

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

(CASE No: OSCE PoA 4/2020)

*Proceedings*

1. The Chairperson of the Panel of Adjudicators (PoA) of the OSCE received on 7 May 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 24 April 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 May 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 June 2020. The Respondent forwarded his reply on 8 June 2020 which was transmitted to the Applicant, advising ██████████ that ██████████ has a right to file a rebuttal which ██████████ did on 29 June 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 11 and 15 March 2021. 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 submitted to it, the Panel noted that the Applicant's main relief claimed is rescission of ██████████ dismissal with immediate effect, reinstatement as ██████████, and payment of lost earnings.
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 [REDACTED] since early 2018.
7. On 10 April 2018 around 4.30 p.m., the Applicant sent a so-called ‘friend request’ on a widespread social media platform to one of [REDACTED] local staff subordinates whom [REDACTED] had met a few days earlier for the first time. The following electronic conversation, dealing with the addressee’s health issues, came to an end at around 6.00 p.m.. Nearly four hours later, the Applicant sent a photograph showing [REDACTED] to the said staff member, followed by an immediate message reading “Sorry! Delete Hi”.
8. Having received a message from that local staff member reading “Deleted and let’s act as if I haven’t seen anything” in the afternoon of 12 April 2018, the Applicant continued to send neutral messages to [REDACTED] on 13, 15, 26, and 27 April, in May, November, December 2018 and at the beginning of 2019.
9. It took some time until the incident of 10 April 2018 was reported to the competent authorities. On 25 March 2019, an investigation in relation to the incident was initiated. The Applicant was informed accordingly, and, in addition, [REDACTED] was placed on administrative leave with pay. On request by the investigators, the Applicant, *inter alia*, described the technical process of producing and sending electronic photographs on the social media platform as comprising five different steps.
10. On 3 May 2019, the Applicant received a formal notification of allegations, informing [REDACTED] that [REDACTED] behavior may constitute a breach of Articles 1 and 6 of the Organization’s Code of Conduct as well as of paragraphs 2.2 – 2.4 and 3.1 of the [REDACTED] Standards of Conduct.
11. In [REDACTED] response to the notification, dated 16 May 2019, the Applicant admitted to having sent the photograph, however inadvertently.
12. On 30 May 2019, the [REDACTED] held that the Applicant’s actions constituted serious misconduct and decided to dismiss [REDACTED] with immediate effect.

13. On 25 June 2019, the Applicant filed a request for internal review. After the establishment of an Internal Review Board (IRB), several statements were submitted. In its report of 27 December 2019, the IRB recommended to uphold the contested decision.

14. On 27 January 2020, the [REDACTED] decided to endorse the recommendation.

15. On 20 March 2020, the Applicant submitted the present request for external review.

### *Contentions of parties*

16. The Applicant's major contentions are:

- [REDACTED] did not send the inappropriate photo to [REDACTED] subordinate deliberately; the photo was intended for another person ([REDACTED] then partner);
- [REDACTED] immediately apologized and asked that the photo be deleted;
- The victim gave no indication that [REDACTED] was angry or in any way affected;
- The sanction is not proportional in light of mitigation factors.

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 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 principles of international administrative law, the review of disciplinary decisions has a limited scope. Pursuant to the Panel's established jurisprudence, 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; decision of 29 January 2021, OSCE PoA 2/2020, para. 18).

### *Procedural legality*

19. The Applicant complains about a "fundamental failing of the process" regarding the allegation that "neither the [REDACTED] nor the IRB made a finding on the issue of whether [REDACTED] intended to send the photograph". However, this question does not concern the procedural rules of the disciplinary process. In this respect, the Applicant does not raise concerns. The Panel did not find any errors or shortcomings either.

### *Substantive legality*

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

### *Establishment of facts*

21. Regarding the establishment of facts (1), the Panel takes note of the undisputed fact that the Applicant, in the late evening of 10 April 2018, without having been invited to do so, electronically sent a photograph showing [REDACTED] to [REDACTED] local staff member. This message was immediately followed by an additional message reading "Sorry! Delete".

22. Further, it follows from the file that, on 12 April 2018, at about 5.00 p.m., the addressee reacted by a message, reading “Deleted and let’s act as if I haven’t seen anything.” Further, on 13 April 2018, at 9.45 p.m., the Applicant in a further message, *inter alia*, apologized “for accidentally sending ...that pic. It was totally unintentional. It was not meant to be sent.” Finally, the Panel takes note that the Applicant continued to send electronic messages to the addressee from time to time until beginning of 2019.

### *Misconduct*

23. 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”.

