified by the Applicant. Additionally, the panel reviewed documents provided by the Applicant and the interviewed witnesses as well as a “multi-rater” competency report.

17. It is also noteworthy that the Applicant does not claim that any of the evidence gathered by the rebuttal panel was false, he simply disputes the panel’s evaluation of such evidence.

18. The Tribunal further notes that the evidence gathered and reviewed by the panel is in strict compliance with the rebuttal manual. Moreover, the rebuttal manual does not require that the staff member be afforded the opportunity to rebut the evidence gathered.

The Applicant's medical condition

19. The Applicant argues that the rebuttal panel allowed the inclusion of a comment concerning what he terms as "alcohol sensitivity" which he claims caused "a misperception of his behavior". He argues that the mention of this medical condition led to the two negative ratings.

20. The Respondent responds that the Applicant's supervisor properly documented observed inappropriate and unprofessional conduct by the Applicant. Even if, as the Applicant claims, such behavior is caused by a medical condition, the Respondent states that such medical condition does not exclude the resulting behavior from being documented as a performance matter. The Respondent argues further that if the Applicant was aware of his sensitivity to alcohol, he should have refrained from consuming alcohol during working hours and while on official travel with colleagues and donors.

21. The record in this case includes a report of an incident involving the Applicant which was observed by colleagues and donor representatives in November 2018. According to the report, the Applicant became intoxicated with alcohol during a flight undertaken on official mission. The Applicant was so impaired as a result of his intoxication that he had to be disembarked from the airplane on a wheelchair. The incident was noted in the 2018 PAD as a shortcoming in the core value of integrity because of its impact on the Organization's reputation. The panel noted the incident in its review along with the fact the Applicant's admitted to his behavior and that the incident was addressed through mediation.

22. The Tribunal notes that the Applicant represented UNFPA during the above-mentioned trip and that his disorderly behavior was observed by both colleagues and donor representatives. The Tribunal finds it reasonable for the Administration to conclude that the Applicant's behavior had an obvious reputational impact for the Organization. Even if this behavior was caused by a medical condition, this does not excuse the Applicant's responsibility in addressing the condition appropriately. It does not appear that the Applicant had notified the Organization's medical services of his condition to ensure that appropriate measures be taken in his office to address any impact of the Applicant's condition on his performance or on the Organization at large.

23. In these circumstances, it was justified for the Applicant's supervisor to consider the November 2018 incident as a performance shortcoming concerning the core value of integrity.

The panel's composition

24. The Applicant further states that the rebuttal panel was not properly convened as it did not include a Staff Council representative.

25. The Respondent responds that the panel was properly formed by three members and a secretary and received the full endorsement of the Staff Council.

26. The Tribunal notes that the rebuttal manual provides that members of rebuttal panel shall be nominated jointly by the Director, the Deputy Director of Human Resources and the Chairman of the Staff Council. An email from the Registry of Staff Council to UNFPA dated 5 January 2018 confirms that the Staff Council endorsed the composition of the rebuttal panel.

27. The Tribunal therefore observes no evidence of irregularities in the composition of the rebuttal panel.

Remedial actions to the Applicant's observed performance shortcomings

28. The Applicant further claims that he was not afforded remedial actions at the mid-year review to allow him to improve his performance.

29. The Respondent responds that the Organization undertook extensive efforts to assist the Applicant in improving his performance and points out to the Applicant's supervisor's remarks to the rebuttal panel. In these remarks, the supervisor references performance issues that were flagged as early as June 2018 and discussed with the Applicant through meetings in June, July and August 2018. Moreover, the supervisor lists a series of meetings with the Applicant to address his training needs throughout the year 2018.

30. The Tribunal is satisfied that the evidence provided by the Respondent shows that the Applicant's management afforded him sufficient notice of his performance shortcomings and provided opportunities to improve.

The Applicant's complaint against his supervisor

31. Finally, the Applicant states that the Administration did not address the complaint of abuse of authority that he filed against his supervisor.

32. As the Tribunal has already noted, the Applicant only filed the complaint in July 2019, that is, after the 2018 PAD was concluded in May 2019. Therefore, the Administration's processing of the complaint could not have impacted the outcome of the 2018 PAD.

Conclusion

33. The application is dismissed.

(Signed)

Judge Joelle Adda

Dated this 2nd day of February 2021

Entered in the Register on this 2nd day of February 2021

(Signed)

Nerea Suero Fontecha, Registrar, New York