



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2019-UNAT-900

**El Sadek
(Appellant)**
v.
**Commissioner-General
of the United Nations Relief and Works Agency
for Palestine Refugees in the Near East
(Respondent)**

JUDGMENT

Before:	Judge Martha Halfeld, Presiding Judge Dimitrios Raikos Judge Richard Lussick
Case No.:	2018-1191
Date:	29 March 2019
Registrar:	Weicheng Lin

Counsel for Appellant:	Amer Abu Khalaf, LOSA
Counsel for Respondent:	Rachel Evers

JUDGE MARTHA HALFELD, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNRWA/DT/2018/042, rendered by the Dispute Tribunal of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA DT or UNRWA Dispute Tribunal and UNRWA or Agency, respectively) on 1 July 2018, in the case of *El Sadek v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*. Mr. Najeh El Sadek filed the appeal on 13 August 2018, and the Commissioner-General filed an answer on 11 October 2018.

Facts and Procedure

2. Effective 1 November 2013, Mr. El Sadek joined the Agency as Chief, Field Health Programme (C/FHP) on a fixed-term appointment at UNRWA's Health Department in the Lebanon Field Office (LFO). Prior to that, he had worked for the United Nations medical services in Yemen.

3. Mr. M. S., Director of UNRWA Affairs in Lebanon (DUA/L), was Mr. El Sadek's immediate supervisor from the beginning of his 2016 performance cycle, January 2016, until Mr. M. S. left his position on 8 October 2016. Nevertheless, Mr. M. S. completed Mr. El Sadek's electronic Performance Evaluation Report (e-PER) for the entire year of 2016, with an overall rating of "fully meets expectations". In that e-PER, Mr. M. S. acknowledged that Mr. El Sadek was a "very knowledgeable and experienced senior health professional" and that he had made "some significant achievements under very challenging circumstances". While commending Mr. El Sadek for having achieved "significant results ... against all odds", Mr. M. S. held the view that, for Mr. El Sadek, management "remain[ed] a challenging area", and communication "[was] an area of relative weakness".

4. From 9 October 2016 until 1 January 2017, Mr. H. S., Acting Director of UNRWA Affairs in Lebanon (A/DUA/L) served as Mr. El Sadek's immediate supervisor.

5. As of 1 January 2017, Ms. G. L., the newly appointed Deputy Director of UNRWA Affairs in Lebanon (D/DUA/L), became Mr. El Sadek's immediate supervisor.

6. By e-mail to Mr. El Sadek dated 8 January 2017, Mr. H. S. noted, following his supervision of Mr. El Sadek for nearly three months from the first week of October 2016 until 1 January 2017, that several areas where Mr. El Sadek needed to “improve [his] performance significantly”. Mr. H. S. went on:

Your overall performance as a chief must improve to provide strong leadership and guidance to the health team as well as maintain [a] close eye on the operations in the areas. I observed that your follow[-]up actions are not sufficient. I also expect you to improve your communication with supervisor as well as team members. During my visits to health centers in areas, I was surprised to learn about a lot of complaints and challenges raised about the operations and support of staff from the department chief. I do not see that you are raising those concerns with me during our regular meetings.

In the e-mail, Mr. H. S. informed Mr. El Sadek that his 2016 e-PER, which had been completed by Mr. M. S. for the entire year of 2016, “by oversight”, had been corrected to reflect the actual period of Mr. M. S.’ supervision from January to October 2016 and the actual period of Mr. H. S.’ supervision from 9 October 2016 to 1 January 2017. In that regard, Mr. H. S. recalled that, in August 2016, Mr. M. S. had identified almost the same areas of management skill challenges in his mid-term review for Mr. El Sadek, and, in his evaluation in December 2016, Mr. M. S. had noted Mr. El Sadek’s weakness in communication.

7. On 10 January 2017, Mr. El Sadek wrote to a Human Resources Officer in charge of e-PERs seeking an explanation for, *inter alia*, the shortening of his 2016 e-PER period. On 12 January 2016, the Human Resources Officer responded: “[d]ue to the early departure of some supervisors, a cycle may be cut short to ensure that evaluation is completed by the concerned supervisor. Sometimes, a handover may be more practical, especially in the middle of a cycle but this is not the case since no replacement was identified for DUA[/]L at that time.”

8. On 13 January 2017, Mr. El Sadek submitted his work plan for 2017.

9. By e-mail dated 16 January 2017, Mr. El Sadek responded to Mr. H. S.’ e-mail of 8 January 2017, rebutting the latter’s comments point by point. Mr. El Sadek stated that he had received positive performance evaluations from his three previous line managers at the Agency and good recommendations from different heads of the United Nations agencies for his work in Yemen. Mr. El Sadek expressed his astonishment that Mr. H. S. had not mentioned “any positive points related to [his] performance”.