24. Pursuant to, e.g., paragraph 3.1 of the █████ Standards of Conduct, harassment in any form, including sexual harassment, is strictly prohibited. In accordance with the legal definition therein, sexual harassment refers to “any sexual or gender-related behavior that is not desired by the person who is the victim of it and that violates his or her dignity”. In the present case, there can be no doubt that the unsolicited electronic transmission of a picture showing █████ to █████ subordinate does fulfill all criteria of the above definition. Apart from that, it is also a clear violation of the overall duty of staff to conduct themselves at the highest personal and professional level at all times, while on duty and off duty (see Article 1 of the OSCE Code of Conduct).

25. Regarding the Applicant’s major contention, i.e. that █████ acted unintentionally, the Panel takes note that, according to the Applicant’s own description, the electronic transmission of a photograph is a complex process, including five different actions from taking the photograph to the selection of the addressee. In this respect, it has to be noted that the Applicant took these steps willingly one by one. The Applicant’s apology of 13 April 2018 to the victim, pursuant to which the photo was sent accidentally and “was not meant to be sent”, is not fully in line with the Applicant’s defense narrative.

26. In fact, the Applicant's claim of acting unintentionally refers to the addressee of [REDACTED] message. The Panel holds that such mistake, well known in criminal law as *error in persona*, does not eliminate the Applicant's full responsibility for [REDACTED] action in the present case.
27. Firstly, it cannot be disputed that the Applicant sent the inappropriate photo intentionally. The Applicant [REDACTED] does not allege that its transmission was initiated against or without [REDACTED] will, e.g. by an accident or a misuse of the electronic device. Nothing else than the Applicant's deliberate actions was the source for the sexual harassment suffered by the victim.
28. Further, there is no evidence that the Applicant did not want to send the photograph to [REDACTED] local staff who actually received it. The course of events shows that [REDACTED] had recently met [REDACTED] and, on the day of the incident, had started to communicate with [REDACTED] via social media. It was not due to a misspelling of the victim's virtual address or any similar mishandling of the process that the photo arrived at the victim's account.
29. Also, the Panel notes that the Applicant continued to contact [REDACTED] local staff after the incident for a longer period of time, without ever being invited to do so and although the victim did not actively engage in a conversation with the Applicant. This behavior indicates that the Applicant had an ongoing interest in keeping in touch with [REDACTED].
30. Lastly, the Applicant's version, according to which [REDACTED] wanted to send the photo to [REDACTED] then partner who allegedly had also sent similar photos to [REDACTED], is not based on any proof or probability. During the initial investigation, the Applicant alleged that all electronic traces of the conversation between this person and [REDACTED] had been deleted, rather than disclosing the identity of this person. The Applicant's version could therefore not be verified, and the Panel notes that in [REDACTED] first apology towards the victim, the Applicant did not indicate that the photograph should have been sent to another person.
31. Taken together, it follows from the above that the Applicant has to take full responsibility of [REDACTED] actions that amount to misconduct in the form of sexual harassment.

## *Proportionality*

32. 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.
33. Considering that dismissal is the most severe measure to be chosen from the catalogue of disciplinary measures provided for in Staff Regulation 9.04, the Panel reiterates that it should only be imposed in clear cases of serious misconduct, whereas minor offences may be sanctioned with less severe disciplinary measures (see Panel's decision of 6 July 2018, OSCE PoA 2/2018, para. 35).
34. Sexual harassment is not a trivial offense. On the contrary, it is not only an unacceptable attack on the dignity of the individual victim, but, as it may and does contaminate the overall work atmosphere and brings discredit to the international organization, it also seriously undermines the functionality of the organization. Therefore, it has to be considered as serious misconduct, thus allowing for imposing the most severe disciplinary measure.
35. Also, as a matter of duty of care and protection of local staff, it is essential for an international organization's credibility to enforce a 'zero tolerance' policy with respect to each case of sexual harassment for purposes of general prevention.
36. Mitigating factors as the Applicant's prior record of commendable service with the [REDACTED] have been taken into account in the contested decision of 30 May 2019. Whether or not the victim, in [REDACTED] position as the Applicant's subordinate, expressed [REDACTED] dismay or accepted the Applicant's apology, is of no relevance. On the other hand, there are also aggravating factors like the fact that the Applicant's acted from a position as [REDACTED] [REDACTED]. In sum, the decision to dismiss the Applicant does not exceed the broad limits of the Organization's discretion in disciplinary matters.

37. As the contested decision is legal, its rescission is not recommended. Further, neither the re-instatement of the Applicant to ■ former position nor compensation for loss of earnings are appropriate.

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

Done on 15 March 2021



Thomas Laker  
Chairperson



Anna Csorba  
Member



Catherine Quidenus  
Member