



**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. The Applicant, a former staff member of the United Nations Office on Drugs and Crime (“UNODC”), contests the decision to finalize his performance appraisal for the performance cycle 1 April 2009 to 31 March 2010 two years after the end of the cycle. He also contests the decision to have the rebuttal of his 2009-2010 performance appraisal report conducted by rebuttal panel members from a list which had not been established in accordance with sec. 14.1 of ST/AI/2002/3 (Performance Appraisal System).
2. The Applicant requests adequate compensation and asks for the expunction of the performance appraisal report and the rebuttal panel report from his Official Status File (“OSF”).

## **Facts**

3. The Applicant joined the UNODC in Vienna in 2002 and, in 2007, was appointed as a Crime Prevention and Criminal Justice Officer at the Terrorism Prevention Branch (“TPB”), Division of Treaty Affairs (“DTA”). 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, TPB, and the Officer-in-Charge, DTA, announced to TPB staff that the Branch was to be reorganised. In early November 2009, the Chief, TPB, and the Officer-in-Charge, DTA, were the Applicant’s First and Second Reporting Officers respectively (“FRO” and “SRO”).
5. On 3 November 2009, the Applicant’s supervisors signed off the mid-point review for the performance cycle period of 1 April 2009 to 31 March 2010 (“2009-2010 performance appraisal”).

6. The Applicant received his 2009-2010 performance appraisal report on 19 November 2010. However, the first version was amended and re-issued severally and the final report was signed off by the FRO and SRO on 2 March 2011, and by the Applicant on 15 March 2011. The facts concerning this course of events shall be described and considered in detail when the Tribunal determines the issue regarding the delay in issuing the 2009-2010 performance appraisal.

7. On 8 December 2009, the Applicant was informed that his post would be abolished and that he would be reassigned to the position of Senior Legal Adviser to be created within the Office of the Chief, TPB. This new post had lessened managerial and supervisory functions.

8. Upon receipt of the final copy of the 2009-2010 performance appraisal, the Applicant, on 15 March 2011, submitted his rebuttal statement to UNODC, HRMS. One year later, on 23 March 2012, the rebuttal report was issued.

9. The facts relating to the constitution of the rebuttal panel and the rebuttal process will equally be articulated below, when the Tribunal addresses the rebuttal process undertaken by UNODC.

10. On 28 March 2012, the Applicant filed the present application contesting the process taken by the Administration in establishing the rebuttal panel and the report of the rebuttal panel. The application was served on the Respondent on 29 March 2012 with a reply due on 30 April 2012.

11. On 2 April 2012, the Applicant received a revised rebuttal report.

12. By Order No. 70 (GVA/2012), dated 10 April 2012, the Tribunal directed the parties to attend a case management hearing on 18 April 2012, in which the present and several other extant cases before the Tribunal were discussed.

13. The Respondent sought an extension of time to file a reply on 26 April 2012 and the Tribunal, by Order No. 77 (GVA/2012), dated 27 April 2012, rejected the Respondent's motion and the reply was filed on 30 April 2012 .

14. On 4 November 2012, the Applicant filed a motion for recusal of the undersigned judge and by Order No. 92 (NBI/2013), issued on 2 May 2013, the then President of the Dispute Tribunal rejected the application for recusal.

15. The Tribunal, by Order No. 134 (GVA/2013), issued on 19 September 2013, directed the parties not to file any further submissions and informed them that the matter would be adjudged based on the written pleadings.

### **Parties' submissions**

16. The Applicant's main arguments are:

- a. The completion of his 2009-2010 performance appraisal took too long and he was issued with several versions of it;
- b. The mandate of the rebuttal panel members expired in 2009 and management failed to constitute a new rebuttal panel in accordance with sec. 14.1 of ST/AI/2002/3;
- c. The rebuttal panel constituted in April 2011 was established in accordance with ST/AI/2010/5 and not with ST/AI/2002/3, which actually governed the performance appraisal for 2009-2010;
- d. His right to timely rebuttal proceedings was denied and when he received a rebuttal panel report, it was re-issued; this constitutes a breach of his rights and entitles him to compensation.

