UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NBI/2016/036
Judgment No.:	UNDT/2017/054
Date:	13 July 2017
Original:	English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ELOBAID

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Robbie Leighton, OSLA

Counsel for the Respondent:
Kara D. Nottingham, HRLU/UNOG

Introduction

1. The Applicant serves as Head of the Human Rights Training and Documentation Centre at the Office of the High Commissioner for Human Rights (OHCHR) Regional Centre for South-West Asia and the Arab Region.

2. On 12 May 2016, he filed an application to contest the decision to issue him a written reprimand and to withhold an investigation report. He is requesting a disclosure of the report and rescission of this decision.

3. The Respondent filed a reply to the application on 16 June 2016. The Respondent is requesting the Tribunal to uphold the decision.

Facts

4. On 11 February 2014, the Investigations Division of the Office of Internal Oversight Services (OIOS) received a report of possible misconduct implicating a staff member of the United Nations Office on Drugs and Crime (UNODC) (Annex 1 to the reply). The complaint alleged that during a break at a conference in Doha, Qatar, from 10 to 12 December 2013, the Applicant publicly accused Mr. A., a UNODC representative, of being corrupt and of conspiring with a Qatari hotel to inflate invoices for UNODC events in return for the hotel refunding the price difference to Mr. A's private bank Account.

5. In case no. 0066-14, OIOS investigated the claims of possible misconduct implicating Mr. A. On 10 April 2014, the Applicant was required to participate in an interview with Ms. Kabita Nirola and Mr. Gianfranco Vittone, OIOS Investigators. OIOS found no evidence that Mr. A was involved in misconduct.

6. OIOS thereafter commenced a new investigation, case no. 0100-15, whereby the Applicant was now the subject. In this connection on 8 May 2015, the Applicant was required to participate in a further interview with OIOS Investigators, Mr. Vittone, and Ms. Elisa Reuter.

7. Based on the evidence gathered during the investigation, OIOS made the following findings:

a. During a coffee break, the Applicant approached a group of participants and queried them about Mr. A. He also voiced allegations of corruption against Mr. A.

b. While the Applicant claimed no recollection of having raised such allegations against Mr. A., OIOS noted that the Applicant did not actually deny having raised these allegations.

c. The Applicant confirmed that, during the material time, he had been frustrated with Mr. A. and the way in which he had been handling a project.

d. The Applicant raised allegations of corruption against Mr. A while having no good faith belief in their veracity or otherwise having willful disregard for their truth or veracity and the reputational harm likely to be caused to Mr. A as a result of raising such allegations.

8. On 28 September 2015, Mr. Kyle Ward, Chief Programme Support and Management Services, OHCHR, issued to the Applicant a communication titled 'Intention to issue written reprimand' (Annex 3 to the application).

9. On 27 October 2015, the Applicant provided his response to the 'Intention to issue written reprimand' (Annex 4 to the application).

10. On 6 November 2015, Mr. Ward issued another communication titled 'Intention to issue written reprimand' (Annex 5 to the application).

11. On 10 November 2015, the Applicant received a memorandum dated 9 November 2015 whereby Mr. Ward issued the written reprimand which was placed in the Applicant's Official Status File (Annex 6 to the application). The Applicant was also informed that he would not be provided with a copy of the OIOS Report. The reason for the reprimand was articulated as follows:

> 6. OIOS determined that you raised allegations of corruption against Mr. [A] while having no good faith belief in their veracity, or otherwise displayed willful disregard for the truth of these allegations and the consequent reputational harm likely to be caused to Mr. [A] as a result of raising these allegations.
>
> 7. The Report states that the established facts constitute reasonable grounds to conclude that you may have failed to observe the standards of conduct expected of an international civil servant…

12. On 7 January 2016, the Applicant requested management evaluation of the decisions to reprimand him and not to provide him with a copy of the OIOS Investigation Report (Annex 7 to the application).

13. On 12 February 2016 the Applicant received a response from the Management Evaluation Unit upholding the decision (Annex 8 to the application).

Applicant's Case

14. The Applicant's case is summarized below.

15. There was procedural unfairness in the process culminating in the issuance of the reprimand.

a. Section 5.2.2 of the OIOS Investigation Manual sets out the importance of including "additional fairness requirements" in subject interviews due to the fact that the investigation may lead to negative consequences against the interviewee. As the Applicant was initially interviewed as a witness, requirements of Section 5.2.2 of the OIOS manual were not implemented.

b. During the second interview and throughout the process investigators and the Administration have relied on questions put and answers given in the Applicant's first "witness" interview. Subsequently, the Administration relied on them to establish facts justifying a reprimand. Since the Applicant was not subject of an investigation during that first interview and had benefited from

none of the "additional fairness requirements" during that interview, such reliance is procedurally unfair.

16. The Administration failed to provide him with a meaningful opportunity to respond to evidence upon which it relied.

a. OIOS failed to place before him the specific allegations that were the subject of their investigation. Whereas Mr. Ward and the MEU claim that sufficient information was provided for the Applicant to respond, these assertions are contradicted by the records of interview, which indicate that during the first interview the totality of information provided was: "OIOS received information that, during this conversation, you made a comment on Mr. A[ ], I quote – "most corrupted person I have ever seen in the UN". This question was repeated in the second interview over a year later though supplemented by an unattributed allegation that the Applicant stated that Mr. A "would cash some of the money directly from the hotel".

b. The Applicant was not informed of who had made the allegation against him, what exact words were being attributed to him, where physically the exchange allegedly had taken place and on what day of the week or at what time of the day. Nor was he provided with any information as to the circumstances when the witness statements had been taken; at the conference, shortly thereafter, years later, or if the statements were sworn or hearsay.

c. Investigators interviewed the Applicant as a subject 18 months after the events in question. Despite this, no effort was made to assist the Applicant in recollecting the alleged exchange. Having failed in any way to provide reference points which might have assisted in recollecting events, investigators and the Administration then compound this procedural unfairness by seeking to rely on the Applicant's failure to recollect as evidence against him.

d. Had he been provided with the information, it might have been available to him to identify countermanding witnesses to provide evidence to discredit the accounts provided, he might have been able to provide alibi evidence demonstrating that the exchange never took place, he might have provided concrete evidence of an unlawful motive on the part of witnesses relied upon by the Administration. He was denied any such opportunity. Compounding the procedural unfairness of the investigation the Administration rely on the Applicant's failure to attack the credibility of the statements provided to justify the Reprimand.

17. The failure to disclose witness identities was procedurally unfair, breached his due process rights and rendered the basis for the reprimand unsound.

a. The Administration relied on witness statements that were both hearsay and anonymous to the Applicant. Any justification for maintaining confidentiality of the identity of those witnesses must be balanced against the prejudice that it causes to the staff member. No such justification was provided in the instant case.

b. In the instant case, no reason has been provided for OIOS's failure to identify the witnesses and for the decision not to provide the Applicant with the investigation report. This decision is not only procedurally unfair but also arbitrary and capricious.

