



Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Isaac Endeley

HAMPSTEAD

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

George G. Irving

Counsel for Respondent:

Jenny Kim, AS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a former staff member of the Department for General Assembly and Conference Management (“DGACM”), filed an application with the Tribunal contesting the decision to terminate his permanent appointment for unsatisfactory service.
2. The Respondent in his reply submits that the contested decision is legal, reasonable, and procedurally fair.
3. For the reasons stated below, the Tribunal finds that the contested decision is lawful and rejects the application.

Facts

4. The Applicant joined the Organization in 1989. At the time of the contested decision, the Applicant served as a Documents Management Assistant at the GS-6 level in the Documents Management Section (“DMS”), Central Planning and Coordination Division (“CPCD”) of DGACM with a permanent appointment.
5. In the 2018-2019 performance cycle, the Applicant received an overall rating of “partially meets performance expectations”. The Applicant rebutted this performance evaluation, but the Rebuttal Panel maintained the rating.
6. In the framework of the 2019-2020 performance cycle, the Applicant was placed on a Performance Improvement Plan (“PIP”) from 1 June 2019 to 31 October 2019. The PIP was extended for subsequent periods ending on 29 February 2020. At the end of the 2019-2020 performance cycle, the Applicant received an overall rating of “partially meets performance expectations”. The Applicant rebutted this performance evaluation, but the Rebuttal Panel maintained the rating.
7. In the framework of the 2020-2021 performance cycle, the Applicant was again placed on a PIP. At the end of the 2020-2021 performance cycle, the Applicant received an overall rating of “does not meet expectations”. The Applicant rebutted this performance evaluation, but the Rebuttal Panel maintained the rating.

8. On 4 October 2021, the Under-Secretary-General for the Department for General Assembly and Conference Management (“USG/DGACM”) submitted to the Assistant Secretary-General for Human Resources (“ASG/HR”) a request for the termination of the Applicant’s permanent appointment for unsatisfactory service.

9. On 7 October 2021, the members of the Central Review Panel (“CRP”) were appointed by the Secretariat of the Central Review Bodies (“CRBs”). Following a review of the proposal for termination, the CRP unanimously concluded that “there was sufficient ground for the termination of the permanent appointment for unsatisfactory service” and agreed with the recommendation for termination of the Applicant’s permanent appointment.

10. By memorandum of 10 November 2021, the Chairman of the CRP transmitted the CRP’s report setting out its considerations and conclusions including supporting documents to the ASG/HR for her consideration.

11. By letter dated 18 November 2021, the USG/DGACM informed the Applicant of the decision to terminate his permanent appointment with immediate effect due to unsatisfactory service. The letter indicates, *inter alia*, that the Applicant would receive compensation in lieu of notice pursuant to staff rules 13.1(a) and 9.7(d).

12. On 30 December 2021, the Applicant requested management evaluation of the contested decision.

13. By letter dated 26 January 2022, the Applicant was informed of the outcome of his request for management evaluation. The contested decision was upheld.

14. On 25 April 2022, the Applicant filed the present application.

15. On 25 May 2022, the Respondent filed his reply.

16. On 17 April 2023, the parties filed their respective closing submissions.

Consideration

Applicable law

17. Staff regulation 9.3(a)(ii) and staff rules 9.6(c)(ii) and 13.1(b)(i) provide that the Administration may terminate a permanent appointment for unsatisfactory service. The procedures for identifying and addressing performance shortcomings and unsatisfactory performance are set out in sec. 10 of ST/AI/2010/5 (Performance Management and Development System)¹.

18. Under sec. 4.10 of ST/SGB/2011/7 titled Central Review Bodies, requests for termination of permanent appointments under staff regulation 9.3(a)(ii) and staff rule 13.1(b)(i) are reviewed by a CRP, following the procedure established in ST/AI/222², before the Secretary-General makes a decision on whether to terminate a permanent appointment.

19. In *Sarwar* 2017-UNAT-757, para. 73, the Appeals Tribunal held that whenever the Secretary-General is called upon to decide if a valid and fair reason exists to terminate an appointment for poor performance, he should consider whether the staff member in fact failed to meet the performance standard and if so whether:

- i) the staff member was aware, or could reasonably be expected to have been aware, of the required standard; ii) the staff member was given a fair opportunity to meet the required standard; and iii) termination of appointment is an appropriate action for not meeting the standard in the circumstances.