17. The Applicant prays the Tribunal to:

- a. Award him adequate compensation for the lack of due process and for the moral injury and emotional distress he has suffered as a consequence;
- b. Order reimbursement of sums of monies he incurred while receiving medical treatment as a result of the situation;
- c. Order the expunction of his performance appraisal and the rebuttal panel report from his Official Status File ("OSF"); and

d. Refer the persons responsible for the delays in conducting his rebuttal to the Secretary-General for accountability.

18. The Respondent's main arguments are:

a. The delay in issuing the 2009-2010 performance appraisal is due to the Applicant's own creation and all the other delays were justified;

b. When the mandate of the rebuttal panel, which was established on 16 March 2007 for a two-year term, expired on 16 March 2009, the panel continued its functions *de facto*;

c. The mandate of that rebuttal panel expired at a time when UNODC was undergoing a restructuring exercise, which triggered administrative changes resulting in delays to establish membership in various administrative committees;

d. In October and November 2010, UNODC management called for staff members to express interest to become a member in administrative committees; it also informed staff members that memberships in some of these committees were overdue for renewal and that they would remain valid until the renewal membership exercise was completed; and

e. The rebuttal report was revised after the correction of a clerical error and as such the change to the initial report was minimal.

19. The Respondent requests the Tribunal to reject the application in its entirety and not to entertain any request for compensation because neither the Applicant's contract of employment nor his terms of appointment have been affected.

### **Considerations**

20. With respect to the contested administrative decision, the Tribunal recalls what was held by the Appeals Tribunal in its judgment *Massabni* 2012-UNAT-238, namely that:

25. The duties of a Judge prior to taking a decision include the adequate interpretation and comprehension of the applications submitted by the parties, whatever their names, words, structure or content they assign to them, as the judgment must necessarily refer to the scope of the parties' contentions. Otherwise, the decision-maker would not be able to follow the correct process to accomplish his or her task, making up his or her mind and elaborating on a judgment motivated in reasons of fact and law related to the parties' submissions.

26. Thus, the authority to render a judgment gives the Judge an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and so, subject to judicial review which could lead to grant or not to grant the requested judgment.

21. With this in mind, the Tribunal finds that it results from the Applicant's submissions that he wishes to contest the delay with which his 2009-2010 performance appraisal was completed, and the delay in completing the rebuttal process as well as the composition of the rebuttal panel.

### **Receivability**

22. The Tribunal notes that the Applicant did not request management evaluation concerning the rebuttal panel report before filing the present application. Regarding the obligation to request a management evaluation before filing an application before the Tribunal, staff rule 11.2(b) provides:

A staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General, or [...] is not required to request a management evaluation.

23. The Tribunal considers that it is the preeminent purpose of management evaluation to afford to the Administration an opportunity to reconsider its initial decisions. Where such reconsideration is delegated to a specialized body, there is no need for further administrative review prior to judicial control which, as a matter of fact, would also necessarily lead to further delaying the final decision.

24. The Tribunal finds that a rebuttal panel should be considered as a technical body under staff rule 11.2(b), since it reviews and issues decisions relating to performance appraisals, which are technical in nature. The Tribunal does not share the view that a request for management evaluation is a prerequisite before filing an application with respect to decisions relating to the process of reviewing performance appraisals (see *Kamanou* UNDT/2012/059, *Gomes da Conceicao* UNDT/2012/190).

25. In coming to this conclusion, the Tribunal took into account the composition and the mandate of the rebuttal panel under the terms of ST/AI/2010/5 (Performance Management and Development System), as well as the course of action to be followed in the rebuttal process. In accordance with sec. 14.1 of ST/AI/2010/5, the rebuttal panel members “must have adequate knowledge and experience required to review the appraisal and its rating”. In view of their qualification and experience gained through their tenure, may be considered as experts in performance related issues. Moreover, the mandate of the rebuttal panel is to review the contested performance appraisal on the basis of a rebuttal statement, the reply from management and interviews with the persons involved. As such, the Tribunal finds that the mandate of the rebuttal Panel serves the exact same purpose as that of the Management Evaluation Unit (“MEU”), namely to review the initial decision taken by the Administration.