18. The failure to disclose the investigation report.

a. The Administration's reliance on the case of *Applicant* UNDT/2010/130 is misguided. In that case the applicant had been provided with the statement of the complainant whose identity was known to him. Besides, the investigative report exonerated him. The Applicant accepts that had the investigation report exonerated him it would not be necessary for him to be given a reasonable opportunity to rebut its conclusions.

b. Mr. Ward and the MEU seek to read the Judgment in *Adorna* UNDT/2010/205 as establishing a threshold requirement of "extraordinary circumstances" for disclosure of an investigation report where a reprimand was made. In *Adorna,* the Tribunal found that "the Organization should have properly exercised its discretion to grant the Applicant's request" namely to view the investigation report. The fact that the Judge found there were extraordinary circumstances in that case does not establish a requirement for the same. In *Adorna*, the UNDT was unconvinced by UNICEF's reliance on a policy not to divulge the investigation report in cases of reprimand. In the instant case the Administration does not even go so far as asserting a policy.

c. In *Bertucci* UNDT/2010/094, the Dispute Tribunal considered a situation prior to the issuance of formal allegations that might, according to the Respondent's arguments, give rise to due process rights. The UNDT found that, having taken the step of inviting a response, the Administration were not entitled to arbitrarily refuse to make full disclosure of the evidence upon which the provisional findings were based. The Applicant's case is yet more serious since this is not a case of a provisional finding but instead an action with negative consequences for him.

d. The Administration undertook to release the investigation report to him in the case that administrative action was taken relying on it. In the management evaluation response, the Administration seeks to indicate that, because in the interview where this statement was made the Applicant was a witness and not subject, the undertaking to release the report somehow does not apply. The assertion is contradicted by Mr. Ward and the MEU's repeated reliance on that first interview to substantiate the reprimand.

19. Due process rights apply.

a. The Administration's reliance on the definition of a reprimand contained in *Akyeampong* 2012-UNAT-192 indicates that a finding of misconduct was

the basis for the Applicant's reprimand. This is supported by Mr. Ward's first memorandum and the reprimand itself. However, purely as a result of their choice of sanction the Administration asserts that the Applicant had no due process rights in the process.

b. The finding of fact required for a reprimand requires the same decision making process as for the imposition of a disciplinary sanction. In such circumstances, it cannot be available to the Administration to argue that their choice of sanction disposes of any requirement for due process or procedural fairness.

c. The case of *Powell* 2013-UNAT-295 asserts that during the preliminary investigation stage, limited due process rights apply. These rights include being appraised of the allegations and being provided an opportunity to respond. This never took place.

d. In the case of *Cabrera* 2012-UNAT-215, the United Nations Appeals Tribunal (UNAT) drew a distinction between a preliminary investigation or simple fact-finding mission and a full-fledged investigation. In the latter, it was found that due process rights applied. Both the OIOS investigation and the reprimand that followed represented such fully-fledged investigations to which due process rights would apply.

20. There was a procedural irregularity.

a. Paragraph 3 of ST/AI/371 (Revised disciplinary measures and procedures) (as amended), requires that if the investigation results in sufficient evidence indicating that the staff member engaged in wrongdoing that could amount to misconduct, the head of office or responsible officer should immediately report the matter to the Assistant Secretary-General, Office of Human Resources Management (ASG/OHRM).

b. The provision describes an absolute requirement. The reprimand demonstrates that the matter was not referred as required. This represents a procedural error that vitiates the decision to enforce a reprimand

21. The facts on which the reprimand was based were not made out.

a. The reprimand asserts as its basis that the established facts constitute reasonable grounds to conclude that he may have failed to observe the standards of conduct expected of an international civil servant.

b. "Reasonable grounds" does not represent suitable proof for the imposition of a reprimand. Mr. Ward seeks to avoid an express finding of misconduct in order to prevent triggering due process rights. Mr. Ward cannot have it both ways; either the reprimand is provided due to a finding of misconduct or it is without basis. A suspicion of possible misconduct is not a reasonable basis for the imposition of a measure as serious as a reprimand rendering it unlawful.

c. The reprimand relies in part on the Applicant having expressed frustration with Mr. A's handling of a project. This is not evidence suggesting misconduct, it is prejudicial and reliance upon it vitiates the decision.

d. The reprimand relies in part on the Applicant's statement to investigators that he could not remember the conversation. His failure to categorically deny the allegation is construed as evidence against him. The Applicant's stated lack of recollection can only be constructed as an implied denial. This demonstrates that the reprimand is unsupported.

e. The Applicant disputes the characterization of his responses to investigators. In his first interview at paragraph 34 he is recorded as having stated "I did not make any reference of inference to the fact that Mr. A[ ] was cashing part of the money." While the exact allegations against the Applicant

are unclear, this would appear to be the sort of categorical denial, which OIOS and Mr. Ward fail to consider.

f. The Administration rely in part on the assertion that the Applicant was aware that his alleged accusations were untrue. In the 'Notice of intention to issue a written reprimand,' it is stated that: "The witness statements obtained throughout the course of the investigation, and consequently the conclusions of the Investigation Report, were thus targeted at assessing whether or not [the Applicant] raised allegations against Mr. A[] during the conference, not whether or not those allegations were true." Despite this clear admission that the investigation did not make inquiries into whether the allegations were true or not, the investigation somehow concluded that the Applicant "indeed made allegations against Mr. A[] with reckless disregard for the truth of those allegations".

22. In view of the foregoing, the Applicant requests that the decision to issue him with a reprimand be rescinded and that his record be expunged. The Applicant further requests that the Administration be ordered to release the investigation report.

Respondent's Case

23. The Respondent's case is summarized as follows.

24. The review of the findings in the Report should be limited in scope.

a. UNAT's jurisprudence in *Koda* 2011-UNAT-130 has recognized that its scope of review in OIOS matters is limited due to the operational independence of OIOS.

b. In *Messinger* 2011-UNAT-123, UNAT made it clear that a *de novo* review of the allegations which were subject to investigation should not be conducted.

c. In *Goodwin* UNDT/2011/104, it was held that the standard of review applied to disciplinary matters may be applicable in a case where an administrative measure such as a written reprimand is at issue only if the administrative measure can be qualified as a disguised disciplinary measure. The facts of the present case can be distinguished from *Goodwin* as the written reprimand at issue does not resemble a disguised disciplinary measure.[1]

d. The Tribunal should restrict its review of the present matter to the decision to take administrative (not disciplinary) action based on the findings of the OIOS Report.[2]

25. Discretionary authority to issue the written reprimand was properly exercised and the Applicant has failed to show that the decision to issue the reprimand was tainted by procedural, legal or factual errors or lack of proportionality.

a. The OIOS Report clearly indicates that a reasonable fact-finding inquiry was conducted and that the Applicant as well as other witnesses were interviewed. OIOS assessed all of the relevant evidence in conducting its investigation and reaching its conclusions.

b. The OIOS Report clearly indicated that the established facts constitute reasonable grounds to conclude that the Applicant failed to observe the standards of conduct expected of a United Nations civil servant.

c. Contrary to the Applicant's claims that based on sections 3 of ST/AI/371 the matter should have been referred to the ASG/OHRM, there is discretionary authority to issue a written reprimand at the outcome of an investigation provided that the decision to do so was not tainted by procedural or factual errors.

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[1] Paragraphs 34-35.
[2] Paragraph 33.

d. The Respondent sought additional confirmation from OIOS following receipt of the OIOS Report and prior to the issuance of the reprimand. The Applicant was given chances throughout the course of the investigation to provide additional input on the matter and failed to do so.

e. Contrary to the Applicant's contentions, the decision to issue the reprimand was based on the findings of the second investigation and not the first.

f. In accordance with staff rule 10.2(c), the Applicant was also provided with the opportunity to submit his comments on the facts and circumstances of the case prior to the issuance of the written reprimand. The comments provided by the Applicant were taken into consideration prior to the issuance of the reprimand and were reviewed in light of the investigation conclusions. Accordingly, the decision to issue the reprimand was not arbitrary or capricious.

