



**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

LEWIS

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON RECEIVABILITY**

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**Counsel for the Applicant:**

Self-represented

**Counsel for the Respondent:**

Nicole Wynn, ALS/OHRM

Nusrat Chagtai, ALS/OHRM

## **Introduction**

1. The Applicant is serving as the Chief Security Officer at the P-4 level with the United Nations Special Mission in Libya (UNSMIL). He filed an application on 5 January 2017 with the United Nations Dispute Tribunal (UNDT/the Tribunal) in Nairobi contesting the “rating and comments” of his Second Reporting Officer (SRO) in his 2015-2016 e-performance document (e-PAS).
2. The Respondent filed his reply to the application on 6 February 2017.
3. The Applicant filed a response to the Respondent’s reply on 7 February 2017.

## **Relevant facts**

4. The Applicant joined UNSMIL on 18 April 2015. His First Reporting Officer (FRO) was Mr. Paepae Wiki, the former UNSMIL Chief Security Advisor (CSA), and his SRO was Mr. Martin Kobler, the UNSMIL Special Representative of the Secretary-General (SRSG).
5. For the performance evaluation period 2015-2016, the Applicant’s FRO gave him an overall rating of “successfully meets expectations” with the following comments:<sup>1</sup>

During the reporting period, [the Applicant] was instrumental in the successful planning and implementing of the security mitigation measures of the UNSMIL Headquarters in Tunis – a challenging task involving both UN and host country interlocutors, in a rapidly deteriorating security environment. [The Applicant’s] engagement with all parties was effective with a number of major hurdles accomplished. [The Applicant] possesses a sturdy management style with a no-nonsense, clear-cut approach to his work, which is at times misinterpreted and has a tendency to discourage the full participation of his subordinates. The ability to communicate and listen to colleagues and subordinates in a tactful manner, and communicate in a suitable tone and style are specific areas that [the Applicant] could focus on so as to harmonise the overall working environment. That said, Mr. Lewis is a team

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<sup>1</sup> The e-PAS submitted by the Applicant as an annex to his application is not signed by him, the FRO nor the SRO.

player who sets solid standards and possesses the requisite work related knowledge and written skill sets to perform his role and responsibilities. [The Applicant] is a capable security professional who is more than capable of taking on the higher responsibilities.

6. His SRO made the following comments in his performance appraisal (e-PAS):

I regret not to be in full agreement with the FRO's assessment of [the Applicant's] performance. In my evaluation as the SRO, based on my observations as the Head of Mission and the information received from a number of colleagues, [the Applicant] only partially meets expectations and therefore should be rated accordingly. He does not work in a client-oriented manner and is not capable of managing his staff and leading a team. His abrasive personality antagonizes his subordinates, leading to tensions and numerous complaints which have been brought to my attention since I have joined the Mission. I cannot agree that [the Applicant] is, as the FRO opines, a "team player" or "fully competent" in areas of teamwork, accountability and client orientation. He also only partially meets expectations and requires development in the managerial competencies of leadership, managing performance, empowering others, and building trust. Regrettably, it appears to me that the FRO has not been sufficiently proactive and supportive in assisting the staff member in remedying the shortcomings, despite several discussions that took place with [the Applicant] in the course of the evaluation period, and despite the many complaints about [the Applicant's] performance which were brought to the FRO's attention. I therefore recommend that a performance improvement plan be put in place in order to provide [the Applicant] with an opportunity to remedy the shortcomings in the aforementioned areas, allowing for continuous monitoring under the oversight of the new FRO during the current evaluation cycle. This certainly needs to be done before there can be any talk of [the Applicant's] capability of taking on the higher responsibilities, as suggested by the previous FRO in his comments.

7. The Applicant became aware of Mr. Kobler's comments on 21 August 2016 and submitted a request for management evaluation on 30 August 2016.

8. On 29 September 2016, the Applicant's new FRO, Mr. Filipino Tarakinikini, UNSMIL's current CSA, informed him by email that "[...] based on MEU feedback, your previous FRO and SRO are working to resolve and roll back of your previous performance evaluation and produce a new performance document for 2015-2016".

9. The Management Evaluation Unit (MEU), by a letter dated 7 October 2016, informed the Applicant that his request for management evaluation was not receivable since no adverse decision directly affecting his terms of appointment had been taken on the basis of his 2015-2016 performance appraisal.

10. The Applicant filed the current application with the Tribunal on 5 January 2017.

11. By Order No. 113 (NBI/2017), the Tribunal directed the parties to submit supplemental evidence by 23 June 2017.

12. The Applicant and Respondent complied with Order No. 113 on 21 and 23 June 2017, respectively.

### **Issues**

13. The issue for determination here is whether the Applicant is contesting an administrative decision within the meaning of the art. 2.1(a) of the UNDT Statute and if so, whether the application is moot.

### **Submissions**

14. The Respondent submits that the application is not receivable *rationae materiae* because the SRO's comments do not constitute a reviewable administrative decision that has direct legal consequences for the Applicant's appointment or contract of employment<sup>2</sup>. Additionally, a staff member may only contest an administrative decision stemming from a final performance appraisal. Lastly, the Respondent submits that the application is moot because the Applicant's 2015-2016 e-PAS is being rolled back for his First Reporting Officer (FRO) and SRO to produce a new performance appraisal for that cycle.

15. The Applicant submits that his application is receivable because the SRO's comments constitute a reviewable administrative decision. He submits that his case is distinguishable from *Ngokeng* 2014-UNAT-460 in that his SRO's

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<sup>2</sup> Ngokeng 2014-UNAT-460.

comments do, in fact, detract from the official rating as they directly contradict the FRO's evaluation and final rating.

