

**DECISION OF THE PANEL OF ADJUDICATORS OF THE OSCE WITH REGARD
TO THE EXTERNAL APPEAL BY ██████████**

(CASE No: OSCE PoA 4/2021)

Proceedings

1. The Chairperson of the Panel of Adjudicators (PoA) of the OSCE received on 24 June 2021 a letter from the Chairperson of the Permanent Council of the OSCE transmitting an external appeal which had been forwarded to her on 17 June 2021. As the appeal concerned individual disciplinary measures against four former ██████████ members of the OSCE ██████████, four separate applications were registered, including the one of ██████████ (Applicant).
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 29 June 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 29 July 2021. The Respondent forwarded her reply on 28 July 2021, which was transmitted to the Applicant on 9 August 2021, advising ██████████ that ██████████ has a right to file a response. On 30 August 2021, the Applicant filed ██████████ response.
3. Travel restrictions in relation to a viral pandemic prevented the Panel from meeting in person, as foreseen in Article VI of the Terms of Reference of the Panel. Following consultations with the parties, the Panel held deliberations via video conference from 21 to 24 February 2022 and on 1 March 2022. The Panel was composed of its Chairperson, Mr. Thomas Laker, and its members, Ms. Anna Csorba and Ms. Catherine Quidenus.
4. After examining all the documents, the Panel noted that the Applicant contests ██████████ separation from service on 16 October 2020; in essence, ██████████ asks for full exoneration from the allegations and reinstatement in ██████████ previous appointment as ██████████.
5. The Respondent, pursuant to her reply, emphasizes that the review of the application should be limited. She holds the view that the Organization adhered to its rules for

disciplinary procedure and that the impugned decision was justified; therefore, the application should be dismissed.

Summary of facts

6. In October 2015, during the on-site phase of the internal audit of ██████████, the Office of Internal Oversight (OIO) noted 'red flags' potentially indicative of fraud with regards to the refuelling activity of ██████████ vehicles. In particular, the fuel coupons provided for two sample months (June and July 2015) did not cover all refuels included in the OSCE Fuel Registry Books, and inconsistencies were identified in the mileage indicated in this document for some of the vehicles. As a result, further diligences were performed by OIO on documents collected during the internal audit which led to identify a pattern of inconsistencies between vehicle trip tickets and the OSCE fuel registry book for these two months and to suspect the existence of an ongoing fraud scheme involving the addition of fictitious entries in the OSCE Fuel Registry Books.

7. Following the opening of the OIO investigation, from April to June 2016, diligences were performed by an OIO investigation team on documents and records - with a view to preparing the first on-site phase of the investigation. In June 2016, the OIO investigation team made a first visit to ██████████, which involved interviews and the collection and review of documentation. From June to August 2016, following the first on-site visit, additional diligences were performed by the OIO investigation team on documents and records. In late August 2016, the OIO investigation team made a first test on a sample of ██████████ vehicles, followed by, in September 2016, a second dedicated on-site visit to ██████████ ██████████ which involved interviews with mission members, the collection and review of documentation, and a second test on a sample of ██████████ vehicles. Between October and December 2016, further diligences were performed by the OIO investigation team on documents and records, including contracting a document forensics expert specialised in handwriting analysis to perform tests and answer specific questions regarding fraudulent entries in a sample of OSCE Fuel Registry Books.

8. On the basis of the diligences performed, draft investigation findings were prepared and sent to 17 subjects in this case, including the Applicant. All subjects in the investigation were given ten working days to respond to the draft findings upon their receipt in accordance with Staff Rule 9.02.1 (b). Responses were accepted in any OSCE official language. In exercising their due process rights, some subjects requested documentation and clarifications. In such cases, they were provided with an additional limited period of time to review and respond to the documentation and clarifications. All but one of the subjects responded to the draft findings.
9. On 18 October 2017, the final OIO investigation report was transmitted to the Applicant.
10. By way of letter dated 17 May 2018, the Head of ██████ notified the Applicant of allegations of misconduct for participation in a fraud scheme.
11. On 5 March 2019, upon review of the collective response to the allegations of misconduct, the then-Acting Head of ██████ notified four other staff members of ██████ decision to submit the findings of the OIO report to a Disciplinary Committee (DC). In August 2019, the new Head of ██████ requested the transfer of decision-making responsibility for all disciplinary procedures in connection with the OIO Investigation to the Secretary General (SG). The SG approved this request on 31 October 2019.
12. On 23 December 2019, the SG notified the four other staff members of the composition of a DC to be convened in the Secretariat. In its report, submitted on 17 April 2020, this DC concluded that the actions at stake violated Staff Rule 2.01 (b) and (c), the OSCE policy on fraud and paragraphs 1 and 11 of the OSCE Code of Conduct. The DC recommended the imposition of the disciplinary measure of separation from service pursuant to Staff Regulation 9.04 (a) (viii).
13. On 30 April 2020, the SG notified the Applicant of the referral of ██████ case to a DC at the Secretariat. On 29 June, this DC recommended separation from service also with respect to the Applicant. On 13 July 2020, the SG decided to separate the Applicant from service with two months' notice, pursuant to Staff Rule 9.06.4. This decision was transmitted to the Applicant on 17 August 2020.
14. On 16 September 2020, the Applicant filed a request for internal review, and an Internal Review Board (IRB) was established.

