

**DECISION OF THE PANEL OF ADJUDICATORS OF THE OSCE WITH REGARD  
TO THE EXTERNAL APPEAL BY [REDACTED]**

(CASE No: OSCE PoA 1/2021)

*Proceedings*

1. The Chairperson of the Panel of Adjudicators (PoA) of the OSCE received on 17 March 2021 a letter from the Chairperson of the Permanent Council of the OSCE transmitting an external appeal by [REDACTED] (Applicant), a former [REDACTED] staff member at the OSCE [REDACTED] which had been forwarded to her on 8 March 2021.
2. The Chairperson of the Panel, through the Executive Secretary of the Panel, informed the Secretary General of the OSCE (Respondent) and the Applicant on 18 March 2021 of the constitution of the Panel, asking them to forward any further communication to the Panel as per Article 5 of the Rules of Procedure of the Panel to reach the Panel no later than 19 April 2021. The Applicant filed a message on 19 April 2021, and on the same day, the Respondent forwarded his reply, which was transmitted to the Applicant, advising [REDACTED] that [REDACTED] has a right to file a response. On 12 May 2021, the Applicant filed [REDACTED] response.
3. The initial appeal included a request for recusal. As this request was directed against all three members of the Panel, by interlocutory order of 7 May 2021, it was transferred for decision to an uninvolved member of the Panel of Adjudicators. The request for recusal was rejected on 17 May 2021.
4. In accordance with Article VI of the Terms of Reference of the Panel, the Chairperson convened the Panel on 7 and 8 October 2021 at the Hofburg premises in Vienna to examine the appeal. The Panel was composed of its Chairperson, Mr. Thomas Laker, its Deputy-Chairperson, Ms. Jenny Schokkenbroek, and its member, Ms. Anna Csorba, the latter participating via videoconference.
5. After examining all the documents, the Panel noted that the Applicant contests [REDACTED] dismissal on 25 February 2020; in essence, [REDACTED] asks for 200.000 EUR for reputational, professional and psychological harm, damages in EUR equivalent to completing up to



9. On 25 February 2020, the Applicant was dismissed with immediate effect. This decision was based on “clear and convincing evidence” that the Applicant

- committed cyber-harassment through improper and unwelcome conduct that has caused or might reasonably be expected or be perceived to cause offence or humiliation to [REDACTED] former TL by sending electronic messages containing accusations against [REDACTED] to the TL [REDACTED] through a pseudonym;
- failed to fully co-operate with the investigation process.

Further, it was considered as aggravating factors that the OIO found “strong preponderance of evidence” with respect to the Applicant

- committing – further – cyber-harassment to two other OSCE officials and negatively affecting the reputation of OSCE by spreading the allegations contained in the message to a significant number of outside parties, including media outlets;
- recording colleagues in a clandestine manner and widely disseminating such recordings.

It was found that the Applicant acted in breach of Articles 1 and 6 of the OSCE Code of Conduct as well as paragraph 9 of the Internal Oversight Mandate.

10. After receipt of a request for internal review on 26 March 2020, an Internal Review Board (IRB) was established which submitted its report on 16 October 2020, recommending, by majority vote, to uphold the contested decision. So did the [REDACTED] [REDACTED] on 16 November 2020.

11. On 15 January 2021, the Applicant submitted a request for external review.

*Contentions of parties*

12. The Applicant's contentions are various and some of [REDACTED] pleas relate to former incidents that have not been part of the present administrative process. [REDACTED] major relevant contentions are:

- [REDACTED] needs to be provided with further documents;
- The OIO committed various and serious errors in their investigation;
- [REDACTED] did not send the message to the TL [REDACTED]; further this message was not sent to an OSCE official and does not fall under the definition of harassment;
- Any allegation that does not meet the required standard of proof should be disregarded.

13. The Respondent's major contentions are:

- The review of the application should be limited in scope;
- The Organization adhered to the internal rules for disciplinary and appeals procedures;
- The disciplinary measure was justified and proportionate.