26. Therefore, the Tribunal considers the application receivable.

## **Merits**

### *Facts regarding the delay in issuing the 2009-2010 performance appraisal*

27. The facts relating to the issuance of the Applicant’s 2009-2010 performance appraisal report were already described in Judgment *Gehr* UNDT/2011/211 and are reproduced hereunder.

28. On 18 January 2010, the Officer-in-Charge, DTA, requested the Applicant to take action in order to finalise his mid-point performance review. Responding to this request, the Applicant pointed out that he had encountered technical

problems with the electronic performance appraisal system (“e-PAS”) and that his e-PAS report contained some inaccuracies.

29. By “Special Message” dated 1 March 2010, the Chief, Human Resources Management Service (“HRMS”), UNODC, informed staff that, in view of the fact that the 2009-2010 performance appraisal was to end on 31 March 2010, end-of-cycle appraisals ought to be completed by 16 April 2010.

30. On 25 March 2010, the Chief, TPB, enquired as to the Applicant’s availability to discuss his performance with a view to finalising his 2009-2010 e-PAS report. In an email sent on the same day to the Chief, HRMS, the Applicant objected to the decision to proceed with his performance appraisal, emphasising that the e-PAS only applied to staff members whose appointments were of at least one year and that the Officer-in-Charge, DTA, had not been designated as his reporting officer though he had taken part in the appraisal.

31. On 15 April 2010, the Officer-in-Charge, HRMS, responded to the Applicant’s email of 25 March 2010, explaining that, though the policy governing the e-PAS process as set out in administrative instruction ST/AI/2002/3 applied to staff holding an appointment of at least one year, the length of the Applicant’s consecutive appointments amounted to one year and covered the performance cycle. He also recommended that a meeting be convened with the Applicant and his FRO in order to finalise his e-PAS report.

32. An exchange of emails ensued between the Applicant and the Officer-in-Charge, HRMS, in which the former argued that ST/AI/2002/3 was not applicable to staff members who held an appointment of less than a year at the beginning of the new performance cycle or at the time of their mid-point performance review.

33. By email of 5 May 2010, the Officer-in-Charge, HRMS, advised the Applicant that, in the event he insisted to be evaluated separately for each period corresponding to extensions of his appointment, his reporting officers would proceed with his performance appraisal outside the e-PAS. In response to this email on 6 May 2010, the Applicant objected to the proposed course of action and

asked to be provided with the provisions according to which such appraisal would be conducted.

34. On 12 October 2010, the Chief, TPB, wrote to the Applicant, stating that, in case he persisted not to take action to finalise his e-PAS report, she and his SRO would prepare a written appraisal of his 2009-2010 performance; the document would then be shared with the Applicant and placed in his OSF. The Applicant replied on the following day, noting that he had not received any response to his query of 6 May 2010 concerning the provisions which would apply to such performance evaluation process.

35. By an email of 19 November 2010, the Officer-in-Charge, DTA, transmitted a written appraisal of his 2009-2010 performance to the Applicant and invited him to submit his comments, if any, in writing by 30 November 2010, after which the appraisal together with his comments would be placed in his OSF.

36. On 24 November 2010, the Applicant enquired with the Officer-in-Charge, DTA, whether a rebuttal would be possible since his performance appraisal had been prepared outside of the framework of ST/AI/2002/3. The Officer-in-Charge, DTA, responded on the same day that, since the Applicant had declined to use the e-PAS, his performance appraisal had indeed been prepared outside of that system and the possibility of a rebuttal did not apply.

37. By email of 26 November 2010 to the Chief, TPB, the Officer-in-Charge, DTA, and the Chief, HRMS, the Applicant proposed that his performance be appraised using the e-PAS only for the period from 1 April to 31 October 2009. He further asked which provisions would apply in the event that the proposed option was rejected.

38. On 1 December 2010, the Applicant submitted a request for management evaluation, in which he challenged a series of “decisions” taken in relation to his 2009-2010 performance appraisal, namely the decision to carry out a single appraisal, the decision to take into consideration events which post-dated 31 March 2010, the failure to answer his queries concerning the applicable provisions and the decision not to allow him to rebut his appraisal.