20. The Appeals Tribunal also clearly stated in *Said* 2015-UNAT-500, para. 40, that the UNDT must accord deference to the Administration's appraisal of the performance of staff members, and cannot review *de novo* a staff member's appraisal, or place itself in the role of the decision-maker and determine whether it would have renewed the contract, based on the performance appraisal. Performance

¹ ST/AI/2010/5 was superseded by ST/AI/2021/4 (Performance Management and Development System) on 13 August 2021. However, since the performance shortcomings at issue in the present case occurred prior to 31 March 2021, the applicable legal framework is ST/AI/2010/5.

² ST/AI/222 titled Procedure to be Followed in Cases of Termination of Permanent Appointment for Unsatisfactory Services is dated 10 December 1974.

standards generally fall within the prerogative of the Secretary-General and, unless the standards are manifestly unfair or irrational, the UNDT should not substitute its judgment for that of the Secretary-General. The primary task is to decide whether the preferred and imposed performance standard was not met and to assess whether an adequate evaluation was followed to determine if the staff member failed to meet the required standard. There must be a rational objective connection between the information available and the finding of unsatisfactory work performance (see *Sarwar* at para. 74).

21. The Appeals Tribunal has recalled that in examining the validity of the Administration's exercise of discretion, the Dispute Tribunal's scope of review is limited to determining whether the exercise of such discretion is legal, rational, reasonable and procedurally correct to avoid unfairness, unlawfulness or arbitrariness (see *Abusondous* 2018-UNAT-812, para. 12). In this regard, the Dispute 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" (see *Sanwidi* 2010-UNAT-084, para. 40).

22. Having reviewed the parties' submissions, the Tribunal notes that, on the one hand, the Applicant raises allegations in respect of the assessment of his performance and the procedure to terminate his permanent appointment. On the other hand, the Respondent adduces evidence of performance shortcomings in the Applicant's employment during three performance cycles and provides information concerning the procedure for the termination of the Applicant's appointment.

23. In view of the foregoing, in determining the lawfulness of the contested decision, the Tribunal will examine the following issues:

- a. Whether the Applicant's performance was evaluated in a fair and objective manner; and

- b. Whether the Administration followed a proper procedure in making the contested decision.

Whether the Applicant's performance was evaluated in a fair and objective manner

24. The Tribunal recognizes that its role is not to review *de novo* the Administration's evaluation of the Applicant's performance but rather to determine whether the rules and procedures governing performance evaluation were complied with (see *Ncube* UNDT-2016-069, para. 127). In this respect, the Tribunal recalls that sec. 2.1 of ST/AI/2010/5 requires that staff members' performance be managed or evaluated in a "fair and equitable manner". This means that performance evaluation should be objective and bias-free.

25. Section 10 of ST/AI/2010/5 sets forth the legal framework for addressing performance shortcomings and unsatisfactory performance providing that (emphasis added):

10.1 During the performance cycle, the first reporting officer should continually evaluate performance. When a performance shortcoming is identified during the performance cycle, the first reporting officer, in consultation with the second reporting officer, should proactively assist the staff member to remedy the shortcoming(s). Remedial measures may include **counselling, transfer to more suitable functions, additional training and/or the institution of a time-bound performance improvement plan**, which should include clear targets for improvement, provision for coaching and supervision by the first reporting officer in conjunction with performance discussions, which should be held on a regular basis.

10.2 If the performance shortcoming was not rectified following the remedial actions indicated in section 10.1 above, and, where at the end of the performance cycle performance is appraised overall as "partially meets performance expectations", **a written performance improvement plan shall be prepared by the first reporting officer**. This shall be done in consultation with the staff member and the second reporting officer. **The performance improvement plan may cover up to a six-month period.**

10.3 If the performance shortcoming was not rectified following the remedial actions indicated in section 10.1, a number of administrative actions may ensue, including the withholding of a within-grade salary increment pursuant to section 16.4, the non-renewal of an appointment or the termination of an appointment for unsatisfactory service in accordance with staff regulation 9.3.

10.4 Where at the end of the performance cycle performance is appraised overall as “does not meet performance expectations”, the appointment may be terminated as long as the remedial actions indicated in section 10.1 above **included a performance improvement plan, which was initiated not less than three months before the end of the performance cycle.**

26. The Applicant asserts that throughout 2019 and 2020, he experienced adverse effects on his health and for the first time received criticism over his work and his need to take sick leave. He indicated that his performance was downgraded to “partially meets expectations” in the 2018-2019 and 2019-2020 performance evaluations despite his rebuttal of this rating and that the PIPs imposed were procedurally defective and offered no help or remedial assistance.