26. The Applicant's allegations concerning anonymous statements are unfounded.

a. Contrary to the Applicant's contentions that reliance on anonymous statements reduces the ability of the accused to challenge such statements, in *Liyanarachchige* 2010-UNAT-087, a disciplinary process was at issue rather than an administrative measure. Further, the investigation into the allegations made against the Applicant did not involve the analysis of anonymous statements. The witnesses who participated in the investigation are named in the OIOS Report.

b. With regard to hearsay, the OIOS Manual states that although a witness can provide testimony about what they heard others say, it is considered hearsay if the purpose of that testimony is offered to prove the truth of this statements. Based on that definition, witnesses may provide testimony about what they heard others say as long as that testimony is not

utilized for the purpose of assessing or proving the substantive veracity of such statement.

c. The witness testimony obtained throughout the course of the investigation and consequently the conclusions of the OIOS Report were targeted at assessing whether or not the Applicant raised serious allegations of corruption against Mr. A and not in assessing the substantive truth of those allegations.

27. The decision not to provide the Applicant with a copy of the OIOS Report was lawful.

a. As confirmed by *Applicant* UNDT/2010/130/Corr.1, a staff member has no absolute right under the applicable regulatory framework to be provided with a copy of an investigation report where such report exists prior to the issuance of a written reprimand.

b. The Applicant was informed of the specific nature of the allegations as well as provided with information concerning the source of the allegations. OIOS also informed the Applicant that it had provided him with an opportunity to propose witnesses and to file a written statement.

c. The decision of whether to share an investigation report with a staff member should be made on a case-by-case basis and in exceptional circumstances as was held in *Ivanov* UNDT/2014/117 and *Ivanov* 2015-UNAT-519. In assessing whether or not the decision not to share an investigation report was proper, the Tribunal considered extraordinary circumstances, including but not limited to the fact that the report had already been shared with external third parties, as in *Adorna* UNDT/2010/2015. In the present case, the Applicant has failed to show any exceptional circumstances which would require the disclosure of the OIOS Report.

d. In sharing a summary of the findings of the Report with the Applicant, a determination was made that the Applicant would not be unduly harmed or prejudiced by not having access to a copy of the Report.

e. With regard to the Applicant's claims that OIOS undertook to provide him with a copy of the Report, the Administration submits, regarding the first interview, that a preamble read to the Applicant stated that "any implicated staff member will be provided with the opportunity to review the factual details", however, the Applicant was then interviewed as a witness. When the Applicant was interviewed again as a subject in the new case he was read the preamble which outlined that if an investigation report was prepared, it would be the responsibility of OIOS to submit the investigation report with appropriate recommendations to the relevant Programme Manager who may take further action. A reference to the opportunity to comment before the finalization of the Report was not part of the interview.

f. The preamble preceding the 8 May 2015 interview informed the Applicant of the interview conditions and offered him the opportunity to ask any questions regarding the process. The Applicant did not request to receive the draft Report for his comments at any point during the interview or during subsequent communications.

g. The Applicant did not provide a written statement to the investigators and made no request for submission of additional evidence.

28. In summation, the Respondent submits that the decision to issue the written reprimand was a lawful exercise of discretionary authority and was not tainted by procedural or legal errors. The Respondent requests that the Tribunal uphold the decisions to issue the written reprimand and not to provide the Applicant with a copy of the OIOS Report.

Considerations

The scope of review

29. Regarding the Respondent's reliance on UNAT in *Koda* that, insofar as the contents and procedures of an individual report are concerned, the UNDT has no jurisdiction "to influence or interfere with OIOS", the Tribunal concurs. It notes, however, that *Koda* also asserts that:

> To the extent that any OIOS decisions are used to affect an employee's terms or contract of employment, OIOS' report may be impugned. For example, an OIOS report might be found to be so flawed that the Administration's taking disciplinary action based thereon must be set aside.[3]

30. The holding in *Koda* simply confirms that as much as OIOS is independent in its work, so is the Tribunal in its own. While the Tribunal does not interfere in the making up of the report, the Tribunal is not bound to accept its results.

31. The *Koda* holding is not limited to disciplinary actions and applies to any administrative decisions that may be based upon OIOS reports.

32. The Respondent further submits, relying on UNDT in *Goodwin*[4], that the standard of judicial review applied to disciplinary matters may be applicable in a case where an administrative measure such as a written reprimand is at issue *only* if the administrative measure can be qualified as a disguised disciplinary measure.

33. The Respondent misrepresents *Goodwin*. In *Goodwin*, the UNDT held with respect to the process established by UNAT for judicial review of the disciplinary measures:

> This process has been limited to cases involving disciplinary measures, but the Tribunal finds that it may also be used when considering cases involving other measures referred to by the Respondent as "administrative measures", as provided for in, for

[3] *Koda* 2011-UNAT-130 para. 42.
[4] *Goodwin* UNDT/2011/104.

> example, former staff rule 110.3(b)(i) (or current staff rule 10.2(b)(i)). This is because, before a sanction is imposed, be it administrative or disciplinary, the Organisation must go through a decision-making process which is substantively the same or very similar. That process will involve investigating, establishing the facts and analysing the impugned conduct to determine whether it is misconduct or not, and then exercising discretion to decide whether a measure of one kind or another is warranted.[5]

34. Thus, the holding in *Goodwin* refers generally to proceedings prior to imposition of a sanction, "be it administrative or disciplinary" and the judicial review of these proceedings.

35. This Tribunal concurs. It notes, moreover, that what has been said in *Goodwin* is not novel. Rather, it expresses the basic precepts of a rational and norm-based decision-making process, as opposed to a capricious or arbitrary one. The same principle was pronounced by UNAT in *Sanwidi*:

> 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. [6]

The Tribunal notes, moreover, that part of the legality test in any instance is whether the organ issuing the decision had the required authority.

36. Specifically, in reviewing decisions imposing sanctions be it disciplinary or administrative, as articulated by UNAT in *Applicant* 2012-UNAT-209, the test is whether the Applicant's due process rights had been respected; whether the facts underlying the measure were established; whether they amounted to misconduct; and whether the measure was proportionate to the offence.[7]

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[5] *Ibid*, para. 50; for references see *ibid*. para 49. See also 2010-UNAT-084, para. 43, quoting *Mahdi* 2010-UNAT-018, para. 27.
[6] *Sanwidi* 2010-UNAT-084.
[7] *Applicant* 2012-UNAT-209, para. 36.

37. Below the Tribunal addresses, to the extent necessary for the determination of the case before it, the following points:

a. whether the decision was issued by the competent organ;

b. whether the Applicant's due process rights had been respected;

c. whether the facts underlying the measure were established.

(a) Whether the decision was issued by the competent organ

38. Regarding the Applicant's contention that the head of office or responsible officer should have immediately reported the matter to the Assistant Secretary-General, Office of Human Resources Management (ASG/OHRM), the Tribunal notes that the legal issue brought up by the Applicant is broader than the question of reporting. It concerns, at first place, whether the written reprimand was issued in accordance with statutorily delegated competence in the sense of staff rule 10.1(c). In this respect, ST/AI/234/Rev/1 (Administration of the staff regulations and staff rules) stipulates in section 5 as follows:

> Matters within the authority of the Assistant Secretary-General for Human Resources Management are listed in annex II. The Assistant Secretary-General may delegate the exercise of this authority within and outside the Office of Human Resources Management, including to an Under-Secretary-General. Authority with respect to the matters indicated by an asterisk in annex II will be exercised by the Assistant Secretary-General for Human Resources Management in respect of staff at Headquarters and at United Nations missions and information centres and by the head of the office concerned in respect of staff at other offices away from Headquarters.

