

**DECISION OF THE PANEL OF ADJUDICATORS OF THE OSCE WITH  
REGARD TO THE EXTERNAL APPEAL BY [REDACTED]**

(CASE No: OSCE PoA 4/2016)

*Proceedings*

1. The Chairperson of the Panel of Adjudicators (PoA) of the OSCE received on 6 December 2016 a letter dated 1 December 2016 from the Chairperson of the Permanent Council the OSCE transmitting an external appeal by [REDACTED] (Applicant), who had worked as [REDACTED] between May 2014 and March 2015.
  
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 December 2016 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 6 January 2017. The Respondent forwarded his reply on 6 January 2017 which was transmitted to the Applicant, advising [REDACTED] that [REDACTED] has a right to file a rebuttal by 27 January 2017. The Applicant filed such rebuttal on 23 January 2017 which was transmitted to the Respondent for information. Without leave from the Panel, the Respondent submitted a surrebuttal on 30 January 2017. All documents were communicated to the parties.
  
3. In accordance with Article VI of the Terms of Reference of the Panel, the Chairperson of the Panel convened the Panel on 6 – 7 April 2017 at the Hofburg premises at Vienna to examine the appeal. The Panel was composed of its Chairperson, Mr. Thomas Laker, Ms. Anna Csorba, and Ambassador Zahary Radoukov. Due to unforeseeable circumstances, Ambassador Radoukov had to be replaced by Panel Member Ms. Jenny Schokkenbroek.
  
4. After examining all the documents submitted to it, the Panel noted that the Applicant's major claims include the following:
  - a) dismissal of the decision to end [REDACTED] contract,
  - b) dismissal of the finding of an investigation report,
  - c) compensation for material damages (two years net base salary and benefits),
  - d) compensation for moral damage (one year net base salary and benefits),
  - e) accountability for staff member involved
  - f) removal of documents from [REDACTED] file.

### *Summary of facts*

5. The Applicant joined the [REDACTED] in May 2014, [REDACTED] initial appointment expiring on 30 September 2014. [REDACTED] contract was extended on 1 October 2014 until 31 March 2015. On 24 March 2015, the [REDACTED] decided not to extend the Applicant's contract; [REDACTED] was, therefore, separated from [REDACTED] on 31 March 2015.
6. In February 2015, the Applicant left [REDACTED] duty station [REDACTED] on leave, approved until 9 March 2015. On 3 March 2015, the Applicant received via email a draft of [REDACTED] Performance Appraisal Report (PAR) which recommended that [REDACTED] appointment expire. The Applicant who was asked to provide [REDACTED] input for the relevant parts of the draft PAR by 13 March 2015, sent an email from [REDACTED] OSCE email account on 7 March 2015 announcing that due to medical treatment [REDACTED] had to change [REDACTED] travel plans and that [REDACTED] would "be able to tell how long" after having seen the doctors on 9 March 2015. Indeed, the Applicant, despite several attempts to contact [REDACTED], only responded on 19 March 2015 by email.
7. On 18 March 2015, the Applicant's supervisors completed the PAR without the Applicant's contribution. The PAR was sent to the Applicant on 19 March 2015 who did not comment on it.
8. After [REDACTED] return to [REDACTED] on 27 March 2015, the Applicant submitted two medical certificates. According to one of them, the Applicant attended dental treatment on 10, 17, 19, and 23 March 2015, the other one certified that [REDACTED] had been under treatment, between 10 and 20 March 2015.
9. On 23 April 2015, the Applicant filed an internal appeal challenging the decision of 24 March 2015 not to extend [REDACTED] contract. On 11 May 2015 a respective Internal Review Board (IRB) was established.
10. Further, also on 23 April 2015, the Applicant filed a formal harassment and discrimination complaint against [REDACTED] former supervisor. On 5 October 2015, the [REDACTED], based on the initial review findings, decided that no further action would be taken regarding the said complaint. The Applicant was notified of this decision by letter of 8 October 2015.
11. The IRB, in the meantime, had decided to suspend its proceedings pending the outcome of the harassment and discrimination complaint. Upon information of 19 October 2015 about the closure of this investigation, the IRB resumed its work in December 2015. On 30 December 2015, the Secretary General submitted his reply. Having received several observations by the parties until 10 February 2016, the IRB issued its report on 22 July 2016.
12. On 20 October 2016, the Applicant filed [REDACTED] present application which was transmitted to the PoA. [REDACTED] contested [REDACTED] "unlawful dismissal", the "continuous denial of due

process" with respect to ■■■ harassment and discrimination complaint, and the IRB's report.

### *Contentions of the Parties*

13. The Applicant's major contentions are,

- that ■■■ was not informed about the non-extension of ■■■ contract in accordance with the Staff Rules;
- that the Draft PAR took ■■■ by surprise while ■■■ was on sick leave and that ■■■ was not aware of the issues raised therein,
- that the non-extension of ■■■ contract is equal to a dismissal,
- that the proceedings with respect to the investigation and the appeal were seriously disturbed by conflict of interest, lack of objectivity, bias, and intentional delay.