10. On 20 and 23 January 2017, Ms. G. L. held meetings with Mr. El Sadek to discuss Mr. H. S.' e-mail of 8 January 2017, Mr. El Sadek's response thereto, and Mr. El Sadek's work plan for 2017. In an e-mail dated 3 February 2017, Ms. G. L. referred to her discussion with Mr. El Sadek about putting in place an informal Opportunity to Improve (OTI) process for him. Ms. G. L. clarified that the concern about Mr. El Sadek's deficiency in communication skills was that his "[c]ommunication may have been clear, but [it] did not raise key management issues or a way forward", and moreover he had not communicated his action clearly to the UNRWA headquarters. For the future performance, Ms. G. L. specified that "management, communication with team members and with the field would be key areas of work and where progress would be supported by [her] and assessed".

11. On 3 February 2017, Mr. El Sadek's work plan was approved with the added suggestions of Ms. G. L. On the same day, he was placed on an informal OTI process.

12. Mr. El Sadek and Ms. G. L. had a meeting on 15 February 2017. According to Ms. G. L., during that meeting, she requested an update on a number of tasks assigned to Mr. El Sadek. Mr. El Sadek subsequently responded in writing that those tasks were either "done", "completed" or "in progress". During that meeting, Ms. G. L. also specified the actions that she expected Mr. El Sadek to take to improve his overall performance.¹

13. On 23 February 2017, Ms. G. L. had another meeting with Mr. El Sadek. Again, she prepared a summary of the meeting and listed the specific tasks and future actions for an update. Mr. El Sadek again provided his comments in writing, point by point.

14. On 6 March 2017, Mr. El Sadek requested review of the decision to modify his 2016 e-PER cycle period from January - December 2016 to January - October 2016.

15. By e-mail dated 9 March 2017, Ms. G. L. informed Mr. El Sadek of her decision to place him on a formal OTI process. She noted some progress in the day-to-day actions on the part of Mr. El Sadek, but she remained concerned with regard to certain key areas of his work, i.e.,

¹ Specifically, Ms. G. L. requested that Mr. El Sadek "[d]etail more clearly rational[e] and provide better explanation in business case or strategy documents", and "[t]ake ownership within the department of the health budget, and this will help speed up response, ensure project funds are spent in a timely way and help with identifying potential gaps that require new proposals to be developed". Ms. G. L. also commented: "Information flow between C[/]FHP and [the Area Hospitalization Medical Officer (AHMO)] and other health staff needs to improve – the meeting on hospitalization was a good step, but it is important to ensure transparency and demonstrate progress on issue of concern (e-health, recruitment, HR issues, supplies for HCs etc) all agreed follow up actions are taken."

communication and leadership and providing support and vision to colleagues. Ms. G. L. felt that there was “little proactive work” on the part of Mr. El Sadek in terms of addressing and implementing the many challenges of the Health Department.

16. On 14 March 2017, a meeting took place between Mr. El Sadek, Ms. G. L. and the Head, Field Human Resources Office (H/FHRO) during which the formal OTI process was discussed. On the same day, Ms. G. L. informed Mr. El Sadek by e-mail that the formal OTI process would end mid-June.

17. Between 14 and 20 March 2017, Mr. El Sadek and Ms. G. L. exchanged e-mails in which Mr. El Sadek made objections to the formal OTI process. On 22 March 2017, the H/FHRO provided Mr. El Sadek with a summary of the procedural aspects of the formal OTI process. Mr. El Sadek and Ms. G. L. continued their exchanges throughout March 2017, during which time possible training opportunities for him were discussed and suggestions as to how he could improve his communication skills were advanced.

18. By e-mail to Ms. G. L. dated 18 April 2017, Mr. El Sadek shared his progress on his work plan objectives and requested Ms. G. L.’s feedback on his improvements. From the beginning of April 2017 until mid-June 2017, Mr. El Sadek was provided with training on leadership and coaching by Mr. M. S. via weekly Skype sessions.

19. On 2 May 2017, Mr. El Sadek and Ms. G. L. met to review his performance. By e-mail dated 8 May 2017, Ms. G. L. provided Mr. El Sadek with her feedback as part of the mid-point review of the formal OTI process. She informed Mr. El Sadek of her continuing concerns about his leadership and communication skills. But she did not believe that it would be useful to extend the formal OTI further beyond mid-June 2017.

20. On 9 May 2017, Mr. El Sadek submitted his application to the UNRWA Dispute Tribunal challenging the decisions to reopen his 2016 e-PER after it had been completed by Mr. M. S., and to subsequently place him on an OTI process.