39. By email of 1 December 2010, the Officer-in-Charge, DTA, informed the Applicant that the option proposed in his email of 26 November 2010 had been rejected. He stated that ST/AI/2002/3 was applicable to the 2009-2010 performance cycle, that despite many requests and instructions the Applicant had repeatedly refused to use the e-PAS and that it had accordingly been decided to proceed with the written performance appraisal outside the e-PAS system. He also stated that the deadline for the Applicant to submit his comments had been extended to 10 December 2010.

40. In the course of the management evaluation, the Administration of UNODC indicated in January 2011 that it would remove the written performance appraisal from the Applicant's OSF. It added that it would prepare a revised version, which would not refer to matters pertaining to the 2010-2011 reporting cycle and which the Applicant would be entitled to rebut in accordance with sec. 15 of ST/AI/2002/3.

41. Meanwhile, the Applicant, on 25 January 2011, filed an application which was assigned case No. UNDT/GVA/2011/004, challenging the same matters which he had submitted for management evaluation, because he had not received a response from the MEU.

42. By letter dated 1 February 2011, the Applicant was notified of the Secretary-General's decision to uphold the decision to carry out a single appraisal for the period from 1 April 2009 to 31 March 2010. Further, in view of the explanations provided by the Administration of UNODC in January 2011, the Secretary-General considered that the decision to take into consideration in the appraisal matters post-dating the 2009-2010 performance cycle and the decision to deny the Applicant an opportunity to rebut the appraisal had become moot.

43. On 14 December 2011, the Dispute Tribunal issued judgment *Gehr* UNDT/2011/211, which the Applicant appealed, and the Appeals Tribunal, by Judgment *Gehr* 2012-UNAT-253, upheld the Dispute Tribunal's judgement in most respects, but differed on the issue of denial of the Applicant's right to a rebuttal process and held that the Applicant had a right to rebut his performance appraisal, irrespective of whether it was conducted outside the framework of

ST/AI/2002/3. The Appeals Tribunal awarded the Applicant compensation for the violation of the principle of *audi alteram partem*.

*Considerations on the delay in issuing the 2009-2010 performance appraisal*

44. Sec. 11.5 of ST/AI/2002/3 provides that:

The head of department or office should report to the Office of Human Resources Management on compliance, including rating distribution, no later than 30 June of each year. The Executive Office or Personnel Office for the department or office should ensure that completed, individual PAS records appear in the Integrated Management Information System and are included in the staff member's official status file.

45. It results from the above provision that departments/offices should submit data on *inter alia* PAS compliance not later than 30 June of each year after the end of the respective performance appraisal period. The Applicant first received his performance appraisal for the reporting period 1 April 2009 to 31 March 2010 only on 19 November 2010.

46. The facts described above show clearly that, between March 2009 and November 2010, the Applicant failed to comply with the performance appraisal process. It was his lack of cooperation and reluctance that inevitably delayed the issuance of his 2009-2010 performance appraisal. Therefore, the Tribunal finds that the delay in issuing the Applicant's 2009-2010 performance appraisal only on 19 November 2010, was exclusively due to the Applicant's fault.

47. However, after the Administration decided to conduct the Applicant's appraisal outside the provisions of ST/AI/2002/3, it bore the burden of ensuring that the process was done properly. Indeed, after the issuance of the 19 November 2010 performance appraisal, the Administration amended this appraisal several times, thereby providing the Applicant with four different versions of the performance appraisal for the same reporting period. It was only on 9 March 2011 that the Applicant received the final version of the performance appraisal. The Tribunal finds that the responsibility of this further delay of about 14 weeks falls exclusively on the Respondent.

48. The Tribunal takes note that most of these changes to the performance appraisal were implemented after the Applicant had requested management evaluation and after he had filed his application before the Tribunal contesting the said performance appraisal.

*Facts regarding the rebuttal process*

49. On 15 March 2011, the Applicant submitted his rebuttal statement to UNODC, HRMS, which acknowledged receipt of it on 24 March 2011 and asked for a performance appraisal document containing all signatures. HRMS further indicated that a new rebuttal panel was yet to be set up by 1 April 2011. The next day, the Applicant sent the page of his performance appraisal report containing all signatures to HRMS.