27. The Tribunal notes that the contested decision is based on the Applicant’s records for the performance cycles of 2018-2019, 2019-2020, and 2020-2021. The Applicant received a rating of “partially meets performance expectations” for the 2018-2019 and 2019-2020 cycles and a rating of “does not meet performance expectations” for the 2020-2021 cycle.

The 2018-2019 performance cycle

28. The evidence on record shows that the main issues identified in this cycle included poor time management, lack of attention to detail at work, inability to work independently, and poor adherence to time and attendance expectations (the Applicant was registered in 2018 being late to work on over 60 occasions in 171 working days). The Tribunal notes that the Applicant had two first reporting officers (“FROs”) during this performance cycle and both, in turn, informed the Applicant about the existence of performance issues and the need to improve his performance. He was given appropriate guidance, training, and feedback. However, the Applicant’s performance did not improve.

29. At the end of the 2018-2019 performance cycle, the Applicant was assessed as only partially achieving the goals set in his work plan. He was rated “requires development” in the core value of Professionalism as well as in three of the six core competencies, namely, Planning and Organizing, Continuous Learning, and Technological Awareness. The Applicant obtained an overall rating of “partially meets expectations”.

30. While the Applicant rebutted the rating of his 2018-2019 performance cycle, the Rebuttal Panel recommended maintaining the overall rating of “partially meets expectations”.

The 2019-2020 performance cycle

31. The evidence shows that during the 2019-2020 cycle, the Applicant’s performance continued to deteriorate. The Applicant was placed on a PIP that initially lasted five months covering the period from 1 June 2019 to 31 October 2019. However, the PIP was further extended until 29 February 2020. The goals included in the PIP related to the timely completion of daily tasks, timely attendance at work, and in general the improvement of his work product requiring him to pay special attention to details to minimize mistakes.

32. The Tribunal notes that the Applicant was provided with feedback and continuous guidance by his FRO and other senior team members on how to improve his shortcomings during the performance period. Further to the initiation of the PIP, the FRO held regular conversations with the Applicant to formally discuss his progress and provide feedback. However, the Applicant did not achieve the expected results.

33. At the end of the 2019-2020 performance cycle, the Applicant was assessed as only partially achieving the goals set forth in his work plan. He was rated as “requires development” in the core values of Professionalism and Respect for Diversity, as well as in three of the five core competencies, namely in Teamwork, Planning and Organizing, and Accountability. The Applicant obtained an overall rating of “partially meets expectations”.

34. The Applicant rebutted the rating of his performance in the 2019-2020 cycle, but the Rebuttal Panel recommended maintaining the rating. The Rebuttal Panel considered, *inter alia*, that the Applicant's "technical skills remained below the required level" and that he only partially met performance expectations.

The 2020-2021 performance cycle

35. During the 2020-2021 performance cycle, the Applicant was again placed on a PIP that was prepared with the support of the Ombudsman's Office. The PIP was planned for an initial period of three months, commencing on 6 July 2020. However, since the Applicant was on annual leave in August and sick leave from September 2020 until 20 January 2021, his PIP was put on hold during that period and was re-initiated with modifications on his return from sick leave on 21 January 2021. The Tribunal notes that the amended version of the PIP was also prepared in consultation with the Applicant.

36. The PIP focused on developing professionalism as well as improving communication, teamwork, and planning and organizing skills.

37. The evidence shows that the Applicant received regular guidance, feedback, and training on the job from senior colleagues including his Team Leader and his FRO. However, his performance did not improve. It is evident from the records that the Applicant was not meticulous in the performance of his daily work which caused mistakes.

38. At the end of the 2020-2021 performance cycle, the Applicant was rated as "requires development" in the core values of Professionalism and Respect for Diversity, as well as in four of the five core competencies, namely in Teamwork, Planning and Organizing, Continuous Learning and Technological Awareness. The Applicant obtained an overall rating of "does not meet expectations".

39. The Applicant rebutted the rating of his 2020-2021 performance cycle, but the Rebuttal Panel recommended maintaining the rating. The Rebuttal Panel considered, *inter alia*, that the Applicant had "demonstrated many difficulties in producing work required of him at his level and [had] made repeated mistakes, in

particular in registering parliamentary documentation”. The Panel further noted that those mistakes had “persisted despite dedicated advice and support provided by his FRO and Team [Leader]”.