## *Considerations*

### *Scope of the Application*

14. At the outset, it is deemed necessary to emphasize that the Applicant's dismissal, dated 25 February 2020, is the only decision brought properly before the Panel. Therefore, the Applicant's efforts to extend the review to other and past issues must be rejected.

### *Procedural issues*

15. Regarding the Applicant's request to get access to [REDACTED] former OSCE email account and to produce documents, the Panel refers to the statement above: The Applicant's concern about denial of leave, discrimination, harassment etc. against [REDACTED] are not part of [REDACTED] present application which is restricted to a review of the disciplinary measure of 25 February 2020. In this respect, the Panel is satisfied that the Applicant received all documents necessary for a reasonable exercise of [REDACTED] rights, including the crucial OIO report which forms the basis of the contested decision in the present disciplinary proceedings.

### *Merits*

16. The Panel reiterates that, pursuant to established principles of international administrative law, the review of disciplinary decisions has a limited scope. In general, it is part of such review to examine the procedural legality, *i.e.* whether the impugned decision was taken by the competent body in application of the Organization's own rules for the disciplinary procedure, including due process. In addition, with respect to substantive legality, it has to be checked (1) whether the facts on which the disciplinary sanction is based have been established, (2) whether the established facts qualify as misconduct, and (3) whether the sanction is proportionate to the offence (see decisions of 6 July 2018, OSCE PoA 2/2018, para. 25; of 17 December 2020, OSCE PoA 2/2020, para. 18).

### *Procedural legality*

17. Regarding the Applicant's objections against the initial investigation, the Panel takes note that such fact-finding efforts - implicitly included as a non-mandatory option in Staff Regulation 9.03 (a) ("... the investigation if one has been conducted ...") - do not have any binding effect on, and are not part of the disciplinary process. Apart from that, the Applicant's allegation of "fraud" and "conflict of interest" are not supported by any evidence. The Applicant was given ample opportunity to comment on the allegations, and the disciplinary procedure was adhered to, as foreseen in Staff Regulation 9.03, and Staff Rule 9.042.

### *Substantive legality*

18. As the impugned decision is procedurally legal, it is necessary to determine its substantive legality.

### *Establishment of facts*

19. Regarding the establishment of facts (1), at the outset, the Panel reiterates international administrative law principles, pursuant to which in disciplinary cases the burden of proof lies with the Organization. Further, the Panel confirms that the standard of proof in disciplinary cases normally does not exceed the level of 'preponderance of evidence' (see decision of 17 December 2020, OSCE PoA 2/2020, para. 25).

20. The Panel adopts the application of a stricter standard of proof where the most severe disciplinary measure, *i.e.* dismissal, is at stake. Considering its serious effects of immediate separation from the Organization, the underlying facts must be supported by 'clear and convincing evidence'. Therefore, in the present case of dismissal, this standard of proof needs to be applied to the factual basis of the contested decision. The Panel takes note that in the contested decision of 25 February 2020, this stricter standard of proof is mentioned and applied by the Respondent himself.