39. Annex II of ST/AI/234/Rev/1 indicates that the reprimand of a staff member is one of the matters for which authority is exercised by the head of the office concerned in respect of staff at offices away from Headquarters. Moreover, as provided in section 8 of ST/AI/234/Rev/, this competence could have been delegated to another official:

> The heads of offices away from Headquarters […] may delegate the exercise of their authority under annexes II, IV and V to the chief of administration or other officials responsible for the administration of their staff.

40. Normally, an administrative decision enjoys a presumption of regularity[8], including that it originated from a competent administrative organ. In the case at hand, however, that presumption does not apply in the face of numerous inconsistencies regarding the designation of the issuing entity.

41. In a memorandum dated 28 September 2015, Mr. Ward, Chief of the Programme Support and Management Services informed the Applicant that "in consultation" with the High Commissioner, he intended to send him a written reprimand which would be placed in his official status file and provided him an opportunity to provide his response. On 6 November 2015, Mr. Ward sent the Applicant another memorandum informing him that, further to his earlier memorandum of 28 September:

> …*we have* reviewed your submission dated 27 October 2015 and have decided to issue a written reprimand, in accordance with Staff Rule 10.2(c).[emphasis added]

42. On 10 November 2015, the reprimand was transmitted to the Applicant by the OHCHR Office Assistant who stated in the email that he was transmitting it "on behalf" of Mr. Ward. The reprimand itself was issued and signed by Mr. Ward, albeit in the text he recalled that "on behalf of the High Commissioner" the Applicant had been informed of the allegations, and further on, echoing the language employed from the memorandum of 6 November Mr. Ward uses the word *we* .[9]

43. In the management evaluation response dated 12 February 2016, it was indicated that Mr. Ward had issued the written reprimand.

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[8] *Rolland* 2011-UNAT-122, para. 26
[9] Annex 6 to the application.

44. The reply to the application indicates that the issuing organ was the Chief, Program Support and Management Services, OHCHR, i.e., Mr. Ward, "in consultation with the High Commissioner".[10]

45. In his response to Order No. 085 (NBI/2017), whereby the Tribunal requested the Respondent to file submissions on who had issued the reprimand in question and whether the person issuing it had authority pursuant to section 5 of ST/AI/234/Rev. 1, the Respondent submitted that the High Commissioner for Human Rights had been the decision maker in the present case and issued the written reprimand. The Respondent submitted that the High Commissioner, as the Head of Office for OHCHR, has delegated authority in this respect.

46. The Respondent further submitted that the indication in the management evaluation that the written reprimand had been issued by Mr. Ward was an error, notwithstanding that in fact there had been consultation between him and the High Commissioner prior to issuing the reprimand, as is evident from the memorandum dated 28 September 2015.

47. For the sake of argument, the Tribunal assumes that the Respondent correctly asserts that the High Commissioner is to be considered the Head of Office Away From Headquarters and, as such, has delegated authority pursuant to section 5 of ST/AI/234/Rev. 1. It notes nevertheless that as recently as mid-2015 the Respondent's representation before UNDT was that the organ competent to issue administrative measures was the Director-General of the United Nations Office at Geneva, which is clearly an Office Away From Headquarters. Whereas UNDT in that case found it incorrect, it did not pronounce on *who* is competent to issue administrative measures in relation to OHCHR staff.[11] The matter, in the opinion of this Tribunal, is of such nature that it must be decided conventionally by a positive decision. At present, it is not evident either from General Assembly res. 48/141 (High Commissioner for the promotion and protection of all human rights), which post-

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[10] Reply, para. 37.
[11] *Kompass* Order No. 99 (GVA/2015), at para. 33.

dates ST/AI/234/Rev. 1, or any other legal instrument accessible to the Tribunal and attracts differing pronouncements on United Nations websites.[12] The Tribunal, in any event, observes that had the decision originated from the High Commissioner, given the requirement of written form, it would be expected that the reprimand letter would have been drafted and signed in his name. Alternatively, the reprimand could have been issued by an individual with a further delegated authority, in accordance with section 8 of ST/AI/234/Rev. 1. In that case, there would be a delegation of authority to such an individual. As held by UNAT, the delegation instrument needs not be *a priori* publicized but needs to be available to be produced when the delegated authority is being exercised;[13] UNAT also held against presuming delegated authority.[14]

48. However, according to the Respondent, neither of these is the case. The Tribunal observes that all the participants to this case seem to have been *ab initio* confused as to the proper identity of the authority that issued the written reprimand, including avoidance of the indication of the authorship of all reprimand-related decisions in the memoranda of Mr. Ward. Having undertaken, unsuccessfully, to clarify the matter with the Respondent's counsel, the Tribunal is left with no option but to take the reprimand on its face as originating from Mr. Ward and conclude that the Respondent did not show that Mr. Ward had delegated authority to reprimand the Applicant. This renders the action *ultra vires.* For the eventuality that the Respondent's counsel changes her position and finds out that Mr. Ward nevertheless had the requisite delegated authority, below the Tribunal will address other errors in the issuance of the impugned decision.

49. *In dictum*, the Tribunal notes that the question whether notifying the ASG/OHRM as per section 3 of ST/AI/371 is still required in the case where authority to issue a reprimand has been delegated, is to be answered in the negative.

[12] *See* http://www.un.org/en/sections/about-un/secretariat/index.html and http://www.un.org/Depts/otherprgs.htm; accessed 29 June 2017
[13] *Bastet* 2015-UNAT-511
[14] *Malmström et al* 2013-UNAT-357; *Longone* 2013-UNAT-358

The main purpose of notification foreseen in ST/AI/371 is to enable a decision by the ASG/OHRM as to the pursuance of a disciplinary or administrative action. Where the competence to take the administrative action itself has been delegated, the rationale for the notification ceases to exist. But even if it were still formally required, for example, for the purpose of monitoring as per section 12 of ST/AI/234/Rev.1, this omission could not have had any impact on the validity of the impugned decision. The Applicant's argument on this score therefore has no basis.

(b) Whether the Applicant's due process rights were respected

50. The procedure applicable to the issuance of administrative measures is described in staff rule 10.2(c) in a scant fashion:

> A staff member shall be provided with the opportunity to comment on the facts and circumstances prior to the issuance of a written or oral reprimand pursuant to subparagraph (b) (i) above.

51. The Respondent's contention is that this provision exhausts procedural obligations owed to a staff member when the Organization intends to impose an administrative measure. The Respondent submits, relying on UNDT in *Goodwin* and UNAT in *Cabrera,* that a staff member should be provided due process rights applicable to disciplinary measures only in a case where administrative measure can be qualified as a disguised disciplinary measure.[15]

52. On the latter issue, the Respondent, again, misrepresents the jurisprudence. Neither *Goodwin* nor *Cabrera* purport to establish a standard of proceedings for disguised disciplinary measures. Disguised disciplinary measures are a pathology rather than a discrete class of legal measures.[16] Depriving staff members of due process rights is only one concern discussed in the cited jurisprudence. Other concerns arising in the face of disguised measures are that administration would then act *male fidei*, non-transparently, in violation of the ostensible legal purpose of the

[15] Paragraph 35 and fn 2, citing to 2011/UNDT/104 and 2012-UNAT-215.
[16] *Cabrera*, 2012-UNAT-215, para 48.

measure and the presumption of innocence.[17] Thus, whereas in both cases the Tribunals deplore situations in which the Administration resorted to disguised disciplinary measures, they, however, did not pronounce on standards for administrative measures concealing a disciplinary sanction, or, for that matter, for administrative sanctions in general.