40. The evidence on record shows that the Applicant’s FRO, his Second Reporting Officer (“SRO”), and other senior colleagues provided him with performance guidance and feedback. The evidence also shows that the Administration assisted the Applicant to improve his performance by calling his attention to performance shortcomings, providing advice, and on-the-job training in line with sec. 10.1 of ST/AI/2010/5 and by implementing two PIPs as required by sec. 10.2 of the same administrative instruction.

41. Under such circumstances and based on the evidence in the record discussed above, the Tribunal is satisfied that the Applicant’s performance was evaluated in a fair and objective manner in accordance with sec. 10 of ST/AI/2010/5 and that the Applicant’s due process rights were respected.

Whether the Administration followed proper procedure in making the contested decision.

42. The procedure to be followed in cases of termination of the permanent appointment of a staff member for unsatisfactory services is set forth in ST/AI/222, as amended by ST/SGB/2011/7, particularly sec. 4.10. In fact, following the abolition of the Appointment and Promotions Board, the relevant Central Review Bodies carry out the review of proposals for the termination of permanent appointments for unsatisfactory service under staff regulation 9.3 (a)(ii) and staff rule 13.1(b)(i), and advise the Secretary-General as to whether the conditions for such termination are met.

43. The ST/AI/222 provides, in relevant part, that (emphasis added):

2. In order to ensure that the review of a proposal to terminate a permanent appointment on the grounds of unsatisfactory service is conducted in a way that will satisfy **the requirements of due process, the proposal shall be referred to a joint review body for advice before the Secretary-General takes a decision on it.**

...

4. The proposal for termination, together with supporting evidence, **shall be submitted in writing to the joint review body** prior to its consideration of the case. A copy of this material shall, at the same time, be provided to the staff member concerned.

5. The joint review body shall base its deliberations on the proposal placed before it and shall advise the Secretary-General **whether or not, in its opinion, there is sufficient ground for the termination of the permanent appointment** for unsatisfactory services under staff regulation 9.1(a).

6. The joint review body may request any member of the Secretariat to provide information, either orally or in writing, relevant to its consideration of the case.

7. The staff member concerned shall be afforded a reasonable opportunity **to comment on the proposal for termination** or on any matter relating to the case and to request that information which he considers to be relevant to the case be obtained from specified staff members. The joint review body shall hear the staff member in person, whenever it considers this feasible.

...

9. The joint review body **shall adopt a report that includes a statement of its considerations, as well as its conclusions and recommendations.**

...

11. In cases where the **decision of the Secretary-General is to terminate the permanent appointment, the staff member shall be given in the notice of termination a statement of the reasons** for the Secretary-General's decision and the considerations, conclusions and recommendations of the joint review body.

44. The Tribunal notes that on 4 October 2021, the USG/DGACM submitted to the ASG/HR a request for the termination of the Applicant's permanent appointment for unsatisfactory service pursuant to staff regulation 9.1(a) and in line with para. 2 of ST/AI/222.

45. The proposal was based on the Applicant's "negative overall performance ratings in the last three performance cycles and his inability to perform at the level required". The proposal referred to the remedial measures put in place which included, *inter alia*, setting clear targets, conducting regular performance discussions, implementing two PIPs, adjusting output timelines, and setting monitoring tools to facilitate the improvement of the Applicant's performance.

46. The evidence shows that the CRP was provided with the documentation submitted by the USG/DGACM including the Applicant's performance documents, his PIPs, and email correspondence. The CRP afforded the Applicant a reasonable opportunity of 30 days to comment on the proposal for termination in line with paras. 4 and 7 of ST/AI/222.

47. The Tribunal notes that the CRP interviewed the Applicant as well as his FRO for the 2018-2019, 2019-2020, and 2020-2021 performance cycles.

48. Following the interviews, the CRP met to deliberate on the proposal. In its deliberation, the CRP noted, *inter alia*, that the Applicant "was unable to undertake the full responsibilities required of a position at his level, as reported in the request for termination ... and the staff member's performance documents". It also noted that the "registration of documents, which should have constituted 50% of his responsibilities remained his weakest area". The CRP was informed that the Applicant submitted a complaint for alleged harassment against his previous SRO to OIOS in January 2021 "but no substantial evidence or concluding report was provided to the [CRP]".

