

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

(CASE No: OSCE PoA 6/2021)

Proceedings

1. The Chairperson of the Panel of Adjudicators (PoA) of the OSCE received on 28 October 2021 a letter from the Chairperson of the Permanent Council of the OSCE transmitting an external appeal which had been forwarded to her on 14 October 2021. In this appeal, ██████████ (Applicant), a former seconded ██████████ ██████████, contests the disciplinary measure of a written censure with transfer to another post of the same category in another duty station.
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 October 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 November 2021. The Respondent forwarded his reply on 26 November 2021, which was transmitted to the Applicant on 30 November 2021, advising ██████ that ██████ has a right to file a response. On 2 and 3 December 2021, the Applicant filed ██████ response.
3. In accordance with Article VI of the Terms of Reference of the Panel (ToR), the Chairperson of the Panel convened the Panel on 17 and 18 March 2022 at the Hofburg. 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 video-conference.
4. After examining all the documents, the Panel noted that the Applicant requests the Panel to order the rescission of the disciplinary measure, as well as financial compensation above 60.000 Euro, or “a guaranteed three-year Contracted P2 Position back” to ██████ ██████.

5. The Respondent, pursuant to his reply, emphasizes that the review of the application should be limited. He 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. On 23 November 2019, the Applicant, in ■ capacity as ■, led a patrol of two vehicles in a village in a non-government controlled area ■, in close proximity to the so-called “line of contact”. As a matter of fact, the Applicant requested the driver of ■ vehicle to use a road which was not marked as a so-called “blue line/blue road” in the patrol plan. Further, the Applicant did not inform Operations about this deviation from the roads indicated in the patrol plan.
7. In connection with this patrol, on 5 December 2019, a security assessment report was prepared. Pursuant to this report, the Applicant diverted from the patrol plan onto a non-usable road. As a result, the next day the Applicant was suspended from ■ function as a ■.
8. Additional information by two other members of the respective patrol was sought. In ■ statement of 31 December 2019, the ■, being in charge of the second vehicle, explained that the patrol did not follow the approved routes and was led onto a dirt road. The female driver of the Applicant’s patrol car, with only little experience, testified that the Applicant had announced to “stress [her] out today” before instructing her to drive on a dirt road. Both members felt misled by the Applicant by saying that the used road had been “cleared”.
9. On 24 January 2020, the Applicant was requested to supply additional information which ■ did in detail by a statement of 13 pages on 28 January 2020, contesting that ■ diverted from the patrol plan onto a non-usable road.

Contentions of parties

19. 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;
- ■ has not been treated equally and with respect;
- The maps included in the patrol plan are only recommendations;
- The roads were usable within the meaning of the accessible Standard Operation Proceedings;
- Other patrols continue to use un-cleared roads;
- It was discriminatory to interview only two members of the patrol.

20. 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

Composition of the Panel

21. Pursuant to Article VI of the Panel's ToR, the Chairperson shall compose the Panel which will examine the application. "To the extent possible", this Panel shall have the same composition for the entire period needed to settle the case (see Appendix 2 to the Staff Regulations and Staff Rules - SRSR). Further, pursuant to Article VII, para. 4 of the ToR, adjudication sessions shall be held in Vienna.

22. In the present case, due to unforeseeable, short-term restrictions on air travel, one initially appointed and invited Panel member was unable to join the session in person. Since this member has never participated in any Panel session by then, its participation via video-conference as an exceptional measure was considered not to be appropriate. Therefore, the Chairperson decided to replace it by another available and experienced member of the Panel.

Scope of the Application

23. At the outset, it is deemed necessary to emphasize that the disciplinary measure taken with respect to the incidents during a patrol on 23 November 2019 is the only decision brought properly before the Panel. Pursuant to Article I, para. 1, of the ToR, the Panel "shall be competent to decide on final appeals filed by fixed-term staff/mission members against administrative decisions affecting them". Therefore, the Applicant's efforts to extend the perspective to other and past issues, including allegations of bullying and intimidation practices (2014), the crash of an airplane (2014), or sexual harassment (2016) must be firmly rejected.

Merits

24. The Panel reiterates that, pursuant to established principles of international administrative law and its own 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; of 4 March 2022, OSCE PoA 2/2021, para. 20).

Procedural legality

25. It is a recognized 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 SRSR, staff/mission members shall be advised in writing of the allegations "at the earliest practicable time".

26. The Panel notes that, in the present case, the incident at stake took place on 23 November 2019, whereas the allegations of misconduct were notified to the Applicant only on 4 May 2020, *i.e.* nearly half a year later.

27. However, it has to be taken into account that additional information was sought from witnesses (end of the year 2019) as well as from the Applicant (end of January 2020). Given the detailed Applicant's report of 28 January 2020, in the Panel's view, the notification of allegations about three months later can be considered as still being 'in time' within the meaning of the internal rules.

28. Further, the Panel notes that more than a year passed by from the notification of the allegations (beginning of May 2020) until the upholding of the disciplinary measure (end of July 2021). The Panel reiterates that in disciplinary proceedings, swift and prompt action needs to be taken in the interest of the concerned person as well as of the Organization (see decision of 3 March 2022, OSCE PoA 2/2021, para. 23). As the chairpersons of both the DC as well as of the IRB had to be replaced, the overall duration of the internal proceedings is deemed to be acceptable and justified by the specific circumstances.