53. As concerns due process standard in general, it should be noted that the imposition of disciplinary measures on civil servants does not of itself necessarily constitute a determination of one's rights and obligations in a suit at law under art. 14.1 of the International Covenant on Civil and Political Rights (ICCPR), nor does it, except in cases of sanctions that, regardless of their qualification in domestic law, are penal in nature, amount to a determination of a criminal charge within the meaning of the second sentence of art. 14.1.[18] Without more, processes leading to the imposition of a disciplinary measure are not automatically governed by the package of fair trial rights under art. 14 of the ICCPR. The Tribunal considers that, *a maiori ad minus*, this statement is applicable to United Nations administrative processes of issuing a reprimand. As such, what constitutes due process for the application of administrative measures under the United Nations Staff Rules remains to be determined autonomously.

54. On the other hand, one general principle articulated by UNAT is that the Administration has a general duty to act fairly, justly and transparently in its dealings with its staff. [19] In a search for more specific norms that implement this principle in administrative proceedings, relevant are rationality (and this includes the postulate to determine all relevant matters, *audi alteram partem* rule, unbiased deciding), lack of arbitrariness and proportionality.[20]

[17] *Ibid* at 50.
[18] *Paul Perterer v. Austria, Communication,* No. 1015/2001, U.N. Doc. CCPR/C/81/D/1015/2001 (2004); *see also* HRC General Comment 32.
[19] *Obdeijn* 2012-UNAT-201, para. 33; *Ahmed* 2011-UNAT-153, para. 45.
[20] Cf *Sanwidi* 2010-UNAT-084.

55. Turning to the question whether in the absence of express provisions related to administrative reprimand specific guarantees of due process should be applied per analogy or are, *a contrario*, inapplicable, the Tribunal considers that it would be instructive to first determine the character of the administrative reprimand: whether it is based on an attribution of misconduct and whether it entails negative consequences. Should the response to these questions be positive, the Tribunal will look systemically at the body of United Nations rules governing the disciplinary process and the rationale behind the specific rule in question, with the view to general principles articulated by UNAT. The Tribunal will discuss these three issues below before drawing conclusion as to whether due process was observed in the case at hand.

(i) Whether the reprimand is based on a finding of misconduct

56. Two observations need to be put forth: First, the type of institutional response to improper conduct – disciplinary or administrative, is not dichotomously determined in relation to abstract and *a priori* defined categories of conduct, akin to disciplinary offences and administrative infractions. Staff rule 10.1 broadly defines misconduct as "failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant". Whereas staff rule 1.2, staff regulation 10.1 and ST/AI/371 give guidance as to specific instances of prohibited conduct and acts that may entail disciplinary measures, a determination of what constitutes misconduct may be made with a degree of discretion, in consideration of the gravity of the act, circumstances surrounding it and circumstances particular to the staff member concerned. Moreover, staff rules 1.2 and 10.3(a) demonstrate that the Secretary-General has discretion in deciding on the initiation of disciplinary processes where the findings of an investigation indicate that misconduct may have occurred. The wide scope of the notion of misconduct, absent distinguishing disciplinary offences from lesser infractions, and wide discretion in pursuing sanctions demonstrate that the

notion of misconduct is not inextricably linked with the application of a disciplinary sanction. Conversely, resignation from applying a disciplinary sanction does not automatically mean that misconduct did not occur.

57. Second, misconduct may attract a disciplinary measure as per staff rule 10.2(a) and/or an administrative measure as per staff rule 10.2(b); these measures are not mutually exclusive.[21] Disciplinary measures, being punitive sanctions, are enumerated and must be based on a finding of misconduct. Administrative measures under staff rule 10.2 are not exhaustively defined, are not of the same nature and function and enter into different relations with the finding of misconduct; the common element placing them in Chapter X of staff rules is that they may be applied in connection with an inquiry into a possible misconduct. Administrative leave has a preventive and provisional character, and is applicable pending determination if misconduct occurred. The measure of recovery, in turn, is related to the finding of indebtedness to the Organization, notwithstanding the ultimate finding of misconduct - indebtedness may result from a good faith mistake or entirely beyond the knowledge of the staff member and recovery may be implemented with the staff member's full consent.[22] Among the listed administrative measures, however, only reprimand has a punitive character, which functionally places it in alternative with disciplinary measures.

58. The entirety of rules described above warrant a conclusion that a reprimand is an alternative to disciplinary measures which is applied at the discretion of the Secretary-General upon a finding of misconduct.

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[21] The Tribunal notes that section 9(a) of ST/AI/371 describes the course of action available for the Assistant Secretary-General, Office of Human Resources Management upon consideration of the dossier of the cases as an alternative between closing a case with a possibility of applying administrative measures or confirming the finding of misconduct and pursuing the disciplinary measures. This section, however, only describes a certain stage in proceedings. ST/AI/371 is not dispositive of the question of what constitutes misconduct and what sanctions it entails in the substantive sense, as demonstrated , among other, by inchoate use of terms "unsatisfactory conduct", "conduct", "misconduct", "wrongdoing", "acts or omissions" and "act or behavior"

[22] E.g., staff rule 3.18(c)(ii) expressly authorizes the Organization to deduct from a staff member's final emoluments indebtedness to the Organization.

59. This understanding is confirmed by UNAT in *Akyeampong*:

> A reprimand is recorded in the staff member's file to serve as a reminder, should the staff member *misconduct* herself again. In such an event, the Administration may administer a harsher sanction (emphasis added).[23]

(ii) Whether a reprimand entails negative consequences

60. The former United Nations Administrative Tribunal held:

> "this [the fact that a reprimand is not a disciplinary measure] does not mean that a reprimand does not have legal consequences, which are to the detriment of its addressee, especially when the reprimand is placed and kept in the staff member's file. The reprimand is, by definition, adverse material…"[24]

61. UNAT considered whether a reprimand may be the basis for denying a promotion in *Akyeampong*. It held, albeit not unanimously:

> […]Ms. Akyeampong, as one of the 10 candidates recommended for promotion, had a good chance of promotion had the reprimands been considered in the correct perspective, as *corrective* measures. (*emphasis added*)
>
> A reprimand is not an adverse entry in the same way as an entry relating to sanction post-disciplinary proceedings would be.
>
> A reprimand is recorded in the staff member's file to serve as a reminder, should the staff member misconduct herself again. In such an event, the Administration may administer a harsher sanction.[25]

62. This Tribunal recalls that, as noted in the dissenting opinion in *Akyeampong*,[26] ST/AI/292 (Filing of adverse material in personnel records) does not prevent the drawing of negative consequences from adverse material. Further, it notes in this connection that the United Nations official career portal, *Inspira*, mandates that job