21. On 11 May 2017, Mr. El Sadek and Ms. G. L. held a meeting to review his performance. On 12 May 2017, Ms. G. L. provided Mr. El Sadek with four specific examples of where his improvement was still needed in terms of the competency of leadership.

22. By e-mail dated 22 May 2017, Mr. El Sadek responded to Ms. G. L.'s feedback and stressed that he had sufficient communication and leadership skills. He noted that leadership, against which Ms. G. L. had assessed his performance, was not part of the competencies under his job description or in his e-PER. His e-PER list of competencies included a management competency, but not leadership. In a subsequent e-mail to Ms. G. L., Mr. El Sadek cited some examples to show that she had been weakening and undermining his leadership and was trying to "destroy him in a non-human [sic], and non-dignified way". Further e-mail exchanges ensued.

23. By interoffice memorandum dated 15 June 2017, Ms. G. L. informed Mr. El Sadek that, despite the significant efforts made by both Mr. El Sadek and the Agency, his level of performance was still not at the level of a C/FHP, and that the OTI process, which had been completed the previous day, was unsuccessful.

24. On 18 June 2017, Mr. El Sadek filed a complaint to the hotline of the Department of Internal Oversight Services (DIOS), UNRWA, alleging that his previous supervisor, Mr. H. S., and his current supervisor, Ms. G. L., had committed prohibited conduct against him. On 13 July 2017, the Chief, Investigation Division, DIOS, informed Mr. El Sadek of her decision to close the investigation as his allegation of abuse of power and harassment was not substantiated. Referring to Mr. El Sadek's e-PER and the OTI procedure, the Chief of the Investigation Division, DIOS, stated that the DIOS investigation showed "no major deviation from policy and thus there was no misconduct identified".

25. By letter dated 13 July 2017, the DUA/L informed Mr. El Sadek that his appointment would be terminated effective 13 August 2017, in accordance with Area Staff Rule 109.1. He added that, in reaching his decision, he had taken into consideration Mr. El Sadek's statements about the OTI, but he had no reason to question the OTI process or its outcome.

26. On 13 August 2017, Mr. El Sadek was separated from the Agency. On 1 November 2017, he filed another application with the UNRWA Dispute Tribunal contesting the decision to terminate his appointment.

27. On 1 July 2018, the UNRWA Dispute Tribunal issued the impugned Judgment, in which it consolidated Mr. El Sadek's two applications against i) reopening his 2016 e-PER after it had been completed and placing him on an OTI process; and ii) terminating his service with UNRWA.

28. In respect of i), the UNRWA Dispute Tribunal determined that Mr. El Sadek's application against reopening his 2016 e-PER and placing him on an OTI process was not receivable for two reasons. One was that the correction of the performance evaluation cycle, the additional comments made by Mr. H. S. and the downgrading of the rating for "planning and monitoring" did not change the overall performance rating of "fully meets expectations" given by both Mr. M. S. and Mr. H. S. and consequently did not affect the terms and conditions of Mr. El Sadek's contract. The other reason was that Mr. El Sadek had failed to raise the issue of the OTI process in his decision review request of 6 March 2017.

29. Regarding ii), the UNRWA Dispute Tribunal dismissed Mr. El Sadek's application against the termination of his service with the Agency. As the termination was based on the "well documented" weakness in Mr. El Sadek's management and communication, the UNRWA DT held that the Commissioner-General had appropriately exercised his managerial discretion in deciding to terminate his service, and that the decision was not affected by formal irregularities or abuse of power, though the UNRWA DT agreed that it was "not a usual occurrence for a senior staff member [Mr. El Sadek], who is rated as 'fully meets expectations' by a previous supervisor, and even by a new supervisor for the last three months of the year, to suddenly start to underperform in two main competencies, namely leadership and communication".² In the context of its consideration of the termination decision, the UNRWA DT also reviewed Mr. El Sadek's allegations regarding his 2016 e-PER and the OTI process, but it concluded that while there existed instances of non-compliance with Area Personnel Directive No. PD/A/23 titled "Performance management", Mr. El Sadek was not prejudiced, because his overall rating for 2016 remained "fully meets expectations". The UNRWA DT further concluded that Ms. G. L. had properly followed the provisions of PD/A/23 with respect to both the informal and formal OTI processes by clearly documenting performance improvement sessions that she had held with Mr. El Sadek, sharing her summaries of the meetings with Mr. El Sadek, providing appropriate assistance through close supervision and necessary feedback and guidance, and allowing Mr. El Sadek more than 30 days to improve his performance. The UNRWA DT noted that Mr. El Sadek did not contest the DIOS' decision to close the investigation into his complaint of harassment and abuse of power against both Mr. H. S. and Ms. G. L.

² Impugned Judgment, para. 100.