29. Finally, the Panels recalls that, pursuant to Article VII, para. 2, of the Internal Appeals Procedure (Appendix 12 to the SRSR), the Secretary General or the respective head of institution/mission shall not be bound by the recommendations of the IRB. Therefore, the [REDACTED] did not exceed [REDACTED] competence when [REDACTED] decided not to follow the recommendation in the IRB report to clear the Applicant “of all accusations”. On the contrary, the [REDACTED] had all the more reason not to adhere to the IRB’s recommendation since the IRB failed to address all accusations raised in the contested decision: Whereas the contested disciplinary measure is, *inter alia*, based on the Applicant’s behavior vis-à-vis the vehicle’s driver, the IRB’s findings are limited to the allegations regarding the use of an uncleared road and does not include any considerations with respect to the Applicant’s attitude towards other members of the patrol. Thus, as the IRB report does not cover all of the allegations, it is to be considered as incomplete and of limited relevance.

Substantive legality

Establishment of facts

30. 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). Where a mere written censure with transfer to another post of the same category is at stake, no stricter standard needs to be applied (cf. decision of 3 March 2022, OSCE PoA 2/2021, para. 26).

31. In the present case, the facts are not disputed: There may be no doubt that, on 23 November 2019, the Applicant ordered the driver of ■ patrol vehicle to leave the roads indicated on the patrol plan (blue line) at two incidents. Further, the Applicant does not contest the correctness of ■ driver's written statement, pursuant to which, at the beginning of the patrol, ■ had announced to "stress [her] out today". Finally, the Panel takes note that the Applicant neither informed Operations of ■ plans to deviate from the blue line, nor did ■ ever give any kind of explication or justification for such deviation.

Misconduct

32. 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 reiterates 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" (see decision of 17 December 2020, OSCE PoA 2/2020, para. 33).

33. The Panel also takes note of the high standards raised in the OSCE CoC, requiring that OSCE Officials "shall conduct themselves at the highest personal and professional level at all times" (Article 1 of the CoC); further they "shall make every effort to ensure the security of the ... mission they are assigned and of its individual ... mission members, and shall follow closely all instructions regarding safety and security matters" (Article 10 of the CoC). Also, they have – via an inclusion of the OSCE Policy on the Professional Working Environment (see Article 6 of the CoC) – a duty to "be respectful to their colleagues and maintain the highest standards of conduct" and "behave in a manner that is free of intimidation ..." (para. 7.1 of Staff Instruction No.21/Rev. 1 on OSCE Policy on the Professional Working Environment).

34. The Panel is aware of the Applicant's view that ■ did no wrong while using the roads at stake which were not part of the approved patrol plan, arguing that the so-called 'blue line' are mere recommendations, a view supported by the IRB report. However, even the

IRB conceded that the Applicant “should have contacted Operations to clear the choice ■ made and receive a go-ahead before changing course”. The Panel notes that the Applicant failed to do so. Further, the Panel notes that the Applicant at no occasion gave any explanation about the reason(s) for the deviation from the planned route. Thus, the Panel holds that the Applicant did not fulfill ■ duty to make every effort to ensure the security of the patrol ■ was leading. In light of this strict standard, it is of no relevance whether or not, according to the IRB report, “the reality varies during patrols”.

35. In addition, the Panel takes note of the Applicant’s provocative, if not intimidating announcement towards ■ vehicle’s driver, an unexperienced female patrol member, to stress her out during the patrol. It is obvious from the witness’ report that the Applicant did so by ordering her twice to use roads that were in a critical state. This attitude is clearly not in line with the requirements of personal conduct as established in the provisions quoted above.

36. It follows from the above that the Applicant’s behavior during the patrol of 23 November 2019 amounted to misconduct in more than one respect.

Proportionality

37. In line with general principles of international administrative law, Rule 9.04.1 of the SRSR 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 (see decision of 15 March 2021, PoA 4/2020, para. 32.)

38. The Panel takes note that the contested decision of written censure with transfer to another post of the same grade in another duty station in the mission area is ranking as second lowest/mildest among the seven disciplinary measures as established for seconded staff/mission members in Regulation 9.04 (b) of the SRSR. Considering that the Applicant’s behavior during the patrol at stake violated more than one of ■ official duties as established by the OSCE’s internal law, the Panel sees no reason to determine the comparatively mild disciplinary measure to be disproportionate.

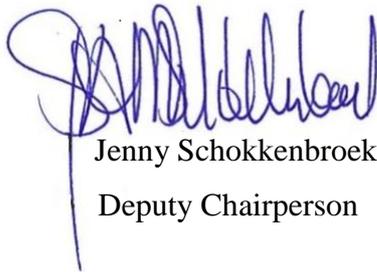
39. As the contested decision is legal, its rescission is not recommended. Further, neither the appointment of the Applicant to a contracted position nor compensation for loss of earnings are appropriate.

40. In view of the above, the application is rejected in its entirety.

18 March 2022



Thomas Laker
Chairperson



Jenny Schokkenbroek
Deputy Chairperson



Anna Csorba
Member