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[23] 2012-UNAT-192 para. 31. The Tribunal notes a different understanding in *Goodwin* UNDT/2011/104 where the UNDT held at para. 51: "Behaviour not amounting to "misconduct", but still falling short of proper conduct, may warrant the Secretary-General imposing an administrative measure (for example a reprimand) rather than a disciplinary measure."
[24] Judgment No. 1176, *Parra* (2004), para. IV.
[25] 2012-UNAT-192 para 29-31.
[26] *Ibid*, at para. 3 of the dissenting opinion.

applicants disclose all received reprimands. In view of this practice, a reprimand serves not just as a reminder for the staff member and deterrent against future misconduct as postulated in *Akyeampong*, but is also intended to flag performance issues and inform decisions on recruitment or promotion. As such, adverse consequences, albeit not defined by statutes akin to disciplinary sanctions, follow in a practical sense as potential impediments in a staff member's advancement. This effect is amplified by the fact that, as it was at issue in *Akyeampong,* a reprimand does not become expunged after a period of time. Moreover, recent UNAT jurisprudence held that, specifically for the purpose of recording misconduct, this measure remains available to the Secretary-General even after the termination of the staff member's employment.[27]

63. As such, negative consequences of a reprimand are far reaching. By way of *dictum*, the Tribunal considers that maintaining lasting adverse consequences of administrative reprimands is not pedagogical in light of the relatively minor violations that are at stake. Having no prospect of clean record ever again is not motivating to reflective performance adjustment but rather conducive to challenging reprimands by all means available. As a result, what should have been – and probably was – meant as a quick and efficient corrective measure, develops into full-fledged litigation, with all the associated human and material costs.

(iii) Whether or not systemic and teleological concerns support analogous application of disclosure of investigative report

64. Considering that a reprimand is issued upon a finding of misconduct and that it entails lasting negative consequences, the Tribunal finds that due process guarantees applicable to disciplinary measures are not *prima facie* irrelevant in determining the ones to be applied in relation to a reprimand.

[27] In *Gallo* 2016-UNAT-706, it was held, at para. 17, that the Secretary-General's discretionary authority to issue a written reprimand as a non-disciplinary measure pursuant to Staff Rule 10.2(b)(i) is not predicated upon and limited to the existence of an ongoing employment contract.

65. The central issue of the Respondent's contention is that, contrary to procedure in disciplinary cases, no obligation exists to disclose to the staff member the investigative material upon which the issuance of a reprimand is purported. The Respondent's argument focuses on ST/AI/371, section 6 which provides:

> If the case is to be pursued, the appropriate official in the administration at headquarters duty stations, and the head of office or mission at duty stations away from headquarters, shall:
>
> (a) Inform the staff member in writing of the allegations and his or her right to respond;
>
> (b) Provide him or her with a copy of documentary evidence of the alleged misconduct;

66. Whereas ST/AI/371 does not expressly limit the application of section 6(b) to the pursuance of disciplinary liability, moreover, the declared purpose of it is to generally "outline the basic requirements of due process to be afforded a staff member against whom [any] misconduct is alleged", section 6(b) has been interpreted by the Respondent as inapplicable to administrative reprimand. The Tribunal concedes that section 6(b) is clearly directed at disciplinary processes, where an investigation necessarily produces an investigative report. The obligation expressed therein, however, is not conterminous with a prohibition of granting access to "documentary evidence of the alleged misconduct" in the case of reprimand. Interpreting this prohibitive effect begs the question about its systemic legal basis and rationale, neither of which has been demonstrated by the Respondent.

67. The Tribunal notes that, on the higher normative level, i.e., the staff rules, the provision relevant to disciplinary cases mandates that staff member be "given the opportunity to respond to those formal allegations"[28] whereas its equivalent referring

[28] Staff rule 10.3(a) provides:

> […]No disciplinary measure may be imposed on a staff member following the completion of an investigation unless he or she has been notified, in writing, of the formal allegations of misconduct against him or her and has been given the opportunity to respond to those formal allegations. The staff member shall also be informed of the right to seek the assistance of counsel in his or her defence through the Office of Staff Legal Assistance, or from outside counsel at his or her own expense.

to administrative reprimand mandates that prior to issuing it a staff member "be provided with the opportunity to comment on the facts and circumstances".[29] Noting that in disciplinary proceedings there is an express requirement of formal written allegations while in the issuance of a reprimand there is an implicit requirement of some kind of notice, the Tribunal finds, however, that staff rules express the same norm, which is the right to respond to the allegations of misconduct.

68. Further systemically speaking, the Tribunal recalls the principle of fairness, justness and transparency in the administration's dealings with its staff. It further recalls that UNAT confirmed, after the Administrative Tribunal of the International Labor Organization (ILOAT), that "the staff member must, as a general rule, have access to all evidence on which the authority bases (or intends to base) its decision against him.[30] It also notes that ST/AI/292 generally asserts the staff member's rights to be informed of, and be given the opportunity to rebut, adverse material that is included in his or her file. In the same spirit also ST/AI/2004/3 (Financial responsibility of staff members for gross negligence) specifically recommends combining, where possible, disciplinary and recovery processes in order to ensure due process guarantees. Unqualified and complete refusal to disclose the adverse material supporting a reprimand is irreconcilable with these principles.

69. Moreover, recalling the principle of rationality in decision making (determination of all relevant matters, *audi alteram partem* rule, lack of bias), the "opportunity to comment on the facts and circumstances" stipulated in staff rule 10.2(c) should not be reduced to a formality but rather be read as a meaningful opportunity to present the staff member's case. This requires not only information of the alleged improper conduct but also information about the evidence on which the allegation is premised, to enable a rebuttal. The latter includes an ability to question

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[29] See Staff Rule 10.2. (c) provides:

> A staff member shall be provided with the opportunity to comment on the facts and circumstances prior to the issuance of a written or oral reprimand pursuant to subparagraph (b) (i) above.

[30] *Bertucci* 2011-UNAT-121, para 46 citing to ILOAT Judgment No. 2229 (2003), para. 3 (b).

the reliability, credibility and completeness of the evidence as well as correctness of any inferences. A mere invitation for a staff member to comment or provide evidence does not suffice to enable rebuttal where the staff member is not aware of the nature and content of the adverse material, is forced to guess the relevance of comments or evidence that he or she is invited to present and, *de facto*, to prove his or her innocence. In the same vein, exculpatory material should be disclosed.

70. Finally, in accordance with the principle of proportionality, any limitation of access to evidence of misconduct for the implicated staff member could only apply to protect a legitimate interest and only to the necessary extent. As stated by UNAT in *Sanwidi*:

> The requirement of proportionality is satisfied if a course of action is reasonable, but not if the course of action is excessive. This involves considering whether the objective of the administrative action is sufficiently important, the action is rationally connected to the objective, and the action goes beyond what is necessary to achieve the objective.[31]

71. As concerns confidentiality, in particular, UNAT confirmed after ILOAT that "[u]nder normal circumstances, [adverse] evidence cannot be withheld on the grounds of confidentiality".[32] This Tribunal adds that protecting witnesses against retaliation or other adverse consequences - if indeed otherwise unattainable - is normally achieved by witness anonymity, and not by withholding the entire content of the testimony. Confidential information, such as details of a related investigation, may be partially redacted. There is, moreover, no need to disclose the whole investigative report, beyond what is relevant for the allegations of misconduct – the disclosure has basis in the right to respond to these charges and not the right to information. In any event, however, the implicated staff member must be provided access to evidence which constitutes the basis for attribution of misconduct.