Submissions

Mr. El Sadek's Appeal

30. The UNRWA Dispute Tribunal erred in dismissing his claim that amending his 2016 e-PER was an abuse of his rights, in contradiction of PD/A/23. Amending his 2016 e-PER was tainted by bias and other improper motives and flawed by procedural irregularities. The UNRWA Dispute Tribunal failed to verify whether Mr. H. S. had reopened only Mr. El Sadek's e-PER, or the e-PERs of the other staff members under his supervision at the same time as well. Moreover, the UNRWA Dispute Tribunal took the side of the Commissioner-General by ignoring the Agency's obvious breaches of its own regulations and rules.

31. The UNRWA Dispute Tribunal did not properly assess the evidence in the case and erred in deciding that his immediate supervisor had properly followed the provisions of PD/A/23 in implementing the informal and formal OTI processes. Mr. El Sadek was put on an informal OTI process without advance notice. He was put on the informal OTI on the same day when his 2017 work plan was approved, without prior discussion. There were no key performance indicators established and no appropriate assistance provided. The same irregularities characterized the formal OTI. Mr. El Sadek emphasizes that the UNRWA Dispute Tribunal failed to consider his crucial argument and proof of a conspiracy, in the form of a performance reevaluation and an OTI process, against him by Mr. H. S. and Ms. G. L. to "get rid of him following the plan to appoint another staff member as C/FHP".

32. The UNRWA Dispute Tribunal's conclusion that the termination decision was not affected by formal irregularities or abuse of power was based on irrational interpretation of the facts and should therefore be rejected. That conclusion was "hardly fair", especially after the UNRWA Dispute Tribunal agreed that his 2016 e-PER and the OTI process were beset by so many procedural breaches.

33. Mr. El Sadek requests that the Appeals Tribunal reverse the impugned Judgment and order the Agency to pay him an unspecified amount of compensation for the loss of opportunity and related expenses and for psychological damage.

The Commissioner-General's Answer

34. In his appeal, Mr. El Sadek repeats issues that were raised and adequately considered by the UNRWA DT. The UNRWA Dispute Tribunal's consideration of the issue of reopening Mr. El Sadek's 2016 e-PER was reasonable and legally correct; it comported with the jurisprudence of the Appeals Tribunal. Mr. El Sadek's shortcomings in management and communication were well documented. Consequently, the issue of an alleged conspiracy does not arise. The proof that Mr. El Sadek alleges to have provided is nothing but his version of facts.

35. The Commissioner-General submits that Mr. El Sadek also repeats issues related to the OTI process that were raised and adequately considered by the UNRWA Dispute Tribunal. He has failed to demonstrate how the UNRWA Dispute Tribunal's findings were in error. Consequently, the UNRWA Dispute Tribunal's conclusions and findings remain unassailable.

36. The Commissioner-General submits that there is no basis for the consideration of Mr. El Sadek's pleas for compensation or an award of moral damages. He therefore requests that the Appeals Tribunal dismiss Mr. El Sadek's appeal in its entirety.

Considerations

37. Mr. El Sadek appeals against the UNRWA DT Judgment which dismissed his second application regarding termination for poor performance, after it had found that the decision to terminate his appointment had not been affected by formal irregularities or an abuse of power.

38. Although there was no explicit appeal against the UNRWA Dispute Tribunal's finding that Mr. El Sadek's first application challenging the reopening of his 2016 e-PER and his placement on an OTI process was not receivable, Mr. El Sadek addresses, in his appeal, some of the issues related to the reopening of his e-PER and his placement and follow-up during the OTI processes. That is because when reviewing the validity of the termination, the UNRWA DT examined the merits of the case, including the reopening of the e-PER for the year 2016 and the subsequent OTI processes.

39. In his appeal, Mr. El Sadek claims that the UNRWA DT failed to correctly assess the evidence he had provided in connection with the lack of communication, discussion and assistance regarding his performance weakness and improvement process. He maintains

that the Agency did not follow the applicable regulations and rules. In particular, he asserts that the one-month duration of the informal OTI was too short (it should have been extended), and that his 2017 work plan could not have been accepted as the formal OTI plan, as it did not mention the unachieved objectives or the remedial plan, as set forth in PD/A/23.

40. We find no fault in the UNRWA DT's ruling on this subject. The UNRWA Dispute Tribunal did not err on a question of law or fact, resulting in a manifestly unreasonable decision, nor did it commit an error in procedure, such as to affect the outcome of the case.

41. The issue of the e-PERs of the other staff members under Mr. H. S.' supervision at the same time was not raised before the UNRWA DT. In line with our jurisprudence, we conclude that Mr. El Sadek cannot introduce, for the first time on appeal, an issue that was not raised either in his request for decision review or before the UNRWA DT.³ This determination is based on the two-tier principle of administration of justice. We find that Mr. El Sadek's appeal in this regard is not receivable.