50. On 30 March 2011, UNODC, HRMS, informed the Applicant that his performance appraisal would be conducted under ST/AI/2002/3 and that the list of rebuttal panel members was incomplete. On the same date, the Applicant wrote informing HRMS that since he was to be assessed under ST/AI/2002/3, the rebuttal panel members should be from the list established under ST/AI/2002/3.

51. On 1 April 2011, HRMS informed the Applicant that since his 2009-2010 performance appraisal was governed by ST/AI/2002/3, he was not limited to the choice of members as per the new administrative instruction ST/AI/2010/5.

52. On 21 April 2011, a broadcast informed UNODC staff of the new list of rebuttal panel members and on 26 April 2011, the Applicant was informed of the new list and was asked to select the members to form the panel for the rebuttal of his 2009-2010 performance appraisal. He was not restricted in any way regarding his selection of panel members.

53. On 12 May 2011, the Applicant selected members to compose his rebuttal panel and on 17 May 2011, HRMS informed him that it would forward his selection [to who?] and co-ordinate the rebuttal as per ST/AI/2002/3.

54. On 25 May 2011, the Applicant received confirmation of his selection of panel members and on 31 May 2011, the rebuttal panel asked the Administration for its response to the Applicant's rebuttal statement.

55. The Administration transmitted its response to the rebuttal panel on 17 June 2011. On 19 July 2011, the Chairman of the rebuttal panel recused himself, for personal reasons, and the Applicant was required to appoint another member to act as Chair.

56. On 25 July 2011, the Applicant nominated one of the Director members from the list of panel members to be the Chair and, on the same date, HRMS informed him that the proposed individual was on annual leave until 27 July 2011. However on 28 July 2011, the proposed individual informed HRMS that he was on leave until 17 August 2011 and that immediately thereafter, he had to be away on a two-week mission. Additionally he indicated that he had many other tasks and declined the assignment of being the Chairman of the Applicant's rebuttal panel.

57. On the same date, HRMS wrote and told the proposed individual that since he was the only person at the Director level left in the panel, he had to take up the assignment.

58. On 17 August 2011, the proposed individual took up the role of Chair and was provided with the relevant materials regarding the Applicant's rebuttal. On 14 October 2011, the panel proposed to the Applicant possible dates for an interview, alternatively between 1-8 November 2011 or 28-15 December 2011.

59. The Applicant indicated his availability for 13-15 December 2011 and his interview took place on 13 December 2011, while the SRO was interviewed on 31 January 2012.

*Considerations on the rebuttal process*

60. Section 18.2 of ST/AI/2010/5, with respect to its applicability, provides that:

ST/AI/2002/3 is hereby abolished. However, performance appraisals anterior to the performance cycle 2010-2011 shall be conducted and completed in accordance with the procedures described in ST/AI/2002/3.

61. It follows from the above provision that the Applicant's 2009-2010 performance appraisal had to be conducted and completed in accordance with the procedures described in ST/AI/2002/3. It further follows from the above that during a certain period, there should have been two rebuttal panels; one under ST/AI/2002/3 and another under ST/AI/2010/5.

62. The Respondent submitted that the previous rebuttal panel had been established on 16 March 2007, with a two-year mandate. He conceded that, pursuant to sec. 14.2 of ST/AI/2002/3, the mandate of the rebuttal panel expired on 16 March 2009; however, he argued that in the absence of a newly established panel, the old panel continued its functions *de facto*.

63. The Tribunal considers that ST/AI/2002/3 provides no legal basis for an extension of the mandate of a rebuttal panel, as claimed by the Respondent. Indeed, sec. 14.2, first sentence, reads: "Rebuttal panel members shall serve for a two-year term" and does not provide for an exception to this rule.

64. Therefore, the Tribunal finds that the fact that the Administration had indicated to staff members that memberships of panels that were overdue remain valid until the exercise of selecting new candidates was completed had no legal impact. Accordingly, the Tribunal notes that after the expiry of their members' mandate in March 2009, the 2007 rebuttal panel was no longer competent to conduct legally valid rebuttal processes.