[31] *Ibid*. at para 39.
[32] *Bertucc*i, *see* fn 27 above.

72. The Tribunal notes that the above conclusion is in full accord with the jurisprudence on point. In *Adorna* UNDT/2010/205, on which the Respondent relies in his invoking of the requirement of "exceptional circumstances", the right to respond was not an issue because the claim was aimed at obtaining the disclosure of the report *after* the conclusion of the proceedings. The Tribunal held that it "will not examine whether the report should have been made available to the Applicant prior to the issuance of the letter of reprimand as this issue is not properly before the Tribunal".[33] Similarly, in *Haydar* UNDT/2012/201, the claim for access to the investigative report was refused, considering that no misconduct charge had been advanced against the applicant and no administrative measure had followed. UNAT confirmed a refusal to the investigative report in *Ivanov* 2015-UNAT-519 but there the case had been closed whereas Mr. Ivanov was not the implicated staff member but an aggrieved party; a similar stance was taken in *Masylkanova* UNDT/2015/088. The closest to the Respondent's position is *Applicant* UNDT/2010/130/Corr. 1, where refusal of a full access to the report was condoned by the Tribunal notwithstanding the fact that a reprimand had been issued. The Tribunal found, nevertheless, that the Applicant "[…] had available to him everything needed for his defence. Thus, he had access to the complaint filed against him"[34] which, on the facts of the case, was the principal incriminating evidence. *Applicant* therefore confirms the right to access to an investigative report to the extent needed to mount a defence. In the *Bertucci* case, UNDT/2010/094, where the claim arose from an incomplete disclosure of the investigation report, the Tribunal ultimately found that it had had no negative impact on the applicant's position. On the issue relevant for the case at hand, however, the *Bertucci* Judgment stated:

> The only reason given was that he was not entitled to it at that stage because that was the practice of OIOS. On its face, this is scarcely cogent, let alone reasonable. He had been invited to respond to the proposed or conditional findings but, without having access to all the material relied on by the investigators, how could he do so? The opportunity to respond at that stage, before a report is finalised, should not arbitrarily be limited

[33] Paragraph 29.
[34] Paragraph 66.

> simply because the practice is not to disclose the material. Put otherwise, decisions cannot lawfully be based on manifestly arbitrary or unreasonable grounds. The only proper reason for non-disclosure – again, confidentiality aside – is that it is not necessary in order for an adequate response to be made. That argument is extremely weak where parts of conversations with witnesses are relied on by the investigators, since it is obvious that other parts might also be relevant, not only because they might qualify what was relied on, but because they might support another matter that the staff member wishes to establish in his or her defence.[35]

(iv) Whether, in light of the analysis above, the Applicant was afforded due process

73. In the present case the Administration provides no rationale for their refusal to disclose the investigation material, which causes the Tribunal to echo the *Bertucci* judgment in pondering over the arbitrariness and unreasonableness of this position. The investigation report in this case gave rise to a finding of misconduct and the reprimand. The finding is based entirely on reports of conversations held between witnesses and the Applicant. Whereas the Applicant was informed of the allegations, they were not detailed. The basic requirement of rational decision-making would dictate hearing the Applicant regarding what had been reported, by whom and what inferences he might propose on this basis to support any matter that he may wish to establish in his defence. The latter may have been the use of particular words, to whom specifically they were directed and whether they were said publicly, points elementary for the substantiation of the charge. For example, the record shows that only one person had actually registered the impugned phrase attributed to the Applicant. The opportunity to comment on this fact was never created, neither prior to the conclusion of the report nor before the issuance of the reprimand.

74. The Tribunal notes, moreover, that the provision for opportunity to comment prior to the issuance of a written or oral reprimand in staff rule 10.2(c) is designed to implement the minimum element of adversarial dispute, where the staff member could impress arguments in his defence upon the decision-maker. In the present case this provision has been reduced to a matter of chronology: the Applicant was invited

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[35] Paragraph 27.

to comment indeed prior to the technical issuance of the reprimand but after Mr. Ward had formed his intention to issue it on the basis of the investigative report.[36] In these circumstances, the Applicant's ability to make his case before Mr. Ward was *ab initio* diminished.

75. In conclusion, the Tribunal finds that the Applicant had not been properly given the "opportunity to comment on the facts and circumstances prior to the issuance of a written or oral reprimand" whereupon his right to respond embodied by staff rule 10.2(c) was not observed. This may have had an impact on the decision. It is not necessary for the Tribunal to entertain the other specific grounds of the application raised under the due process heading.

(c) Whether the facts were made out

76. Responding to whether the facts of the case were made out requires determination of two questions: what is the standard to which the conduct needs to be proven and who is ultimately responsible for factual determinations giving rise to administrative measures. The Tribunal will address these two issues in turn.

77. According to section 2 of ST/AI/371, "[w]here there is reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed, the head of office or responsible officer shall undertake an investigation". The Applicant is therefore correct in that the undemanding "reason to believe" or "reasonable suspicion" is a threshold triggering the investigation, and not the standard of proof required to be met for imposition of a corrective measure.

78. According to section 3, "[i]f the investigation results in sufficient evidence indicating that the staff member engaged in wrongdoing that could amount to misconduct, the head of office or responsible officer should immediately report the matter to the Assistant Secretary-General, Office of Human Resources Management". This indicates that upon the conclusion of an investigation the conduct must be proven to some "sufficient evidence" standard but not a definitive finding of

[36] Annex 3 to the application– Intention to issue reprimand.

misconduct. The same is confirmed by staff rule 10.3(a) which says: "The Secretary-General may initiate the disciplinary process where the findings of an investigation indicate that misconduct may have occurred."

79. ST/AI/ 371, section 9 provides that:

> Upon consideration of the entire dossier, the Assistant Secretary-General, Office of Human Resources Management, on behalf of the Secretary-General shall proceed as follows:
>
> (a) Decide that the disciplinary case should be closed, and immediately inform the staff member that the charges have been dropped and that no disciplinary action will be taken. The Assistant Secretary-General may, however, decide to impose one or more of the non-disciplinary measures indicated in staff rule 10.2 (b)(i) and (ii), where appropriate; or
>
> (b) Should the preponderance of the evidence indicate that misconduct has occurred, recommend the imposition of one or more disciplinary measures.
>
> (c) Decisions on recommendations for the imposition of disciplinary measures shall be taken by the Under-Secretary-General for Management on behalf of the Secretary-General.

80. As such, section 9 guarantees, at minimum, the "preponderance of evidence" standard for the imposition of disciplinary measures; the Tribunal notes that this proposition has been augmented by UNAT's proclamation that disciplinary charges resulting in termination must be proven through "clear and convincing evidence". On the other hand, neither the staff rules nor ST/AI/371 determine to what standard of proof the factual basis for the administrative measures need to be established. This, in the Tribunal's opinion, does not mean that administrative measures are to be applied upon a lax determination. The level of proof required for the imposition of administrative measures should be commensurate to, first, onerousness of the consequences that it entails and, second, to permanence of these consequences. And thus, preventive measure which is administrative leave with pay, which by its nature is provisional, may be applied upon a reasonable suspicion; administrative leave without pay, albeit also impermanent, given its onerousness should not be applied unless there is a probable cause; recovery of funds, given its onerousness and

permanence requires preponderance of evidence, a standard usually applied in deciding civil claims. A decision on reprimand, the opinion of this Tribunal, considered its final character and lasting negative consequences, requires preponderance of evidence as its factual basis.