15. On 23 February 2021, the IRB submitted a report, recommending further review of the disciplinary decisions with an additional technical expert opinion. On 25 March 2021, the SG decided to uphold the disciplinary decision without seeking a further opinion from a technical expert.
16. On 10 May 2021, the Applicant submitted a joint application for external review.

Contentions of parties

17. The Applicant's contentions are various and will be addressed in detail below, where appropriate. In general, the Applicant argues that
 - The case has been going on for a long time;
 - Many technical factors affecting fuel consumption were not taken into account;
 - ■ did not commit fraud.
18. 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 is proportionate.

Considerations

19. At the outset, the Panel reiterates that, pursuant to principles of international administrative law and its own established jurisprudence, 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

20. It is a well-established principle of international administrative law that the Administration must adhere to the Organization's internal law, including rules of procedural character. In this respect, the Panel notes that within disciplinary procedures, pursuant to Rule 9.02.1 (a) of the Staff Regulations and Staff Rules (SRSR), staff/mission members shall be advised in writing of the allegations "at the earliest practicable time".
21. Further, the Panel notes that the OIO investigation, executed between October 2015 and December 2016, resulted in a final investigation report which was sent on 18 October 2017 to the Applicant. However, it took the Organization seven months to notify the Applicant of the allegations by letter dated 17 May 2018.
22. In the Panel's view, a delay of seven months cannot be considered as "the earliest practicable time". In disciplinary proceedings, swift and prompt action needs to be taken in the interest of the concerned person as well as of the Organization. In the present case, even when taking the complexity of the matter into account, no extraordinary circumstances can be found allowing for more than half a year for taking just the first step of initiating the decision-making process.

23. Finally, in this particular case, after the notification of allegations on 17 May 2018, it took the Organization until 30 April 2020, *i.e.* nearly two years, to inform the Applicant about the referral of ■ case to a DC. Although there are no clear time lines established for this (next) step in the SRSR, the Panel considers it as a breach of duty of care to let nearly two years pass by before continuing with the disciplinary proceedings.

Substantive legality

Establishment of facts

24. 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).
25. However, the Panel has applied a stricter standard of proof where the most severe disciplinary measure, *i.e.* dismissal, is examined (see decision of 8 December 2021, PoA 1/2021, para. 20). Considering the serious effects of immediate separation from the Organization, the underlying facts must be supported by ‘clear and convincing evidence’. The same applies to the disciplinary measure of separation from service. Therefore, in the present case of separation from service, this standard of proof needs to be applied to the factual basis of the contested decision. The Panel takes note that this stricter standard of proof is also endorsed by the OIO in its Final Investigation Report as well as by the Respondent in her reply.
26. When applying the standard of ‘clear and convincing evidence’, it is not appropriate to limit judicial interference to cases of ‘manifest error’, as suggested by the Respondent in her reply. On the contrary, such elevated standard of proof does require a thorough review of the findings in disciplinary proceedings. The Panels notes that pursuant to other jurisprudence, a distinguished international administrative Tribunal even applies a stricter standard by confirming to “review the evidence to determine whether a finding of guilt beyond a reasonable doubt could properly have been made” (see ILOAT judgment no. 3649, para. 14, referring to ILOAT judgment no. 2699, consideration 9).

