



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2012/017

Judgment No.: UNDT/2012/071

Date: 10 May 2012

Original: English

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**Before:** Judge Thomas Laker

**Registry:** Geneva

**Registrar:** René M. Vargas M.

GEHR

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Ingeborg Daamen-Mayerl, UNOV/UNODC

## **Introduction**

1. By an application filed on 12 February 2012, the Applicant challenges the Administration's failure to conduct a rebuttal process in relation to his performance appraisal for the period from 1 April 2010 to 31 March 2011 ("2010-2011 performance appraisal") in accordance with applicable rules.

2. He asks the Tribunal to award him compensation for the violation of his due process rights and the moral injury he suffered. He also seeks compensation for the Administration's bad faith and the denial of justice he endured. He further asks the Tribunal to order that his performance appraisal reports be expunged from his personnel file.

## **Facts**

3. The Applicant joined the United Nations Office on Drugs and Crime ("UNODC") in Vienna in 2002. With effect from 1 November 2007, he was appointed to the post of Senior Terrorism Prevention Officer, at level P-5, in the Terrorism Prevention Branch ("TPB"), within the Division of Treaty Affairs ("DTA"). His functional title was changed to that of Chief of the Counter-Terrorism Legal Services Section I in April 2008 and his fixed-term appointment was extended several times until 31 December 2011, when he was separated from service.

4. In the fall of 2009, the Chief of TPB and the Officer-in-Charge of DTA, respectively the Applicant's first and second reporting officers, informed him that his post would be abolished and that he would be reassigned, at the same level, to the position of Senior Legal Adviser which was to be created within the Office of the Chief of TPB.

5. From then, the relation between the Applicant and UNODC management deteriorated and he submitted a series of informal and formal complaints (see in particular *Gehr* UNDT/2011/142, *Gehr* UNDT/2011/150, *Gehr* UNDT/2011/178, *Gehr* UNDT/2011/211).

6. By an email of 5 August 2011, the Applicant submitted a rebuttal statement in relation to his 2010-2011 performance appraisal. In his email, he stated the reasons why, in his view, the composition of the rebuttal panel was flawed. However, in order “not to miss the deadline”, he transmitted to the Chief of the Human Resources Management Service (“HRMS”) the names of the three members whom he had selected to serve on his panel. An exchange of emails ensued between the Applicant and HRMS, in which he claimed that the rebuttal process was being conducted in breach of ST/AI/2010/5 and that he had no choice in selecting the rebuttal panel members. This exchange culminated in the Applicant selecting a new rebuttal panel, whose composition differed slightly from that appointed on 5 August 2011.

7. By an email of 22 December 2011, the Chief of HRMS informed the Applicant that one of the rebuttal panel members he had selected, Mr. D., had declined to serve on it. He therefore invited the Applicant to select Mr. G. as he was “the only other remaining chairperson of the rebuttal panel who c[ould] be nominated”. In an email of 28 December 2011, the Applicant requested the reasons for Mr. D.’s recusal and sought explanations as to why Mr. G. was “the only other remaining chairperson of the rebuttal panel who c[ould] be nominated”.

8. On 20 July 2011, the Applicant filed with the Tribunal the application which forms the subject of this Judgment.

9. A directions hearing was held on 18 April 2012, which the Applicant and Counsel for the Respondent attended by videoconference.

### **Parties’ submissions**

10. The Applicant’s principal contentions are:

- a. In spite of his queries, he was not provided with the reasons for Mr. D.’s recusal. It is therefore to be inferred that the Administration’s assertion that Mr. D. wanted to recuse himself is false and made in bad faith;

b. His 2009-2010 performance appraisal is tainted with irregularities and neither that appraisal, nor that covering the 2010-2011 performance cycle had been provided to him at the time of filling the application;

c. The Administration acted in breach of administrative instruction ST/AI/2010/5 (Performance Management and Development System), particularly with regard to the deadlines stipulated therein for the rebuttal process;

d. The list of rebuttal panel members was not properly established pursuant to sections 14 and 15 of ST/AI/2010/5;

e. The manner in which his performance appraisals for the periods 2009-2010 and 1 April-31 December 2011 were handled is further evidence of the Administration's unwillingness to provide him with lawful appraisals. This conduct is not the result of a simple lack of rigour and diligence, but of the Administration's decision to deny justice to the Applicant.

11. The Respondent's principal contentions are:

It results from staff rule 11.2 and article 8 of the Statute of the Tribunal that a staff member who wishes to contest an administrative decision must, as a first step, submit the contested decision for management evaluation. As the Applicant failed to request a management evaluation of the contested decision in this case, his application is not receivable.

### **Consideration**

12. The main issue raised in the present case is that of the admissibility of the application.

13. In challenging the Administration's failure to conduct a rebuttal process in relation to his 2010-2011 performance appraisal in accordance with applicable rules, the Applicant first submits that the rebuttal process is tainted by irregularities, in particular with respect to the composition of the rebuttal panel.

14. In *Gehr* UNDT/2011/211, the Tribunal explained, in relation to another application filed by the Applicant:

[I]t 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 from the rebuttal process has been given. In view of the fact that the appraisal of a staff member's performance is a matter for which the Administration enjoys discretion ... in exercising judicial review the Dispute Tribunal must determine "if the decision under challenge is reasonable and fair, legally and *procedurally correct*, and proportionate" (see *Sanwidi* 2010-UNAT-084, emphasis added).

15. Consequently, the Tribunal declined to review the Applicant's claims in relation to the legal basis for the rebuttal process and the comments made or individual ratings given by his reporting officers, finding that these constituted preliminary decisions and that they should be challenged only once the outcome of the rebuttal process is known.

16. The same reasoning must apply in the instant case. Insofar as the Applicant alleges irregularities in the rebuttal process, the Tribunal will not interfere with the review of his 2010-2011 performance appraisal before the process is finalised.

17. In his pleadings, the Applicant also submitted that the Administration was not willing to provide him with a lawful appraisal and he complained about the excessive length of the rebuttal process. During the directions hearing held on 18 April 2012, he emphasised that it was only because he had filed his application that the Administration had proceeded with the rebuttal process and he explained that, by "shying away from decisions", the Administration had in fact taken the decision not to proceed and this was the contested decision in the instant case.

18. Even assuming that, in identifying the contested decision in his application as "[t]he decision not to allow a rebuttal process [in relation to his 2010-2011 performance appraisal] to be carried out in accordance with applicable ... norms", the Applicant indeed sought to challenge the implicit decision not to finalise the rebuttal process and to complain about the delay in finalising the process, his application cannot be deemed receivable.

19. It is settled case law of both the Dispute Tribunal (see, *inter alia*, *O'Neill* UNDT/2010/203, *Leboeuf* et al. UNDT/2010/206, *Znamenski* UNDT/2010/208) and the Appeals Tribunal (see, *inter alia*, *Crichlow* 2010-UNAT-035 and *Planas* 2010-UNAT-049) that requesting a management evaluation is a mandatory first step in the appeal process.

20. In the instant case, the Applicant failed to submit for management evaluation the decision not to finalise the rebuttal process in relation to his 2010-2011 performance appraisal prior to contesting this decision before the Tribunal. Therefore, his application is irreceivable.

### **Conclusion**

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

The application is rejected.

*(Signed)*

Judge Thomas Laker

Dated this 10<sup>th</sup> day of May 2012

Entered in the Register on this 10<sup>th</sup> day of May 2012

*(Signed)*

René M. Vargas M., Registrar, Geneva