

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

(CASE No: OSCE PoA 3/2020)

Proceedings

1. The Chairperson of the Panel of Adjudicators (PoA) of the OSCE received on 30 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 23 March 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 8 April 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 8 May 2020. The Respondent forwarded his reply on 8 May 2020 which was transmitted to the Applicant, advising ██████ that ██████ has a right to file a rebuttal which ██████ did – after being granted extension of time - on 12 May 2020.
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 28 and 29 January 2021. 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 decision to terminate the Applicant's assignment for medical reasons, payment of 10.000 Euro for non-material damage, and legal fees of 4.800 Euro.
5. The Respondent, pursuant to his reply, is of the view that the contested decision was taken in accordance with the relevant internal law; therefore, the request for compensation should be dismissed.

Summary of facts

6. As this case touches upon sensitive personal issues like the health status of the Applicant, at the outset, the Panel wishes to emphasize that its assessment is based on medical documents voluntarily and unsolicitedly presented by the Applicant. Nevertheless, the Applicant's privacy will be protected to the extent possible.
7. The Applicant, a seconded official, served as [REDACTED] since November 2015. In September 2018, upon return from leave, [REDACTED] was re-assigned to the [REDACTED], where [REDACTED] served until the termination of [REDACTED] assignment for medical reasons on 30 June 2019.
8. On 28 February/ 1 March 2019, the Applicant was hospitalized in [REDACTED]. Pursuant to the discharge report of the Hospital, the Applicant had [REDACTED]. Being somnolent, lethargic and answering questions with delay, it was decided to apply [REDACTED]. After being medically evacuated to [REDACTED] home country on 6 March 2019, where [REDACTED] was hospitalized for another five days, the Applicant was deemed not fit to work in [REDACTED] on 6 March 2019. On 20 March, the Applicant was informed accordingly and requested to undergo medical assessment of [REDACTED] fitness to work by [REDACTED] treating medical practitioner.
9. On 29 March 2019, the Applicant submitted to the [REDACTED] a statement of fitness to work, issued by [REDACTED] doctor of choice. [REDACTED] was then, on 15 April 2019, examined by a third medical practitioner who, in his statement received on 17 May 2019, concluded that the Applicant was not fit to work in [REDACTED].
10. On 29 May 2019, the Applicant was informed about the decision to terminate [REDACTED] assignment for medical reasons effective 30 June 2019.
11. On 6 June 2019, the Applicant submitted a request for internal review. After its establishment and partial re-composition, the Internal Review Board (IRB) submitted a report on 3 December 2019, recommending to uphold the contested decision. This recommendation was endorsed by the [REDACTED] on 20 December 2019.

12. On 18 February 2020, the Applicant submitted a request for external review.

Contentions of parties

13. The Applicant's major contentions are:

- ■■■ was subject to harassment campaigns leading to a deterioration in ■■■ health;
- The medical examination process was biased, irregular and subjective;
- The deterioration of ■■■ health does not amount to unfitness to work.

14. The Respondent's major contentions are:

- The Applicant's allegations of harassment should have been submitted in other venues and are irrelevant for the unfitness to work issue in the present case;
- The termination of the Applicant's assignment for medical reasons was in line with the relevant internal rules of the Organization;
- There is no evidence that the Applicant's case was treated in an irregular way;
- The request for compensation is devoid of merit.

Considerations

Scope of the application

15. The Panel takes note that the contested decision of 29 May 2019 is limited to the question of the Applicant's inability to perform ■■■ functions for medical reasons. Pursuant to Staff Rule 4.02.4 (a), the respective mission member's assignment "shall be terminated for medical reasons if he/she is unable to perform his/her functions as a consequence of an infirmity or a diminution of his/her physical or mental faculties".

16. Pursuant to the wording of the relevant rule (“... shall be terminated ...”), there is no discretion as to whether an assignment may or may not be terminated once the respective medical reasons are established.
17. Further, it is generally neither necessary nor appropriate to inquire about the sources or causes for the infirmity or diminution of the physical or mental faculties. Indeed, the only relevant question is whether the medical reasons are established or not.
18. Finally, evaluating diverging medical reports and statements with respect to their contents would not be within the Panel’s competence. However, it is within the Panel’s competence and duty to check whether such reports show any inconsistency, or neglect relevant factual circumstances, or plainly misread the evidence.
19. It follows from the above that the Applicant’s allegations about being harassed on different occasions by more than one Team Leader during [REDACTED] assignments to the [REDACTED] cannot and will not be addressed in the present assessment. The proper venue for such concerns is laid down in Staff Instruction No. 21/Rev.1 on the OSCE Policy on the Professional Working Environment. Documents in the file indicate that the Applicant was informed about the procedure and decided - for whatever motives - not to avail [REDACTED] of this option. Although the Applicant’s experience with [REDACTED] supervisors may have affected [REDACTED] health in various ways, for the present application, the only relevant question is whether [REDACTED] was unable to perform [REDACTED] functions as a consequence of an infirmity or a diminution of [REDACTED] physical or mental faculties at the time [REDACTED] assignment was terminated.