27. The Panel takes note that, in the present case, pursuant to the undisputed determinations of the OIO investigation, there has been some decline of the average fuel consumption of the official OSCE car assigned to the Applicant after an internal fact finding had taken place.
28. However, it is also noted that “in the context of the investigation, OIO could not assess the individual extent of the fraudulent activity for each of these drivers...Given the number of vehicles involved and the number of years in which these fraudulent activities occurred, and taking into consideration the fact that vehicles were sometimes refuelled by several drivers on the same month, assessing the individual extent of the fraudulent activity of these drivers would have required a level of analysis that OIO’s current investigative resources could not reasonably implement and such a level of granularity would have led to relatively low assurance with regards to the figures produced.”(Cover Investigation Report - Case number 01/16, para. 5.25)
29. Further, the Panel regrets the lack of consensus about the reasons for the elevated average consumption prior to the internal fact finding and its decline afterwards. As a matter of fact, the parties offer conflicting explanations for these factual circumstances:
30. In the Respondent’s view, the decline may only be reasonably explained by the presence of recurrent, inaccurate declarations regarding the refuelling of this vehicle, leading the OSCE to pay for more fuel than it actually used.
31. In contrast, the Applicant denies any participation in a fraud scheme. ■ offers various reasons for the decline, including the change of fuel suppliers, different driving styles, use of fuel consuming elements like air-condition etc..
32. The Panel is not in a position to fully investigate the numerous allegations made by the parties, including highly technical circumstances. The Panel also notes with regret that it remains unclear in which way the so called ‘fraud scheme’ was operated and how many and which persons participated. In light of these circumstances, the evidence in the particular case shows:

33. In the Panel's view, it is not sufficient to state that the Applicant, being the driver of vehicle [REDACTED] and having refuelled it many times, was definitely somehow involved. It follows from the respective OIO report, that the Applicant had exclusive control over the vehicle at stake for only "a sample of months", *i.e.* in January 2014, and in January and September 2015 with an average fuel consumption of less than 14 litres, including 13,1 litres in January 2015. Pursuant to the same table, in March 2016, the average consumption was 13,8 litres, and in September 2016, it still was 11,9 litres. It follows from this data that there was no decline of consumption in March 2016, although the fact-finding investigation had taken place in January of this year. Further, the Panel takes note that even the decline in September 2016 was not more than 9% compared to the average consumption in January 2015.
34. Further, the Panel takes note that the OIO report does not show the overall consumption of Vehicle [REDACTED] during the whole investigation period between January 2014 and March 2017. Rather, it compares the average consumption of this vehicle to the "the average monthly fuel consumption for the whole [REDACTED] fleet of vehicles (which) started to gradually decrease, from 17 litres to 14 litres per 100 km...".
35. The Panel recalls that disciplinary measures are appropriate with regard to individual misconduct. In the Panel's view, the Applicant's individual participation in any kind of 'fraud scheme' is not supported by clear and convincing evidence. In fact, the OIO report is silent about the mechanism of such fraud scheme and, *e.g.*, in which way the Applicant has or might have profited. More importantly, in this specific case, the decline - if any - was not significant. Therefore, the OIO report itself fails to establish the crucial basis for the allegations of misconduct, *i.e.* a considerable change in fuel consumption.
36. Due to the lack of clear and convincing evidence for the relevant facts, it is not necessary to assess whether these facts, if established, would amount to misconduct (2), or the proportionality of the disciplinary measure (3). As an indispensable element for imposing a disciplinary measure is missing, the contested decision cannot stand.

Remedies

37. 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.
38. In light of the above, the Panel recommends to rescind the contested decision.
39. Should the impugned decision not be rescinded, the amount of compensation is fixed at 900 EUR. This sum takes into account the Applicant's monthly salary and the fact that ■■■ yearly contract would have ended on 31 December 2020, *i.e.* about 2,5 month after ■■■ separation from service. Since it is an open question whether ■■■ contract would have been extended beyond this date, no further *in lieu* compensation is granted.
40. Notwithstanding the above, with respect to the procedural irregularity of not having conducted the disciplinary process in a timely manner, the Panel recalls that excessive delay can amount to a violation of due process (see decision of 6 April 2017, OSCE PoA 4/2016, para. 29). In the present case, more than one delay has to be noted, including an inappropriate delay of nearly two years from the notification of allegations until the establishment of a DC. A compensation of 1500 EUR shall be granted.
41. All other pleas are rejected.

3 March 2022



Thomas Laker
Chairperson



Anna Csorba
Member



Catherine Quidenus
Member