21. The Panel takes note that, according to the decision of 25 February 2020, the Applicant's dismissal is based on clear and convincing evidence that the Applicant sent electronic messages to ■ former TL ■ with the content that is recorded on file. Further, there is such clear and convincing evidence that the Applicant failed to cooperate with the OIO investigation while refusing to offer access to ■ electronic devices.
22. The Panel further notes that the Applicant, in ■ application, alleges that ■ "did not send such alleged message". However, pursuant to the minutes of ■ interview with the OIO investigators on 20 August 2019, ■ indicated "to have sent the message" from an email account and "explained that it was ■ right to defend ■".
23. The Applicant's efforts to deny the veracity of the minutes are not based on any evidence and therefore unfounded. The Panel holds that there can be no doubt that the Applicant is the author of the message at stake, in which ■ raises serious allegations against ■ former TL, including that the latter was abusing ■ power, "made racist comments against me, ...slandering and saying lies about me".
24. Further it is noted that, during ■ interview on 20 August 2019, the Applicant refused to restore ■ electronic account in front of the investigation team although being asked to do so in order to figure out whether the Applicant had entertained a further electronic account under ■ official mobile number.
25. Finally, the Panel takes note that the contested decision additionally refers to the OIO's finding that there is "strong preponderance of evidence to suggest" that the Applicant committed cyber-harassment with respect to two (other) OSCE officials and negatively affected the OSCE's reputation by spreading the allegations to outside parties, including media outlets.
26. However, pursuant to the Respondent's own assessment, these allegations are not based on "clear and convincing evidence". In light of the Panel's finding about the applicable standard of proof (see above para. 20), they cannot be considered as being established at the necessary level of proof. Due to this lack of probative value, the respective allegations cannot be taken into account while assessing the Applicant's relevant behavior.

## *Misconduct*

27. Regarding the next question, *i.e.* whether the established facts amount to misconduct within the meaning of the Organization's internal law (2), the Panel takes note that, pursuant to the broad scope defined in Staff Regulation 9.01, (each and every) failure to comply with an obligation stipulated in the Staff Regulations, the Staff Rules, the OSCE Code of Conduct, or any other relevant administrative issuance "may constitute misconduct warranting disciplinary action".
28. The Panel reiterates that the OSCE Code of Conduct raises high standards, requiring that OSCE Officials "shall conduct themselves at the highest personal and professional level at all times" (Article 1 of the OSCE Code of Conduct), or – via an inclusion of the OSCE Policy on the Professional Working Environment (see Article 6 of the OSCE Code of Conduct) – the duty to "be respectful to their colleagues and maintain the highest standards of conduct" (para. 7.1 of Staff Instruction No.21/Rev. 1 on OSCE Policy on the Professional Working Environment).
29. It follows that sending electronic messages with serious allegations against an OSCE official to the official ██████ using rude language, constitutes a breach of each staff member's duty to be respectful to colleagues, regardless of the veracity of such allegations or of any alleged right to self-defense. In the present case, such attitude does not only obviously constitute bad behavior in relation to the addressee, rather it shows clear and serious disrespect towards the concerned OSCE colleague, the Applicant's former TL.
30. Considering the broad scope of potential misconduct, as foreseen in Staff Regulation 9.01, it is not necessary to determine whether the Applicant's action - additionally - falls under the definition of "harassment" as defined in para. 6.1 and 6.2 of Staff Instruction No.21/Rev. 1 (OSCE Policy on the Professional Working Environment). The Panel takes note that the contested decision does not refer to the said Staff Instruction. It follows that the disciplinary measure is not based on harassment in the meaning of OSCE's internal law.



31. Regarding the Applicant's refusal to restore an electronic account during the interview with the OIO investigation team on 20 August 2019, the Panel takes note that para. 9 of the OIO's mandate requires that all staff/mission members "shall co-operate to the fullest extent possible with Internal Oversight". The Applicant failed to do so without any explanation. In this respect, [REDACTED] committed a second act of misconduct.

### *Proportionality*

32. Regarding the proportionality of the disciplinary measure (3), the Panel reiterates that the OSCE's system of disciplinary sanctions includes a graded variety of seven different measures among which dismissal is the most severe one (see the list in Staff Regulation 9.04 (a)). Further, it has to be recalled that pursuant to Staff Rule 9.04.1 (a), any disciplinary measure shall be proportionate to the gravity of the misconduct. In accordance with international administrative law, the Panel respects the Organization's broad discretion in choosing disciplinary measures. However, it follows from the existence of a system of ranked disciplinary measures that dismissal as the most severe sanction should only be imposed in clear cases of serious misconduct, whereas minor offences should be sanctioned with less severe disciplinary measures, as provided for in the Staff Regulations (see decision of 6 July 2018, OSCE PoA 2/2018, para. 35).