42. With reference to the reopening of the 2016 e-PER after it had been completed by the previous supervisor and the correction of the evaluation cycle, our jurisprudence is well settled that if a downgrade of one or more competencies does not detract from the overall satisfactory rating, it does not affect the terms or conditions of employment.⁴ In the present case, the decision to reopen Mr. El Sadek's e-PER evaluation for 2016 and the subsequent downgrading of the individual competencies "planning and monitoring" did not affect the rating of the overall performance evaluation, which was maintained as "fully meet expectations". Therefore, this decision on its own did not affect the terms and conditions of Mr. El Sadek's contract. Consequently, it was not an administrative decision subject to judicial review.

³ *Ho v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-791, para. 37; *Haimour and Al Mohammad v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-688, para. 38, citing *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-547, para. 25; *Simmons v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-221, para. 61; *Khashan v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-502, para. 21; *Azzouz v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-432, para. 20.

⁴ *Beidas v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-685, paras. 22-26.

43. With regard to the termination itself, the jurisprudence of the Appeals Tribunal has been consistent and clear since its first Session in 2010, when it was established that:⁵

... When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

...

... In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision maker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

44. Area Personnel Directive No. PD/A/23 effective 1 April 2012 was the applicable regulatory framework in the present case. It reads, in part, as follows:⁶

PRINCIPLES

8. Principles adopted in the policy include the following:

a. Reinforcement of the principle of continuous feedback and dialogue through a annual 'performance cycle' involving objective-setting at the beginning of the cycle, formal six-month review of performance and objectives and full review of performance at the end of the cycle;

b. Opportunity for staff to have their views and comments recorded in the evaluation;

⁵ *Ouriques v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-745, para. 14, quoting *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, paras. 40 and 42.

⁶ Internal notes, footnotes, chart and table omitted (Emphases in original).

- c. All staff members are to have clear objectives and accountabilities against which they will be assessed.
 - i. There are clear linkages between individual objectives, accountabilities, competencies & performance targets and organisational results.
- d. Elimination of the inflation of overall ratings: the policy provides three ratings for grading the performance of staff members. There are two satisfactory ratings (“best performer/exceeds expectations” and “fully meets expectations”) and one rating for dealing with poor performance (“does not fully meet expectations”).
- e. Linkage of performance evaluations to initiatives to:
 - i. reward staff who perform at an exceptional level as per the rewards and recognition policies; and
 - ii. address underperformance with the toolkit for managing underperformance.
- f. Enhanced role of Senior Management in oversight and planning of human resources in their Field / Department / Unit.

PERFORMANCE CYCLE

- 9. The performance evaluation process involves formal and informal discussions between the staff member and their immediate supervisor about objectives, work performance, staff development needs and competencies. It is important to document and communicate these objectives and indicators to staff at the beginning of the performance cycle so that the performance levels and expectations are clear from the outset.
- 10. The immediate supervisor is to ensure that input is sought from relevant stakeholders, including profession specific or technical input, at all stages of the process. This is to ensure a fair and balanced evaluation that reflects all aspects of the staff member’s work. Where an immediate supervisor changes during the reporting period it is the responsibility for the departing supervisor to ensure wherever possible that a briefing for their successor is completed for each staff member. Where there will be a period of time between the departing supervisor’s departure and the successor’s arrival it is the responsibility of the departing supervisor to provide a written brief.
- 11. Disagreements between the staff member and their immediate supervisor on objectives and/or the progress of achievement should be discussed and resolved prior to reaching any of the key stages of the performance evaluation process. If necessary the staff member and/or immediate supervisor can raise the matter at issue with the second supervisor. Additional guidance may be sought from HR.
- 12. Discussions between the immediate supervisor and the staff member take place over an annual cycle on a continuous basis, involving three formal 'events' pictured above:

a. Cycle begins: The cycle begins with a discussion between the staff member and the immediate supervisor. Together they agree the work plan for the year, along with the objectives for the staff member to achieve and the indicators that will be used to assess progress. The discussion should encompass development needs that the staff member may have.

b. Midpoint Review: This is a 'formal' opportunity for the staff member to receive feedback from the immediate supervisor on his/her progress in the first six months of the cycle. It should be focused on the objectives (including development opportunities) agreed at the beginning of the cycle. It is also an opportunity for the work plan to be updated.

c. End of Cycle Review: This stage wraps up the whole year, reviewing the competencies and objectives and how the staff member has progressed during the year. In reviewing the performance it is important to think about any development needs identified through the cycle and how they were addressed along with those that have arisen so that these can be carried forward to the next cycle.

...