81. As regards the question of responsibility for the findings of misconduct for the purpose of attributing it to the staff member, the Tribunal considers that this is the ultimate competence of the administrative organ applying the disciplinary or administrative measure. While these organs, i.e., ASG/OHRM, USG for Management or persons with delegated authority, are not those who usually hear the evidence, they are nevertheless required, at minimum, to critically review the record and the findings of the investigation, and establish whether the required threshold of proof has been met and whether the acts, as established, amounted to misconduct. This has consistently been the practice of USG for Management in disciplinary cases before this Tribunal.

82. The investigative bodies, on the other hand, are not responsible for the ultimate finding of misconduct. As confirmed in the current OIOS Investigation Manual:

> The aim of OIOS investigations is to establish facts and make recommendations in light of its findings. The Secretary-General or delegated programme manager, in the circumstances of the case, has the responsibility to consider what action, if any, is to be taken after receipt of the report.[37]

And even more expressly stated in an older version of the OIOS Manual:

> The OIOS investigation is not a criminal investigation and OIOS must demonstrate only that its conclusions and recommendations reasonably follow from the facts. It will then be for the Programme Manager to review the report and decide whether to conclude that "the report of misconduct is well founded" […] and, on that basis, to report the matter to the Assistant Secretary-General for Human

[37] OIOS Investigations Manual, January 2015, page 5.

> Resources Management (ASG/OHRM) who has the authority to decide whether the matter shall be pursued.[38]

83. Also UNAT confirmed that failure to establish facts to the required standard of proof in the decision-making calls into question all subsequent decisions taken by the Organization on its basis. It stated:

> With regard to the report duly produced by the Ad hoc Panel, we concur with the Dispute Tribunal's effective finding that reliance by the Panel on what was "plausible" or on what someone "strongly believed" and the Panel's ultimate assessment that "the allegation might well be founded" (emphasis added) did not satisfy the requirements of ST/AI/371.
>
> […]
>
> It follows that the failure of the Ad hoc Panel to adhere to the standards required by ST/AI/371, and indeed the standards necessitated by the mandate it itself had set, called into question all of the steps taken by the Organization post 30 September 2005. Such steps included the decision taken by Management in October 2005 to forward the report for further action and the decision taken in August 2006 to charge Mr Marshall with verbally and physically assaulting the Complainant and with acting in a manner unbecoming of his status as an international civil servant . We are of the view that there was no valid procedural basis for any of the afore-said decisions, in light of the deficiencies of the Ad hoc Panel. [39]

84. Turning to the present case, the Tribunal observes that it demonstrates complete abdication of the role in assessing the report and attributing the misconduct. As stated in the Reprimand dated 9 November 2015:

> 6. OIOS determined that you raised allegations of corruption against Mr. [A] while having no good faith belief in their veracity, or otherwise displayed willful disregard for the truth of these allegations and the consequent reputational harm likely to be caused to Mr. [A] as a result of raising these allegations.
>
> 7. The Report states that the established facts constitute reasonable grounds to conclude that you may have failed to observe the standards of conduct expected of an international civil servant…

[38] OIOS Investigations Manual, March 2009, para. 66.
[39] *Marshall* 2012-UNAT-270, paras. 56 and 58.

85. Not a single sentence produced by Mr. Ward indicates that he had undertaken to assess the report, not even by endorsing OIOS' findings. Likewise, there is no finding of misconduct; to the contrary, it appears that making such finding is purposefully avoided. Instead, the basis for the reprimand is the OIOS evaluation that the Applicant "may have failed to observe standards of conduct." This is not sufficient establishment of misconduct.

86. In addition to the formal deficiencies of the impugned decision, the practical consequences of not assessing the report are numerous. The reprimand rests in part on the OIOS noting that in his statement to investigators the Applicant had not denied having raised allegations against Mr. A. This is incorrect. In his first interview the Applicant is recorded as having stated "I did not make any reference of inference to the fact that Mr. A [ ] was cashing part of the money." As to the remainder of the allegation, the Applicant is recorded as saying that he had not recalled stating the words attributed to him.[40] This cannot be construed as an implied admission. Any inferences from what the Applicant had denied or had not recalled would be only valid when assessed vis-a-vis assessment of veracity and credibility of witness testimony. This has not been done.

87. OIOS relies in part on the Applicant having expressed frustration with Mr. A's handling of a project. The Applicant is right that this is not evidence suggesting misconduct. The reprimand does not explain what inference is drawn therefrom. On one hand it may lend support to the finding that the Applicant voiced out allegations against Mr. A., on the other hand it may indicate that he had had factual reasons to voice them; eventually it may be a mitigating circumstance. However, this assessment is absent.

88. As a related issue, OIOS found that the Applicant had raised allegations of corruption against Mr. A. while having no good faith belief in their veracity or otherwise having willful disregard for their truth or veracity. In the 'Notice of intention to issue a written reprimand,' it is admitted that:

[40] Applicant's annex D.

> [t]he witness statements obtained throughout the course of the investigation, and consequently the conclusions of the Investigation Report, were thus targeted at assessing whether or not [the Applicant] raised allegations against Mr. A. during the conference, not whether or not those allegations were true.

89. The Tribunal considers that it would have been material for a case of this kind whether the allegations were true or not; however, given that the investigation against Mr. A. cleared him of all allegations, the question material for the case is rather whether the Applicant had had any reason to believe that they had been true. Obviously, OIOS had at minimum "reason to believe", since it launched an investigation regarding Mr. A. Explanation of the basis for the finding of the Applicant's "lack of good faith belief or otherwise willful disregard for their truth or veracity" is entirely missing whereas explanations of his basis for suspecting Mr. A. remained unaddressed.

90. OIOS found that allegations had been made publicly, but only one person heard them clearly; apart from that the incident happened in a public place no findings have been made whether the allegations could actually be heard by others.

91. On the whole, the Tribunal is forced to conclude that facts relevant for the decision were not established to the required standard; moreover, the organ issuing the reprimand failed to make a finding of misconduct.

Conclusion

92. The Tribunal recalls that, as held by UNAT, the Dispute Tribunal is not conducting a merit-based review, but a review which is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. The Dispute Tribunal is not conducting an appellate review.[41] Therefore, it is not for the Dispute Tribunal to replace the entire fact-finding and decision-making administrative processes with its own ones.

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[41] *Sanwidi* 2010-UNAT-084.

93. Administration of punitive measures, whether administrative or disciplinary, is to be done in a formal manner. "Formal" does not need to be convoluted but certain benchmarks, discussed in section (a) above, must be observed; primarily, the issuing person must act within the ambit of a formal authority and embrace responsibility of making the decision. This Tribunal has found that the impugned decision failed to meet these benchmarks on many levels, starting with ambiguity as to the authorship of the decision and dubious authority to issue it, through the inexplicable denial of due process, and ending with the failure to make the requisite determinations. Whereas part of these irregularities may be attributed to the lack of clarity in the governing legal framework – which this Tribunal has attempted to elucidate - the written reprimand must be rescinded.

94. Rescinding the reprimand on formal grounds makes the disclosure of the investigative report unnecessary.

Judgment

95. The decision to issue the Applicant with a written reprimand is rescinded. The Tribunal orders the Respondent to expunge the reprimand from the Applicant's Official Status File. All other pleas are rejected.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 13th day of July 2017

Entered in the Register on this 13th day of July 2017

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi