

**DECISION OF THE PANEL OF ADJUDICATORS OF THE OSCE WITH
REGARD TO THE EXTERNAL APPEAL BY ██████████
(CASE No: OSCE PoA 46/2019)**

Proceedings

1. The Chairperson of the Panel of Adjudicators (PoA) of the OSCE received on 20 November 2019 a letter from the Chairperson of the Permanent Council of the OSCE transmitting an external appeal by ██████████ (Applicant) which had been forwarded to ██████ on 8 November 2019.
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 22 November 2019 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 23 December 2019. The Respondent forwarded his reply on 19 December 2019 which was transmitted to the Applicant, advising ██████ that ██████ has a right to file a rebuttal which ██████ did on 23 December 2019.
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 8 and 9 October 2020. The Panel was composed of its Chairperson, Mr. Thomas Laker, its Deputy-Chairperson, Ms. Jenny Schokkenbroek, and its member, Ms. Anna Csorba.
4. After examining all the documents submitted to it, the Panel noted that the Applicant wants to be exonerated from allegations of misconduct, further, ██████ claims compensation of 250.000 EUR for an incident while on duty on 1 June 2018, resulting in work incapacity.
5. The Respondent, pursuant to his reply, is of the view that the measures taken with regard to the allegations were reasonable and responsible, and that the claim for compensation should be processed in a different venue.

Summary of facts

6. The Applicant, who had been serving with different OSCE missions for the maximum period, was exceptionally appointed as [REDACTED] with [REDACTED] [REDACTED] on a Short-Term Assignment (STA) until 15 June 2018.
7. On 29 May 2018, the Applicant was informed about the details of [REDACTED] separation from service, due to the expiration of [REDACTED] appointment on 15 June 2018.
8. On 1 June 2018, the Applicant was officially informed about allegations that [REDACTED] had behaved inappropriately towards two female residents who had reported these events on 28 May 2018. [REDACTED] was given the opportunity to respond to the allegations until 15 June 2018. Further [REDACTED] was put on administrative leave with pay “until further notice”.
9. Also, on 1 June 2018, the Applicant sustained an injury on duty which [REDACTED] reported on 4 June 2018.
10. On 5 June 2018, [REDACTED] was asked by one of the OSCE’s Medical Doctors via phone about [REDACTED] condition and whether [REDACTED] needed help. According to the report of 4 July 2018, the Applicant’s answer was that everything was ok and that [REDACTED] needed no help (see Annex 11 to the Respondent’s reply).
11. From 7 to 22 June 2018, the Applicant was hospitalized [REDACTED] [REDACTED]
12. In a message of 13 June 2018, the Applicant rejected the allegations of inappropriate behavior. At the end of [REDACTED] submission, the Applicant expressed [REDACTED] hope that following a promise given to [REDACTED] that [REDACTED] would have “2 (two) STA extensions”.
13. On 15 June 2018, the Applicant was separated from the OSCE upon expiry of [REDACTED] STA.
14. On 24 June 2018, in a message addressed to [REDACTED] [REDACTED] the Applicant requested to be informed “about my OSCE [REDACTED] legal status in reference to the ... Notification of Sexual Harassment dated on 1.06.2018.”

15. On 27 September 2018, [REDACTED], under the authority delegated to [REDACTED], referring to the notification of allegations of 1 June 2018, informed the Applicant of the decision to close the case in view of the Applicant's separation from service, and of the decision to place the notification and its annexes in the Applicant's OSCE personnel file, together with [REDACTED] response.
16. In an email of 9 October 2018, addressed to [REDACTED], the Applicant referred to the decision of 27 September 2018 and asked for "full exoneration from the allegations". Further, [REDACTED] was, "based on Regulation 10.01. - ... definitely asking for Internal Review of (the) impugned decision."
17. On 8 November 2018, the Applicant filed [REDACTED] request for internal review in the form prescribed by Staff Rule 10.01.1. In this request, the Applicant exclusively addresses the decision of 27 September 2018; no single word is directed to the incident of 1 June 2018.
18. In February 2019, an Internal Review Board (IRB) was established. In the first part of [REDACTED] rejoinder dated 9 May 2019, the Applicant addresses the decision of 27 September 2018. In a second part (as from para. 15 of said document), the Applicant, "in the interest of completeness", mentions [REDACTED] injury of 1 June 2018 and claims that [REDACTED] appointment should have been extended while being on sick leave.
19. Following extensive exchanges between the parties, on 3 July 2019, the IRB submitted its final report, recommending to reject the Applicant's claims related to the decision dated 27 September 2018 as well as the claim for compensation. The IRB report includes as well a recommendation to reject the Applicant's claim that [REDACTED] STA should have been extended on account of [REDACTED] purported injury on duty.
20. On 8 August 2019, the Secretary General endorsed the recommendations of the IRB.
21. The Applicant filed [REDACTED] request for external review by email dated 7 October 2019.

Contentions of parties

22. The Applicant's major contentions are:

- The investigation into the allegations of inappropriate behavior was flawed because the information was obtained in violation of investigation rules;
- ██████ should be exonerated from the unproven allegations;

- ██████ STA should have been extended on account of ██████ purported injury on 1 June 2018;

- ██████ should be granted compensation of 250.000 Euro for work incapacity due to occupational illness and to the incident of 1 June 2018.

- ██████ should also be granted compensation for loss of earnings for more than ten years and moral damages.

- The PoA failed to complete the proceedings within the legal time-frame.

23. The Respondent concedes that the rules on extension of appointment in cases of sick leave are applicable on the Applicant's STA. However, it is submitted that

- It was reasonable and responsible to close the Applicant's case and to place the notification of allegations, together with the Applicant's response, in ██████ OSCE personnel file;

- ██████ was not in position to assess whether the Applicant had indeed incurred injury giving rise to a potential extension of ██████ appointment;

- Claiming compensation for purported disability resulting from the performance of official duties needs to be processed through the OSCE's insurance company;

- The request to be awarded compensation as part of the proceedings at hand is without merit.

Considerations

Procedural issues

Timeliness of the proceedings

24. Pursuant to Art. VIII para. 1 of the Terms of Reference of the PoA (Appendix 2 of the Staff Regulations and Staff Rules), the Panel shall take its decision within six months upon receipt of the application by the Chairperson of the Panel, “to the extent possible”. Pursuant to Art. VII para. 4 of these Terms of Reference, adjudication sessions shall be held in Vienna.
25. Having received the application on 20 November 2019, the Panel notes that due to the various travel restrictions as a result of the Covid-19 pandemic, as from middle of March 2020 it was impossible to hold adjudication sessions in Vienna. In order to avoid unnecessary delay, as an exceptional measure, the Panel started to hold its deliberations via video-conference. The Applicant was informed accordingly in July 2020.
26. Considering these circumstances, it was not possible to take the decision in the present case within six months upon receipt of the application.

Jurisdiction of the Panel

27. It follows from Staff Regulation 10.02 that the Panel is competent to hear final appeals “against an administrative decision” directly affecting a staff/mission member.
28. The panel takes note that in all matters regarding █████ claim of disability resulting from the performance of official duties, the Applicant has been advised to address these claims to an insurance company that OSCE has contracted to provide compensation in case of respective incidents (see Staff Regulation 6.04 and Staff Rule 6.04.2 (b)).
29. The Panel notes further that, to the best of its knowledge, no administrative decision with respect to disability claims has been taken yet. As long as no such administrative decision has been taken, the Panel has no jurisdiction.

Request for internal review

30. Pursuant to Staff Rule 10.01.1 (b) and (c), a request for internal review shall be submitted in writing to the Secretary General or the head of institution/mission responsible for taking the impugned decision; further the request shall specify date and references of the impugned decision, the date of notification, the aspects of the decision that are challenged, and arguments for asking the review. Further, the request shall be submitted in accordance with the form set out in a Staff Instruction issued by the Secretary General. Finally, pursuant to Staff Regulation 10.01(c), to be considered, an appeal shall be lodged within thirty days from the date of the notification of the impugned decision.

31. For a request for internal review it is not sufficient to express some general disagreement. Also, statements that a potential applicant “would indeed like to appeal“ (see Panel’s decision of 24 November 2017, OSCE PoA 2/2017, para. 16), or “would now like to initiate the appeal mechanism ... suggested to me” (see Panel’s decision of 25 August 2020, OSCE PoA 45/2019, para. 13) do not meet the requirements quoted above. Rather, the written submission has to reflect the substantial elements of Staff Rule 10.01.1, whereas the use of the prescribed form is a mere formality in order to ease the administrative process.

Closure of the case of allegations of inappropriate behavior and decision to place the relevant documents in the personnel file (decision of 27 September 2018)

32. The Panel notes on the one hand that the Applicant submitted the prescribed form for requests for internal review only on 8 November 2018, i.e. after the expiry of the thirty-day time-line for lodging an appeal, as required by Staff Regulation 10.01 (c).

33. On the other hand, it is also noted that, by email of 9 October 2018, addressed to [REDACTED], the Applicant already explicitly referred to Staff Regulation 10.01 and asked for internal review of the decision of 27 September 2018. Further, [REDACTED] presented arguments for asking the review.

34. Considering the clear and unambiguous wording of said email of 9 October 2018, the Panel considers that this message fulfills all essential requirements of a request for internal review within the meaning of Staff Rule 10.01.1. Also, it is addressed to the competent official within the Organization. Therefore, in the present case, a valid request for internal review was lodged within the prescribed time-line.

Separation from service on 15 June 2018 and non-extension of appointment

35. Pursuant to Staff Rule 4.01.1 (a), appointments shall expire automatically without notice on the expiration date specified in the letters of appointment or terms of assignment, unless they are extended under Staff Regulations 3.08 and 3.11. Further, pursuant to Staff Rule 7.05.5, the appointment of OSCE officials who have incurred illness or suffered injury in the performance of official duties shall be extended for the purpose of the additional sick leave.

36. The Panel takes note that the Applicant, in █████ messages of 13 June 2018 and of 24 June 2018, did not ask for an internal review of █████ separation from service that had been announced to █████ by email of 29 May 2018. In the email of 13 June 2018, the Applicant merely refers to an alleged promise for two STA extensions. In the email of 24 June 2018, the Applicant only asks for information about █████ legal status in reference to the allegations of misbehavior. None of these messages include the necessary elements of a request for internal review of the Applicant's separation from service and/or the decision not to extend █████ STA, as described above.

37. The Panel further notes that in the request for internal review of 9 October 2018, neither the separation from service nor the non-extension of contract are mentioned.

38. Regarding the Applicant's rejoinder of 9 May 2019 in the procedure before the IRB, when the Applicant explicitly - and for the first time - referred to Staff Rule 7.05.5, the Panel notes that the thirty-day time line for lodging a request for internal review regarding the non-extension of contract had expired by far.

39. The Panel is aware of the fact that the Applicant was in poor health condition following the accident on 1 June 2018. However, █████ injury did not prevent █████ from writing the messages of 13 June 2018 and of 24 June 2018. Therefore, the Panel assumes that the

45. The same follows from the catalogue of disciplinary measures, as provided for in Staff Regulation 9.04. None of the measures exhaustively listed therein may take any effect upon a person who is not or no longer a staff/mission member.
46. As no satisfactory investigation could have been completed before the Applicant's separation, the disciplinary procedure needed to be closed after this date without further action. In this situation, the Applicant's request for exoneration is not justified.

Decision to place relevant documents in the personnel file

47. The Panel takes note that, as the Respondent rightly concedes, the OSCE internal rules on Disciplinary Procedure laid down in Art. IX of the Staff Regulations and Staff Rules, do not provide a legal basis for the placement of documents about disciplinary proceedings after the separation from service of the concerned (former) staff/mission member.
48. Considering this lack of statutory basis, it is not sufficient that para 9.1 of Staff Instruction No. 21/Rev.1 On OSCE's Policy on the Professional Working Environment (SI 21) allows for a placement of a note in the personnel file of an alleged offender in cases of resignation of the alleged offender. Obviously, in the present case, the alleged offender did not resign; rather ■■■ was separated from service due to the end of ■■■ appointment. Further, the initial allegations were raised by two non OSCE persons and, therefore, do not deal with improper behavior within the meaning of SI 21 which is restricted to misbehavior among OSCE colleagues. Finally, para. 9.1 of SI 21 only allows for a note disclosing that the alleged offender resigned while under investigation for allegations of violation of SI 21; such disclosure does not include the placement of the concrete allegations etc., as it is intended in the present case.
49. Neither Staff Instruction No. 6/Rev. 1 on Personnel Files (SI 6) forms a sufficient legal basis. Para. 5.2 (c) relates, *inter alia*, explicitly to "disciplinary measures" only. No such measures are at stake. Finally, it is not appropriate to consider the allegations raised against the Applicant as mere "Miscellaneous" in the sense of SI 6, para. 5.2 (g).
50. In the absence of a sufficient legal basis, and given its potential negative effect, the placement of documents about the allegations cannot stand.

Separation from service on 15 June 2018 and non-extension of appointment


51. Pursuant to Staff Regulation 10.02., the right of final appeal to the PoA is granted “further to the procedure established in Regulation 10.01.”, i.e. the internal appeals procedure. Further, Staff Rule 10.02.2 (d) (i) states that an application to the PoA shall not be admissible unless it complies with the requirements of the internal appeals procedure.
52. Read together, pursuant to established jurisprudence of the Panel, it follows from these provisions that access to the PoA can only be granted where the formal requirements of the internal appeals procedure have been met (see, e.g., decisions of 24 November 2017, OSCE PoA 2/2017, para 26; of 20 April 2018, OSCE PoA 4/2017, para. 29; of 14 September 2018, OSCE 3/2018, para. 30; of 15 May 2020, OSCE PoA 1/2020, para. 24). Since, in the present case, the initial appeal with respect to the separation from service and to non-extension of appointment has not been lodged within the time-limit (see above paras. 35 – 40), the Panel is prevented from entering into a discussion of the merits (see also Appendix 12, Art. III 3. (b) regarding the procedure of the IRB).

Conclusion

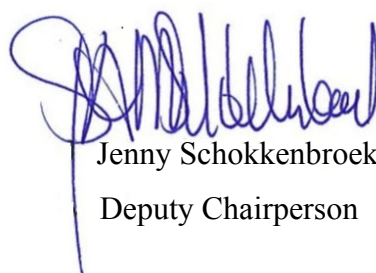
53. It follows from the above that it is recommended to rescind the decision of 27 September 2018 in part. Therefore, the notification of 27 September 2018, together with copies of the notification of 1 June 2018 and its annexes and the Applicant’s response to it shall not be placed in the Applicant’s personnel file. Should the impugned decision not be rescinded in this respect, the amount of compensation to be paid to the Applicant is fixed at 2000 EUR.

54. All other pleas are rejected.

Done on 9 October 2020



Thomas Laker
Chairperson



Jenny Schokkenbroek
Deputy Chairperson



Anna Csorba
Member