## **Considerations**

### **Was there an administrative decision?**

16. Art. 2.1(a) of the UNDT Statute provides that:

1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.

17. Section 15.1 of ST/AI/2010/5 (Performance management and development system) states that:

Staff members who disagree with a "partially meets performance expectations" or "does not meet performance expectations" rating given at the end of the performance year may, within 14 days of signing the completed e-PAS or e-performance document, submit to their Executive Officer at Headquarters, or to the Chief of Administration/Chief of Mission Support, as applicable, a written rebuttal statement setting forth briefly the specific reasons why a higher overall rating should have been given. Staff members having received the rating of "consistently exceed performance expectations" or "successfully meets performance expectations" cannot initiate a rebuttal.

18. Section 15.7 of ST/AI/2010/5 provides:

The rating resulting from an evaluation that has not been rebutted is final and may not be appealed. However, administrative decisions that stem from any final performance appraisal and that affect the conditions of service of a staff member may be resolved by way of informal or formal justice mechanisms.

19. In *Andati-Amwayi* 2010-UNAT-058, the United Nations Appeals Tribunal (UNAT) held that: "What constitutes an administrative decision will depend on

the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision”.

20. In *Ngokeng*, UNAT held that there was no evidence of any adverse administrative decision stemming from the applicant’s performance appraisal. UNAT held that the FRO’s comment, which was made in a satisfactory appraisal, was not a final administrative decision because “it did not detract from the overall satisfactory performance appraisal and had no direct legal consequences for Mr. Ngokeng’s terms of appointment”.

21. The current case is distinguishable from *Ngokeng* in that the SRO’s comments were not in fact just simple comments but actually constituted an alternative rating that sought to replace the FRO’s overall satisfactory rating with an unsatisfactory one. The FRO evaluated the Applicant’s overall performance as “successfully meets expectations” whereas the SRO evaluated his performance as “partially meets expectations” and provided very strong comments in support of this negative rating. The SRO went on further to recommend the institution of a performance improvement plan (PIP) to address the Applicant’s performance shortcomings. In light of the nature and depth of the SRO’s comments, the Tribunal holds that the SRO’s comments detracted so substantially from the overall satisfactory performance appraisal as to put the FRO’s overall rating in doubt.

22. At the direction of the Tribunal, the Applicant submitted copies of the Letters of Appointment (LoAs) that he has signed since his appointment to UNSMIL in April 2015 and information as to the length of time his current FRO has been serving with UNSMIL.

23. Upon the Applicant’s entry on duty with UNSMIL, he was initially granted a one year fixed-term appointment from 18 April 2015 to 17 April 2016. On 29 September 2016, the Applicant’s current FRO, Mr. Tarakinikini, recommended that his appointment be extended for only six months and that he be placed on a PIP during that period. Mr. Tarakinikini explained that the PIP was based on his observations but following a review of the chronology of events, the Tribunal is not convinced that this was the case.

24. Mr. Tarakinikini assumed his duties as CSA and the Applicant's FRO on 23 May 2016. The Applicant submits that he was on certified sick leave from 23 May to 3 June 2016, and that he was away on official training in Italy from 20 to 24 June 2016; and again on certified sick leave from 27 June to 26 July 2016.

25. This means that from the time Mr. Tarakinikini became CSA and the Applicant's FRO up until the time he recommended a six-month contract extension and PIP for the Applicant, he had worked with the Applicant for only about 2.5 months. In light of this short period of interaction between the Applicant and Mr. Tarakinikini, the Tribunal finds that absent considerations such as the SRO's negative comments and ratings in the Applicant's 2015/2016 e-PAS, Mr. Tarakinikini could not have had sufficient basis on his own to recommend only a six month extension.

26. The question that arises here is, whether any administrative decision(s) stems from the SRO's comments and rating in the Applicant's performance appraisal that affected his conditions of service? The clear answer can only be yes since the Applicant was granted only a six month contract in September 2016 instead of the one year appointment that he was granted when he entered on duty with MINUSCA in April 2015. The SRO's comments no doubt had direct legal consequences for the Applicant in that he ended up with a shorter term of appointment.

27. In conclusion, the Tribunal finds that the SRO's comments constitute a reviewable administrative decision.

### **Is the application moot?**

28. The Respondent submitted in his reply that the application is moot because the Applicant's 2015-2016 e-PAS was being rolled back. In response to Order No. 113, the Respondent explained that the Mission was still in the process of rolling back the Applicant's e-PAS because the appraisal has to be cancelled by the Applicant's former FRO, Mr. Wiki, who has now left UNSMIL and is currently serving with the United Nations Department for Safety and Security in New York.

The Respondent attached email communication between UNSMIL and Mr. Wiki as evidence that there are continuing efforts to resolve the matter.

29. A matter can only be considered to be moot where a dispute no longer exists. This, unfortunately, is not the case here. The Respondent has continued to assure the Applicant since September 2016 that the 2015-2016 e-PAS would be rolled back and re-created. Based on the emails submitted by the Respondent, it appears that the roll back, regrettably, was not addressed with Mr. Wiki until December 2016, three months after the fact.

30. Seeing as Mr. Wiki did not leave the Organization but merely moved to the United Nations Headquarters in New York, the Tribunal finds that his reassignment is no excuse for the Respondent's delay in rolling back the e-PAS. The emails also do not evince any specific measures or timeline to indicate that action will be taken soon to resolve this matter.

31. Until such time as the e-PAS is in actuality rolled back and re-created, the cause of action remains a live issue before the Tribunal. Accordingly, the application is not moot.

### **Judgment**

32. The application is receivable.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 28<sup>th</sup> day of June 2017

Entered in the Register on this 28<sup>th</sup> day of June 2017

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi