

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

(CASE No: OSCE PoA 2/2020)

Proceedings

1. The Chairperson of the Panel of Adjudicators (PoA) of the OSCE received on 2 March 2020 a letter from the Chairperson of the Permanent Council of the OSCE transmitting an external appeal by ██████████ (Applicant) which had been forwarded to him on 26 February 2020.
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 4 March 2020 of the constitution of the Panel and asked 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 3 April 2020. The Respondent forwarded his reply on 3 April 2020 which was transmitted to the Applicant, advising ██████████ that ██████████ has a right to file a rebuttal which ██████████ did on 20 April 2020. An invoice for legal fees (1734 EUR) was submitted.
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 on 10 and 17 December 2020. The Panel was composed of its Chairperson, Mr. Thomas Laker, its Deputy Chairperson, Ms. Jenny Schokkenbroek and its member, Ms. Catherine Quidenus.
4. After examining all the documents submitted to it, the Panel noted that the Applicant's main relief claimed is rescission of the contested disciplinary measure, compensation for loss of payment since 1 July 2018, psychological damages amounting to 50.000 Euro, and legal fees.
5. The Respondent, pursuant to his reply, is of the view that the contested decision was taken in accordance with the relevant internal law and is proportionate; therefore, the request for compensation should be dismissed.

Summary of facts

6. The Applicant, a seconded official, served at [REDACTED] as from January 2016 at [REDACTED]. [REDACTED] contests the disciplinary measure to transfer [REDACTED] to the lower post of [REDACTED].
7. On 28 November 2018, the [REDACTED], based on reports from staff members, including the [REDACTED], issued a notification of allegations in connection with “a series of events ...throughout May-October 2018” to the Applicant. These allegations referred to “a few occasions in May 2018, as well as in August and September 2018” where the Applicant allegedly used “inappropriate and offensive language in the workplace”. Further, the Applicant was confronted with allegations of having discriminated against team members “by not allowing them to share the same office space”. Also, the Applicant allegedly intimidated local mission members “by interrogating them during a meeting behind closed doors”. Finally, allegations were raised that the Applicant showed “preferential treatment” towards a female staff member with whom [REDACTED] allegedly had developed an intimate relationship throughout the past three years.
8. On 11 December 2018, the Applicant refuted the allegations in writing, except regarding one instance of using inappropriate language in relation to a colleague, for which regret was expressed.
9. On 22 January 2019, an investigative team was appointed to gather further information. A compilation of 16 written statements of witnesses was submitted on 29 February 2019 and sent to the Applicant who, in [REDACTED] comments of 29 March 2019, maintained [REDACTED] initial position.
10. On 18 April 2019, the matter was referred to a Disciplinary Committee (DC). The Applicant was offered the opportunity to raise objection against the composition of the committee which [REDACTED] did not.
11. In its report of 15 May 2019, the DC did not clearly establish its findings with respect to the specific allegations. Rather, pursuant to its conclusion, the DC found “that the

working environment in [REDACTED] is very difficult”, and that “the situation from May to October 2018 did not suddenly appear, but it is the result of months and years of disagreement and difficulties within the team”. The DC found further that the Applicant “made a poor personal decision in engaging in a relationship with a subordinate [REDACTED]” and that [REDACTED] “should have informed [REDACTED] supervisor ... about the relationship at an early stage”. Finally, the DC found that the Applicant “should have acted earlier in cooperation” with [REDACTED] superiors to deal with “some of the perceived personnel challenges within the Team”. The DC recommended to transfer the Applicant to another post of a lower level, in another duty station.

12. In [REDACTED] decision of 28 May 2019, [REDACTED] endorsed the recommendation of the DC. Referring to the DC’s report, it was concluded that “by engaging in and continuing the relationship” with the female [REDACTED] “which negatively affected the overall working environment in the [REDACTED], and by “holding a meeting that was perceived by some of your colleagues as intimidating and using inappropriate language ... at least on one occasion”, the Applicant was considered to have “acted in breach of Articles 1 and 6 of OSCE Code of Conduct, and of paragraphs 2.1 to 2.5 of the [REDACTED] Standards of Conduct.
13. On 24 June 2019, the Applicant filed a request for internal review. Established on 15 July 2019, the Internal Review Board (IRB), after an extensive exchange of submissions, submitted its report on 29 October 2019. The IRB checked the authenticity of the written witness statements (see above para. 9) and found that the Applicant’s doubt about the correctness of some statements (3 out of 15) “has proven (at least partially) true.” However, the IRB confirmed the DC’s conclusion that the Applicant breached the OSCE Code of Conduct and [REDACTED] Standards of Conduct “- evidence has been provided in terms of [REDACTED] inappropriate use of language in one instance and conducting a meeting with mission members that some participants judged as (very) awkward, stressful and (very) tense.” Further, with respect to the personal relationship to a female [REDACTED], the IRB saw this “not as a performance issue but as unethical.” Insofar, the IRB saw a conflict of interest, since the Applicant signed off performance reviews of this staff member. Finally, the IRB judged the non-disclosure of this relation as favoritism. The IRB recommended to reject the Applicant’s claim and [REDACTED] requested relief not to be downgraded.

14. On 18 November 2019, [REDACTED] decided to endorse the recommendation of the IRB, referring to the above views of the IRB.

15. On 16 January 2020, the Applicant submitted an application for external review.

Contentions of parties

16. The Applicant's major contentions are:

- The process has not been conducted correctly, impartially, professionally or credibly;
- The DC was not composed appropriately and did not act in line with its Terms of Reference;
- The IRB's report was not correct;
- The whole process mixed up performance issues with acts of disciplinary relevance;
- The contested decision is disproportionate and punitive.

17. The Respondent's major contentions are:

- The Organization adhered to its rules for disciplinary procedure and respected the Applicant's due process rights;
- The contested decision was taken in accordance with the Staff Regulations and Staff Rules (SRSR) and is proportionate to the gravity of misconduct;
- The request for compensation is devoid of merit.

Considerations

Merits

18. At the outset, 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 decision of 6 July 2018, OSCE PoA 2/2018, para. 25).

Procedural legality

Proceedings of the initial investigation

19. 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. Rather, this process starts, as in the present case, only with the submission of the case to a DC. Accordingly, optional investigations are not subject to further legal regulation. Indeed, it may not have been very wise to appoint the [REDACTED] as member of the investigation team. However, no rights of the Applicant were breached in the context of the informal proceedings of the initial investigation.

Composition and proceedings of the Disciplinary Committee (DC)

20. Regarding the composition of a DC, Staff Rule 9.06.1 (e) includes an option to the concerned person to object to the nomination of up to two members of the DC within three working days of being notified. The Panel takes note that the Applicant not only

failed to do so after being informed by message of 18 April 2019, but explicitly, on 25 April 2019, wrote that ■ did “not wish to submit any objections to the committee composition”. In light of these circumstances, the Applicant is now excluded from raising concerns regarding the composition of the DC.

21. As for the proceedings of the DC, the Panel does not find that the DC did “receive instructions” or acted in breach of procedural rules otherwise. Firstly, the Panel takes note that there is no ‘minimum time’ for a DC to spend on its deliberations and preparation of its report. Rather, Staff Rule 9.06.3 (f) fixes a maximum of 30 days after the referral of the case for the submission of its report. The request to finalize the report within a shorter deadline was irrelevant and can hardly be construed as an ‘instruction’. Further, the Panel notes that the DC spent 20 days on the investigation and preparation of its report, including a voluntary (see Staff Rule 9.06.3 (a)) in-person interview of the Applicant. No relevant breach of procedural rules can be found.

Substantive legality

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

Establishment of facts

23. Regarding the establishment of facts (1), the Panel takes note that the only undisputed fact is a one-time use of inappropriate language that has been admitted by the Applicant since the very beginning of the investigation.
24. Apart from that, it is unclear and/or disputed by which specific actions the Applicant, as alleged in the contested decision of 28 May 2019, “by engaging in and continuing the relationship with ■ for a considerable amount of time, which negatively affected the overall professional working environment in the ■, as well as holding a meeting that was perceived by some of your colleagues as intimidating” might have breached OSCE ■ standards of conduct.
25. At the outset, the Panel subscribes to international administrative law principles, pursuant to which in disciplinary cases the burden of proof lies with the Organization.

Further, the Panel acknowledges that the widely accepted standard of proof in disciplinary cases normally does not exceed the level of ‘preponderance of evidence’.

26. In this respect, the Panel takes note that the DC, having carefully considered the evidence, including witness statements and an interview in person with the Applicant, “did not find it possible to establish whether (the Applicant) did favor ██████ in this case”. Further, the DC held on the one hand that the meeting of 12 October 2018 “was experienced as intimidating by national staff”, whereas, on the other hand, the DC “did not find other sufficient proofs of a pattern of intimidating actions” by the Applicant.
27. The Panel further is aware of the Applicant’s extended objections against the DC’s assessment. For example, it became clear that the transcripts of statements of some participants of the meeting did not fully reflect their real views. However, there is no reasonable doubt that the meeting of 12 October 2018, organized and chaired by the Applicant, was held in a tense atmosphere which no participant considered as normal.
28. With respect to other factual elements, the Panel notes that, in ██████ final decision of 18 November 2019, ██████ seems to approve parts of the IRB’s report like “the IRB considered that your actions constituted favouritism on your part in relation to ██████ ██████ In this regard, I note the IRB's observation that you did not disclose this relationship to the Head Office at an earlier stage because of your concern for ██████ potential redeployment to a hazardous duty station in ██████. Moreover, the IRB considered the fact that you, as a supervisor, participated in decisions concerning ██████ ██████, as your subordinate, including your signing of ██████ performance appraisals, to be "unethical" and "a conflict of interest which questions [your] good sound judgment [...] as a team manager".
29. With respect to the latter statements, the Panel takes note that the specific acts mentioned therein (non-disclosure, participating in performance appraisals) have not been made part of the allegations in the initial message of 28 November 2018, nor in the referral to the DC of 1 April 2019, nor in the contested decision of 28 May 2019. As a matter of fact, the Applicant had never been confronted with these acts before the IRB mentioned them.
30. The Panel finds it necessary to clarify that it is only for the disciplinary authorities to raise specific allegations within the respective procedure. In contrast, the IRB, within

the internal review of a disciplinary decision, (just like the PoA at the level of external review) has to limit its assessment to the allegations raised in the decision under review, rather than considering other and new acts and/or omissions. Therefore, in the case at hand, newly alleged actions/omissions cannot be taken into account when assessing the legality of the contested decision.

31. Finally, the Panel notes that the Applicant's relation to ██████, in the contested decision, is considered as relevant, as it "negatively affected the overall working environment in the ██████". Such allegations do not identify and/or contain facts within the meaning of disciplinary proceedings. These allegations, even if they are true in their totality, obviously do not refer to specific acts or omissions.
32. Taken together, among the relevant facts, as alleged in the contested decision, only a one-time use of inappropriate language and the creation of a tense atmosphere at the meeting of 12 October 2018 can be considered to meet the relevant standard of 'preponderance of evidence'.

Misconduct

33. 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".
34. Given the high standards raised in the OSCE Code of Conduct, 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), the Panel cannot but conclude that the one-time use of inappropriate language as well as the awkward holding of the meeting on 12 October 2018 may be considered as misconduct.

Proportionality

35. In line with general principles of international administrative law, Staff Rule 9.04.1 requires that any disciplinary measure shall be proportionate to the gravity of the misconduct (3). In this respect, broad discretion is accepted, and it is not for the Panel to substitute the Administration's decision by its own assessment. However, such discretion is not unfettered.
36. Further, and apart from the requirements of proportionality, Staff Regulation 9.03 (c) provides that partial exoneration from the allegations may lead to disciplinary action and/or other administrative actions which may be taken as appropriate, including "issuance of a letter of reprimand", and "reflection of work performance issues in the performance appraisal".
37. Finally, Staff Rule 9.03.1 states that "should the allegations of misconduct not be serious enough to warrant initiating disciplinary action, written reprimands may be issued".
38. It follows from the above that the OSCE's internal rules on disciplinary procedure entail a system of different tools for addressing problematic conduct of its staff, pursuant to which not all kind of shortcomings should initiate disciplinary action. Rather, the application of this system asks for the use of differentiated measures as described above.
39. The Panel notes that the contested decision of 28 May 2019, based on a DC's report circumventing precise establishment of relevant acts and/or omissions, identifies the one-time use of inappropriate language and the (also one-time) mishandling of the meeting of 12 October 2020 as actions asking for disciplinary action. The contested decision then imposes a serious disciplinary measure without even considering or weighing other tools provided for in the Organization's disciplinary procedure. This approach does not meet the requirements of taking decisions within the OSCE's sanction system as described above.
40. The Panel recalls that the DC report considered the working environment in ████████ to be "very difficult" and "the result of months and years of disagreement and difficulties within the team". Regarding the Applicant's responsibility for this result, the report

accuses [REDACTED] of a “poor personal decision” with respect to the relation to [REDACTED] and considers that [REDACTED] should have informed [REDACTED] supervisors and acted earlier.

41. In the Panel’s view, in such a situation, the one-sided implementation of a massive disciplinary measure is inappropriate. The undisputed and longer-lasting tension between various members of [REDACTED] at different levels under the Applicant’s leadership and responsibility rather asked for higher-level management activities than shifting to disciplinary action.
42. The Panel respects [REDACTED] broad discretion in disciplinary cases and will not lightly interfere. However, in the present case, two singular events of limited weight – use of inappropriate language and mishandling of a meeting – did not justify the imposition of the third most serious measure among a list of eight possible courses of action (including reprimand procedures).
43. It is the Panel’s overall impression that the Organization considered the transfer of the Applicant to another post of a lower level to be an effective way to repair the unfortunate situation at [REDACTED]. However, disciplinary action is not a tool to be used to serve the purposes of performance management. Every disciplinary measure has to be balanced against the concrete misconduct of the concerned staff member. The contested decision fails to do so.

Remedies

44. 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. In addition, the Panel may award costs to be reimbursed to a successful applicant for properly vouched legal fees and expenses incurred by the Applicant, taking into account the nature and importance of the dispute.
45. In light of the above, the Panel recommends to rescind the contested decision. That does not mean that the Applicant has to be fully exonerated from all allegations. The

Organization may choose to proceed along the lines described (see paras. 36 and 37).
However, the contested decision cannot stand for the reasons outlined above.

46. Should the impugned decision not be rescinded, the amount of compensation is fixed at 10.000 EUR.

47. In addition, and independently from the above, the Applicant is granted 5.000 EUR compensation for moral damage.

48. Further, the successful Applicant is granted 1.500 EUR as a contribution to legal fees and expenses.

49. All other pleas are rejected.

Done on 17 December 2020



Thomas Laker

Chairperson



Jenny Schokkenbroek

Deputy Chairperson



Catherine Quidenus

Member