PERFORMANCE RATINGS

15. The competencies, objectives and indicators for each staff member will vary with different grades and posts. Grades 1-7 will, as a general rule, have a set of standard competencies and indicators across occupations and grades. Grades 8-15 will have generic competencies and post-specific objectives and indicators. Immediate supervisors are responsible for setting objectives and indicators for their staff. For large occupation groupings Programme and HQ Departments may support this with profession specific objectives and indicators.

16. There are three possible overall ratings: two satisfactory ratings ("best performer/exceeds expectations" and "fully meets expectations") and one unsatisfactory rating ("does not fully meet expectations"). Comments from the immediate supervisor are required for all "best performer" and "does not fully meet expectations" ratings (overall and / or individual objectives). Comments are encouraged, but not required, for "fully meets expectations" ratings.

17. Overall guidance for determining each rating is as follows:

a. Best Performer – Exceeds Expectations – The staff member has achieved all performance targets and set objectives, and has exceeded the outputs required, in at least 4 out of 6 objectives (or 7 out of 11 dimensions for senior staff). The staff member may have had to perform some special assignments, unplanned activities or cope with unexpected circumstances making the achievement of the required targets more difficult than expected, but has still exceeded the standards. Any additional assignments or unplanned activities have also been performed to a very high standard.

The work performance has made a significant contribution to achievement of the departmental results, and is recognised within the work group as exceptional.

b. Fully Meets Expectations – A performance rating at this level is the norm, representing successful performance in completing objectives and performing required work. The staff member has achieved most or all performance targets and other objectives according to the standards expected and recorded at the beginning of the year. If the objectives have not been fully met in some cases, this must be offset by others where the required outputs have been exceeded, or there must have been genuine contingencies or mitigating circumstances that made full achievement more difficult than expected (for example, unplanned activities taking up a significant proportion of work time).

c. Does Not Fully Meet Expectations – The staff member is below the standard expected. The quality of work and / or progress towards achievement of the objective (s) and related indicators agreed at the beginning of the year has not met expectations, and substantial contingencies or mitigating circumstances to justify this are missing. There has been no significant improvement in standards, despite support and advice being provided by the supervisor or other staff. Overall, the staff member's performance has made little contribution to the departmental results, and may have caused the need for others in the work group to compensate for the staff member's shortcomings.

18. The immediate supervisor is limited to giving the “best performer” overall rating to up to 30 percent of staff supervised. This is not intended to be a target; rather it is an upper limit. The overall rating made should reflect the different aspects of performance, the difficulty, and relative importance e.g. achievement of objectives, adherence to core values, and competencies. The aspects will vary in significance in relation to the work plans, FIPS/HIPS and operational realities. Supervisors must be aware that the ratings awarded are fully justified, and that the oversight panel will review the distribution of ratings across the Agency. As stated in the principles section the application of this policy seeks to avoid the inflation of overall ratings awarded that has been observed in the past, particularly at higher grades. It is the responsibility of the HQ and Field Directors to ensure that differentiated performance is reflected in differentiated overall ratings, and to hold supervisors to account for the award of appropriate ratings.

19. If the “does not fully meet expectations” rating is given, the immediate supervisor is required to clearly state the reasons for this rating as well as the steps taken to remedy the poor performance, as per the toolkit for managing under performance and the Opportunity to Improve processes. This rating will not normally be awarded without the staff member being in a formal OTI process, or having failed the formal OTI process.

...

MANAGING UNDERPERFORMANCE

27. As highlighted in the Principles section above key to good performance management is an environment where a continuous dialogue is maintained between staff members and their supervisors. Dialogue that encourages performance and builds a supportive work environment is an essential ingredient in preventing under-performance. By strengthening the quality of informal supervisor/staff member communication there is an opportunity to understand and act on any perceived decline in performance.

28. Supervisors have an obligation to their staff to bring to their attention any areas where improvement is required and provide them with the opportunity to improve. The process for managing under-performance has two major parts: the informal improvement process and the formal improvement process. Additional resources are available on the HRD intranet site, and HR staff are to be involved with these processes.

Informal OTI process

29. Having identified the underperformance in one or more of the objectives the immediate supervisor needs to discuss the matter with the staff member. Specific examples need to be presented to the staff member that highlight how performance is considered to have deteriorated, and how this varies from the agreed objectives and indicators in the ePer. The staff member must be given an opportunity to provide an explanation in order to understand the underlying reasons for the decline in performance.

30. Notwithstanding this is an “informal” process, agreement is required on the reasons behind the performance problem and on the standards required to be met. As a minimum the process must include:

- a. a documented performance improvement session with the objective being that the staff member understands and agrees the areas in which his/her work is below standard and the goals for improvement over an agreed period; and
- b. the provision of appropriate assistance (e.g. training, closer supervision) to enable the staff member to meet the required standards.