Merits

Procedural legality

20. Pursuant to Staff Rule 4.02.4 (b), a mission member’s inability to perform his/her functions shall be recorded jointly by a medical practitioner approved by the OSCE and a duly qualified medical practitioner treating the mission member concerned. In the event of a disagreement, a third medical practitioner shall be consulted. As a consequence of this procedure, the view of the third medical practitioner shall prevail.

21. The Panel takes note that, after the incident of 28 February 2019, on 6 March 2019, the Applicant was deemed permanently unfit to work in the [REDACTED], whereas the Applicant presented a statement of fitness to work by [REDACTED] doctor of choice on 29 March 2019. Consequently, on 5 April 2019, the Applicant was invited to present [REDACTED] for a third medical examination on 15 April 2019 which [REDACTED] did. The contested decision was taken in accordance with the assessment of the third doctor. Therefore, the prescribed procedure was applied, and no procedural errors can be found.
22. The Applicant's concerns regarding an alleged lack of specialization and expertise of the third doctor are without merit. Firstly, the relevant rules do not require a specific specialization. Secondly, the Applicant's doctor of choice does not possess any relevant specialization either, and finally, concerns of such kind should be raised prior to the examination and notification of its result.

Medical reasons for termination of assignment

Applicable standard with regard to the location of deployment

23. Pursuant to para. 10 of the Terms of Assignment, signed by the Applicant on 31 March 2018, the Head of Mission was entitled to assign and re-assign the Applicant to any location within the [REDACTED], including arduous, high-stress or hazardous environments. It follows that the ability of a staff member to perform official functions, taking into account medical circumstances, needs to be guaranteed for the mission area in its totality. Therefore, it is of no relevance whether the Applicant was deployed in a safe part of the mission area; further, it is not necessary to evaluate the degree of possibility that [REDACTED] might have been deployed in a more dangerous part.

Establishment of unfitness to work

24. As pointed out above (see para. 18), it is not for the Panel to assess the decisive third doctor's evaluation in terms of its substance. However, serious shortcomings regarding consistency, relevant factual circumstances, or plain misunderstanding of the evidence will be checked.

25. The Panel is aware of the Applicant's detailed objections against the third doctor's report dated 17 April 2019, in particular regarding specific aspects of the anamnesis included therein. Thus, the Applicant complains, e.g., about an alleged misinterpretation of ■ hospitalization in 2015, a medical evacuation in 2016 or the events end of February 2019. Based on ■ own perception, the Applicant further considers the third medical examination to be "clearly biased and subjective" and alleges a "lack of impartiality".
26. On the other hand, the Panel takes also note that some crucial factual statements of the third doctor's report are undisputed. For example, the Applicant does not deny that ■ took a very high number (■ according to ■ own description, more than ■ according to the hospital's discharge report) of ■, although allegedly "inadvertently". Also, as a matter of fact, the Applicant consequently had to be transported to a hospital in ■ on 1 March 2019 where ■ underwent ■ and ■. Finally, according to another unchallenged statement in the third doctor's report, in an email of 26 April 2019, the Applicant admits ■ illness and the necessity of therapy. Further, in this email, ■ submitted medical prescriptions from ■ doctors of choice for ■ one of which dates back to January 2019, i.e. prior to the incident end of March 2019.
27. The Panel takes note that no verifiable evidence was presented with respect to the Applicant's allegations of bias, subjectivity, and/or lack of impartiality. Even if the third doctor may have misinterpreted single elements of the Applicant's anamnesis, the medical report in its totality does not reveal serious shortcomings with regard to consistency, relevant factual circumstances, and interpretation of the evidence. On the contrary, the report indicates in a comprehensible way that the Applicant's overall medical status is characterized by a remarkable degree of fragility, lability, and lack of balance which is in need of therapy. Its conclusion, i.e. the Applicant's permanent inability to perform the demanding functions as an official within the challenging environment of ■, is well founded.

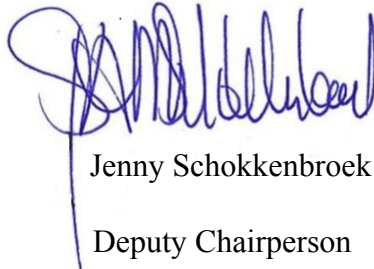
Conclusion

28. It follows from the above that there are no reasons to recommend the rescission of the contested decision.
29. As the contested decision is not deemed illegal, no compensation for non-material damage is justified.
30. Finally, as pursuant to Art. VIII para. 5 of the Panel's Terms of Reference (Appendix 2 to the Staff Regulations and Staff Rules), legal fees and expenses can only be reimbursed to successful applicants, compensation of such costs cannot be ordered in the present case.
31. In light of the above, the application is rejected in its entirety.

Done on 29 January 2021



Thomas Laker
Chairperson



Jenny Schokkenbroek
Deputy Chairperson



Catherine Quidenus
Member