65. It follows from the above that in 2010, duly constituted and competent rebuttal panels did no longer exist at UNODC. The mandate of the rebuttal panel, which the Administration sought to extend, had already elapsed, by virtue of

expiry of the panel's two-year term. Since sec. 14.2 does not provide for an exception, the mandate could not be legally extended.

66. In addition, the Tribunal notes that, after the Applicant's rebuttal statement of 15 March 2011, it took more than one year to deliver the rebuttal panel's report of 23 March 2012. Although no clear time-lines are established, sec. 15.2 of ST/AI/2002/3 requires that the responsible official, after receipt of the rebuttal statement "shall promptly prepare and submit to the rebuttal panel a brief written statement ...", and sec. 15.3 of ST/AI/2002/3 requires that the panel "shall prepare [its report] with maximum dispatch". A delay of one year from the rebuttal statement until the delivery of the respective report is not in line with the spirit of promptness provided for in above-referenced provisions of ST/AI/2002/3.

67. Therefore, the Tribunal finds that the rebuttal panel established on 21 April 2011 could not legally conduct the Applicant's performance rebuttal process, since it lacked the competence to do so. Also, it delivered its report with undue delay.

### **Remedies**

68. Section 15.3 of ST/AI/2002/3 provides that:

The rebuttal panels shall prepare with maximum dispatch a brief report setting forth the reasons why the original appraisal rating should or should not be maintained. The report of the rebuttal panel shall be placed in the staff member's official status file as an attachment to the PAS. The performance rating resulting from the rebuttal process shall be binding on the head of the department or office and on the staff member concerned, subject to the ultimate authority of the Secretary-General as Chief Administrative Officer of the Organization, who may review the matter as needed on the basis of the record. Any change in the final rating, and the date of the decision, shall be marked by the executive or administrative office on the final appraisal section of the PAS form, with annotation that the rating was changed as a result of a PAS rebuttal.

69. It follows from the above provision that in case of a successful rebuttal, the challenged rating is replaced with a new one, which leaves no room for cancellation or expunction of the original performance appraisal report.

70. Since the Applicant did not ask for specific performance with respect to a new performance appraisal, such cannot be granted to him.

71. Article 10.5(b) of the Dispute Tribunal's statute empowers the Tribunal to grant compensation for violation of the legal rights of a staff member as provided for under the Staff Regulations, Rules, and administrative issuances.

72. Though not every violation will necessarily lead to an award of compensation (see *Zhouk* 2012-UNAT-224), the Tribunal may award compensation for actual pecuniary or economic loss, non-pecuniary damage, procedural violations, stress, and moral injury (see *Antaki* 2010-UNAT-095).

73. The Tribunal finds that the Applicant's due process rights were violated by the Administration, through denying him an opportunity to a timely performance appraisal, a timely rebuttal process and by the fact that the rebuttal process was conducted by a panel which was not competent to do the review. Additionally, the Applicant had to challenge the inclusion in his 2009-2010 performance appraisal of matters which did not occur during the reporting period in question and furthermore filed an application with the Tribunal on 25 January 2011. Though the Respondent acknowledged some of the errors in the 2009-2010 performance appraisal and corrected them, at this point in time, the Applicant had already been subjected to emotional distress and anxiety.

74. The Tribunal finds that all the above violations of the Applicant's rights warrant compensation.

### **Conclusion**

75. In view of the foregoing, the Tribunal DECIDES that:

- a. The Respondent pay the Applicant compensation in the amount of USD5,000 for the breach of procedural rights and the inordinate delay in issuing the performance appraisal and the rebuttal report;

- b. This amount shall be paid within 60 days from the date this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional 5% shall be added to the US Prime Rate until the date of payment;
- c. This judgment is put in the Applicant's Official Status File; and
- d. All other pleas are rejected.

*(Signed)*

Judge Thomas Laker

Dated this 31<sup>st</sup> day of October 2013

Entered in the Register on this 31<sup>st</sup> day of October 2013

*(Signed)*

René M. Vargas M., Registrar, Geneva