33. Pursuant to the contested decision, the Applicant's behavior was rated as serious misconduct, "having considered all of the facts". The Panel notes that this assessment is not only based on the two actions as described above, *i.e.* the sending of a message to the TL [REDACTED] and the failure of co-operation. Rather, in choosing the disciplinary sanction, the cyber-harassment of two other OSCE officials as well as recording colleagues in a clandestine manner and disseminating such recordings have been taken into account and explicitly have been considered "to constitute aggravating factors".

34. The Panel reiterates that in case of dismissal, the strict standard of "clear and convincing evidence" needs to be applied. Pursuant to the Respondent's own assessment, the incidents mentioned above (see para. 26) are merely based upon "preponderance of evidence". Accordingly, these incidents may neither be considered as established facts nor taken into account as aggravating factors.

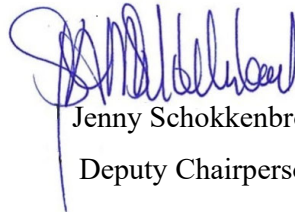
35. It follows from the above that the exercise of the Organization's wide discretion in determining an appropriate disciplinary measure was affected by improper considerations. It is doubtful whether dismissal would have been chosen without these "aggravating factors" which were not established in view of the applicable standard of proof.
36. In the Panel's view, it is not sure whether the remaining incidents, *i.e.* the message to the TL [REDACTED] and the failure to co-operate, even when taken together, may be rated as serious misconduct. As emphasized above, it is not for the Panel to replace the Administration's discretion by its own views.
37. However, since the exercise of discretion is influenced by improper considerations, the contested decision cannot stand. The Panel respects the Administration's broad discretion in disciplinary cases and will not lightly interfere. In the present case, it is doubtful whether two singular incidents do justify the imposition of the most serious measure among a list of eight possible courses of action (including reprimand procedures).
38. The Panel, having been accused by the Applicant of "perversion of justice", is more than aware of [REDACTED] difficult personality. [REDACTED] seems to be fully focused on the impression to have been mistreated in [REDACTED] alleged role of whistle-blower. Although, to the Panel's best knowledge, [REDACTED] accusations have been handled according to the Organization's internal rules, the Applicant continues to raise accusations, sometimes based on considerations close to conspiracy theories, and unacceptably using rude and inappropriate language.
39. Thus, the Applicant's general attitude raises doubts about [REDACTED] qualification as staff member of an international Organization like the OSCE. Notwithstanding the above, if disciplinary action is taken, the rules of the respective legal order must strictly be followed. Pursuant to Staff Regulation 9.01, a staff member's individual "failure to comply with an obligation stipulated" in OSCE's internal law needs to be identified and assessed in the prescribed way. In the present case, this did not happen in an appropriate way.

*Remedies*

40. According to Article VIII (4 and 5) of Appendix 2 to the Staff Regulations and Staff Rules ('Terms of Reference of the Panel of Adjudicators'), if the Panel finds that the application is well founded it shall recommend the rescission of the impugned decision. The Panel shall also fix the amount of compensation to be paid to the Applicant should the impugned decision not be rescinded.
41. In light of the above, the Panel recommends to rescind the contested decision. That does not mean that the Applicant has to be exonerated from all of the allegations. The Organization may choose to take a different, less severe disciplinary measure. However, the contested decision cannot stand for the reasons outlined above.
42. Should the impugned decision not be rescinded, the amount of compensation is fixed at 5.000 EUR. This sum takes into account that the Applicant, not being an international contracted staff member, did not receive a salary from the OSCE. Further, ■ appointment was of short duration (see Panel's decision of 15 May 2020, OSCE PoA 43/2019, para. 15). Considering the remaining relevant misbehavior, compensation of moral damages is not justified.
43. All other pleas are rejected.



Thomas Laker  
Chairperson



Jenny Schokkenbroek  
Deputy Chairperson



Anna Csorba  
Member