31. Subsequent to this initial process the following may take place:

- a. Schedule regular performance improvement discussions to track the progress of the performance improvement plan.
- b. Provide closer supervision and feedback to positively reinforce good performance on a regular basis.
- c. If a skills shortage is identified, set up on-the-job training to assist the staff member.

d. Team/partner assignment: the staff member can be assigned to work alongside a competent member of the team (e.g. classes with joint instruction in schools).

32. Supervisors must use their judgement to determine the period of time allowed for improvement, but this should not be less than 30 days and not exceed 90 days.

Formal OTI Process

33. If, no more than 90 days after the date of the performance improvement discussion, the staff member's performance has not reached a satisfactory standard, supervisors must liaise with HR and the second supervisor to commence the formal OTI process. The formal OTI process cannot take place without a preceding informal OTI process. The formal OTI process will create a formal OTI plan⁶ for the staff member. This plan is to document:

a. A summary of the unachieved objectives and performance indicators for each objective and a detailed analysis of the objectives/performance indicators against which the staff member is underachieving. Factual evidence is to be included.

b. A remedial plan for improving the staff member's performance. The staff member's acceptance of the plan and approval of the plan by the second supervisor is to be recorded. This plan will encompass the following facets:

i. The timeline by which the plan's requirements should be completed. The maximum amount of time allowed to complete the requirements under this track is 90 days.

ii. The required training scheduled for the earliest opportunity.

iii. Any additional corrective actions required by the staff member to raise the level of his/her performance.

34. Once the formal OTI period has commenced the staff member is required to demonstrate achievement of the deliverables specified in the OTI plan, and the supervisor is to monitor progress and have regular sessions with the staff member to provide feedback on the achievement of the deliverables. Additional supporting actions to be considered are:

a. On-the-job training and support: depending on the support activities specified in the OTI plan, the staff member will receive the necessary training and support to accomplish the objectives in the OTI plan.

b. Special assignments⁸: The staff member may be assigned special tasks (relevant to job description) at the supervisor's discretion. These tasks should clarify the ability of the staff member to perform at the required level.

35. Upon completion of the OTI period identified (Section V) the second supervisor, in consultation with the Department Head⁹, has the following two options regarding the staff member:

a. Certify the staff member has completed all required remedial training and that his/her performance has returned to an acceptable level.

i. In such a case, the staff member must maintain this level of performance for one year commencing from the date of the OTI. Repeated underperformance in the same objective(s), or underperformance in more than one objective, will cause a new formal process of OTI to be initiated (without the informal process repeated).

OR

b. Decide that the performance of the staff member has not returned to an acceptable level. If this is the case the Department Head can, in consultation with HR, either:

i. Extend the OTI period by another 90 days. The maximum performance improvement process period should be nine months (90 days informal + 90 days formal + 90 days further formal OTI).

OR

ii. Recommend removal from functions, in accordance with the applicable regulations, rules and related issuances.

36. If the Department Head has recommended removal from functions, the file of the staff member should be forwarded to the Field Office Director/Headquarters Director for review and appropriate action.

37. All discussions and follow up reviews taking place between the staff member and the supervisor/Departments Heads during and at the end of the OTI period are to be carefully documented and signed by the parties involved. To be fair to both the staff member and the Agency the documentation needs to show that supervisors have explained and the staff member has understood the plan, work assignments and the level of performance expected. Decisions taken at the end of the OTI process are to be documented and staff member is to be informed in writing. Background and status of the OTI track is to be documented in the staff member's performance evaluation report, referring to details in the OTI file.

45. We hold that the UNRWA DT was correct in finding that the procedural irregularities were not serious enough to vitiate the outcome of the process. One of those irregularities was the completion of the 2016 e-PER by the previous supervisor, who had left his position before the end of the period of evaluation, while paragraph 10 of PD/A/23 requires that the departing supervisor should brief his or her successor whenever a supervisor changes during the reporting period of evaluation. Apart from the fact mentioned above that the reopening of the e-PER did not result in any change of the overall rating, it must be acknowledged that

it ultimately corrected the said irregularity, since it would be incumbent on the successor supervisor—and not the departing supervisor—to complete the e-PER.

46. Another irregularity found by the UNRWA DT concerned the lack of discussion with Mr. El Sadek about his performance assessment in 2016. In this regard, the UNWRA DT concluded that, since there was no modification in the overall rating of “fully meets expectations”, this lack of communication did not prejudice Mr. El Sadek.⁷ We find no error in this ruling, in the context of the facts of the present case, particularly in light of the opportunities given to Mr. El Sadek for training and/or improvement. In this regard, we note that Mr. M. S., the previous supervisor, had also expressed his concern that Mr. El Sadek’s management and communication skills needed improvement – and this fact has not been challenged by Mr. El Sadek.