49. The CRP unanimously concluded that there were sufficient grounds for the termination of the Applicant's permanent appointment for unsatisfactory services and on 10 November 2021 recommended the termination of his permanent appointment to the ASG/HR.

50. The ASG/HR forwarded to the Under-Secretary-General for the Department of Management Strategy, Policy and Compliance ("USG/DMSPC") the proposal for the termination of the Applicant's appointment and, on 15 November 2021, the

USG/DMSPC, in the exercise of her delegated authority, accepted the CRP's recommendation to terminate the Applicant's permanent appointment.

51. The Applicant was subsequently issued a notice of termination of his permanent appointment effective 18 November 2021. The termination notice provided, *inter alia*, that the Applicant would receive compensation in lieu of notice pursuant to staff rules 13.1(a) and 9.7(d).

52. The Tribunal has reviewed the process followed for the termination of the Applicant's permanent appointment and is satisfied that it was conducted fairly and in accordance with ST/SGB/2011/7 and ST/AI/222. The Applicant's due process rights were respected, he was aware of the required standards of performance and was given reasonable guidance and opportunities over three performance cycles to meet those standards. Nevertheless, the evidence shows that his performance did not improve.

The Applicant's claims

53. The Appeals Tribunal has consistently held that under the presumption of regularity, the Applicant has the burden of proving that the contested decision is unlawful (see *Rolland* 2011-UNAT-122, para. 26). The Tribunal will thus review the Applicant's claims in this respect.

54. The Applicant argues that he began facing challenges at work in 2018 when Mr. D, a new Chief of the Documents Management Section, was appointed and became his SRO. According to the Applicant, this change led to an increasingly hostile working environment resulting in a formal complaint of abuse of authority and discrimination to the Head of the Department in March 2020. However, Mr. D was appointed in December 2018. He was not the Applicant's SRO for the 2018-2019 performance cycle, and he did not take part in his performance evaluation.

55. Regarding the Applicant's complaint of abuse of authority and discrimination, the Tribunal notes that the Director, CPCD, held a meeting with the Applicant on 6 March 2020 to discuss his concerns and that following the

Applicant's second complaint on 19 November 2020, the Applicant's SRO was replaced by the Director, CPCD, who then took part in the Applicant's performance evaluation during his 2020-2021 performance cycle.

56. In relation to the Applicant's claim that his second PIP was initiated in spite of his absence on sick leave, the evidence shows that his second PIP was implemented on 6 July 2020, but it was suspended during the Applicant's annual leave in August 2020 and sick leave starting in September 2020. It was only reinitiated with modifications on the Applicant's return from sick leave on 21 January 2021. Therefore, his claim has no merit.

57. The Applicant also argues that the Administration "had an obligation to look beyond the review of statistical evidence and examine what has led up to this result, including the question of how his medical issues were handled". However, the Applicant's managers were not privy to his medical records or health condition and, in any event, it would have been inappropriate for them to speculate on his health condition and its impact on his performance.

58. Concerning the Applicant's claim that no referral for disability was made, the Tribunal notes that the Executive Office brought the Applicant's case to the attention of the Medical Director on 5 May 2021 as a potential disability case due to the Applicant's low sick leave with full pay balance. Nonetheless, the Division of Healthcare Management and Occupational Safety and Health ("DHMOSH") did not submit a disability request to the Pension Fund because the Applicant's estimated date for the exhaustion of his entitlements was not imminent, i.e., it was in March 2022.

59. The Applicant alleges that no accommodation was offered to him in relation to his then-ongoing medical issues. On the one hand, the evidence shows that a request for advice regarding workplace accommodation was reviewed and was not supported by DHMOSH on 8 November 2021. On the other hand, it is unclear whether the Applicant ever requested any specific accommodation such as flexible working arrangements ("FWA").

60. Furthermore, while the Applicant was close to retirement at the time of the termination of his appointment for unsatisfactory service, this mere fact does not render the decision unlawful or demonstrate that the Organization fell short of its duty of care towards him.

61. In light of the above, the Tribunal finds that the Administration properly followed the relevant procedures to address performance shortcomings and for the termination of the Applicant's permanent appointment for unsatisfactory service. Consequently, the Tribunal determines that the contested decision is lawful and as such, the Applicant is not entitled to the remedies claimed.

Conclusion

62. In view of the foregoing, the Tribunal rejects the application.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 13th day of June 2023

Entered in the Register on this 13th day of June 2023

(Signed)

Isaac Endeley, Registrar, New York