47. The other irregularity was that not all discussions were signed, as prescribed by paragraph 37 of PD/A/23. However, they were all documented and/or summarized by e-mails sent to Mr. El Sadek.⁸ The exchange of the voluminous e-mails can well substitute for signed discussions, since Mr. El Sadek could and did actually present his views on the different matters at stake.

48. Regarding the duration of the informal OTI period, it is worth remembering that paragraph 32 of PD/A/23 states that it “should not be less than 30 days and not exceed 90 days”. As the informal OTI officially began on 3 February 2017⁹ and ended when he was placed on the formal OIT process on 9 March 2017,¹⁰ we consider that the minimum duration for the informal OTI was respected by the Agency, since it fell into its discretion to extend the duration of the process.

49. Likewise, with respect to the fact that the 2017 work plan served as the formal OTI plan, we find that it was reasonable for the UNRWA DT to consider that the numerous e-mails exchanged between Mr. El Sadek and his immediate supervisor provided a detailed account, with factual evidence, of the analysis of his improvements vis-à-vis his objectives and his shortcomings.¹¹ In short, the totality of the evidence here demonstrates that the

⁷ Impugned Judgment, para. 84.

⁸ *Ibid.*, para. 99.

⁹ *Ibid.*, para. 12.

¹⁰ *Ibid.*, para. 18.

¹¹ *Ibid.*, para 94.

unachieved objectives and the remedial plan cited by PD/A/23 were known to Mr. El Sadek and were subjected to detailed information, meetings, and discussion.

50. Consequently, it is our view that the procedural irregularities were immaterial and inconsequential within the context of Mr. El Sadek's contract.

51. According to the UNRWA DT Judgment, Mr. El Sadek's weakness in leadership and communication was well documented; there was not only on-going dialogue, but there were also efforts to help him improve his performance through discussions, guidance, and training, as documented by the informal and formal OTI processes, the weekly Skype meetings and the numerous e-mails exchanged between Mr. El Sadek and his immediate supervisor throughout March to June 2017. The UNRWA DT also concluded that the termination decision was based on the lack of required improvement in performance.

52. These findings are in line with the regulatory framework of the Agency, as well as with our jurisprudence, according to which a concern about a high-level manager's performance can be a proper basis for the decision not to renew, even if the overall performance of the manager is not rated as unsatisfactory.¹²

53. Further, it must be acknowledged that all three line managers, Mr. M. S., Mr. H. S., and Ms. G. L. were concerned about Mr. El Sadek's weakness in leadership and communication, even though he was a senior staff member and had already had three years of experience at the Field Health Programme at the time of the reopening of his 2016 e-PER in January 2017. All three managers had supervised Mr. El Sadek during different periods of time, for a total of more than one and a half years, from January 2016 until his separation from service on 13 August 2017.

54. The conspiracy theory advanced by Mr. El Sadek would thus have required all three managers to have colluded to fabricate those identified performance deficiencies, which is a far-fetched accusation. In this respect, it must be recalled that, generally speaking, the burden of proving improper motives rests with the person making the allegation.¹³ Mr. El Sadek made such a claim without providing adequate supporting evidence of harassment or abuse of power. We note in this regard that the DIOS found Mr. El Sadek's June 2017 complaint of

¹² *Assale v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-534; *Morsy v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-298.

¹³ *Nwuke v. Secretary-General of the United Nations*, Judgment No. UNAT-2015-506, para. 49.

harassment and abuse of power not substantiated, and closed the matter, and Mr. El Sadek did not challenge the DIOS' decision.¹⁴ All in all, this has led to the correct conclusion that neither the DIOS nor the UNRWA DT found any serious deviation from the applicable regulatory framework.

55. Similarly, Mr. El Sadek's claim that it was wrong to terminate his service on the basis of the concerns about only two of the eleven competencies in the e-PER is not supported by any authority. In addition, it is reasonable for the Administration to view the competencies of leadership and communication as the important requirements for the position of C/FHP.

56. In this context, we hold that the UNRWA DT did not err when it found that the Agency had reasonably and adequately exercised its discretion in terminating Mr. El Sadek's appointment.

Judgment

57. The appeal is dismissed and Judgment No. UNRWA/DT/2018/042 is hereby affirmed.

Original and Authoritative Version: English

Dated this 29th day of March 2019 in New York, United States.

(Signed)

Judge Halfeld, Presiding

(Signed)

Judge Raikos

(Signed)

Judge Lussick

Entered in the Register on this 29th day of May 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar

¹⁴ Impugned Judgment, para. 100.