14. The Respondent's major contentions are,

- that the appeal against the decision not to take further action with respect to the Applicant's harassment and discrimination complaint was not submitted within the applicable time-limits and, therefore, is irreceivable,
- that the Applicant had been informed about issues raised in the PAR by ■■■■■■■■■■ ■■■ direct supervisors,
- that the established PAR procedure was followed by ■■■■■■■■■■ Administration to the extent possible,
- that the decision not to extend the Applicant's contract was taken in accordance with the applicable Staff Rules and Regulations,
- that the internal appeals procedure was handled in accordance with the applicable Staff Rules and Regulations.

### *Considerations*

### *Procedural Issues*

15. The Panel notes that the Applicant addresses three different issues in ■■■ appeal, as described above. In this respect, the Panel emphasizes that the IRB's report is part of the OSCE's internal justice system and, as such, does not constitute a contestable administrative decision within the meaning of Staff Regulation 10.01 (a). Therefore, alleged errors and/or short comings of an IRB report can only be reviewed in

connection with the underlying administrative decision which forms the subject of the respective IRB report.

16. It follows that only two single administrative decisions are before the PoA, i.e. on the one hand the decision of 24 March 2015, taken by [REDACTED] [REDACTED] not to extend the Applicant's contract beyond 31 March 2015, and on the other hand the decision of 5 October 2015, also taken [REDACTED] [REDACTED] not to take further action regarding the Applicant's formal harassment and discrimination complaint.
17. With respect to the latter decision of 5 October 2015, the Panel further notes that the Applicant submitted [REDACTED] appeal against it directly to the PoA on 20 October 2016, i.e. more than a year after [REDACTED] had been informed about said decision on 8 October 2015.
18. Pursuant to Staff Rule 10.02.2 (d)(i), an application shall not be admissible unless an Applicant has exhausted the internal appeals procedures, except if the jurisdiction of the IRB has been waived in accordance with Rule 10.02.1.
19. Pursuant to Staff Regulation 10.01 (c), an appeal shall be lodged within thirty days from the date of the notification of the impugned decision, normally before an IRB (see Regulation 10.01 (b)). Obviously, the present appeal has not been submitted within this time-limit. The Panel notes that the relevant time-limit had already elapsed at the date of the submission of the appeal to the PoA; therefore, even an internal referral to the IRB would not have rectified the non-observance of the time limit.
20. Pursuant to Staff Rule 10.02.1, only with the express written consent of the Secretary General or the respective head of institution/mission in consultation with the Secretary General, an Applicant may appeal directly to the PoA. The Panel takes note that, in the present case, no consent to a direct appeal to the PoA was either requested or granted.
21. Since the Applicant did not exhaust the internal appeals procedure nor was entitled to appeal directly to the PoA, the Panel cannot but conclude that the appeal is not admissible as far as it concerns the impugned decision of 5 October 2015.

22. The Panel does not take into consideration the surrebuttal submitted by the Respondent on 30 January 2017 as part of the proceedings. The Respondent is not entitled to any such further communication unless expressly granted by the Panel. As already emphasized in its decision of 21 October 2016 (OSCE PoA 2/2016), the Panel holds the view that Art. 5 of its Rules of Procedure (RoP) must be read in a way that excludes a potential endless exchange of written communications. Indeed, the “further communications” mentioned in Art. 5 para. 4 RoP are to be construed as a final reaction to the reply as established in para. 3 of this provision.

### *Merits*

23. With respect to the separation from service, the Panel clarifies that the Applicant’s contract ended due to the expiration of its term. Therefore, the provisions on termination are not applicable. Instead, this case is about an administrative decision not to extend a contract.
24. Regarding the non-extension of the Applicant’s contract, the Panel notes that pursuant to established principles of law, fixed term appointments do not carry any expectancy of renewal or conversion to any other type of appointment (see also Staff Regulation 3.11 (a)). Also, unsatisfactory performance is a generally accepted reason for non-extension of a contract. Pursuant to Staff Regulation 3.11 (b) (i), satisfactory services are a mandatory requirement for any kind of extension of contract. Staff members shall be informed of the decisions on the extension of contracts, to the extent possible, at the latest two weeks before the expiry date of a contract of six months up to one year (Staff Rule 3.11.1 (a)).
25. The Panel notes that the Applicant was notified of the non-renewal of ■■■ contract of six months duration on 24 March 2015, i.e. only seven days before the expiry date. Considering all circumstances of the case, the Panel finds that the Respondent nevertheless fulfilled his duty to timely inform the Applicant to the extent possible within the meaning of Staff Rule 3.11.1 (a).

26. The Panel takes note that the Applicant was informed about a potential decision for non-extension of ■■■ contract for the first time on 3 March 2015 when ■■■ received a draft PAR, recommending the non-extension. If ■■■ had given ■■■ input, as requested, to the draft PAR within the – reasonable - deadline of 13 March 2015, the two weeks - time line for notifying ■■■ about the final decision not to extend the contract could have been met. As the Applicant chose to comply with the request only on 19 March 2015, it was impossible for the Respondent to observe the notification deadline.
27. The Panel does not accept the Applicant's reasons for not complying with the request in a timely way. Rather, it was possible and acceptable for the Applicant to complete the PAR. The fact that ■■■ had four dentist appointments on 10, 17, 19 and 23 March 2015 and that ■■■ was under medical treatment between 10 and 20 March 2015 ■■■ ■■■ does not indicate that the Applicant was unable to fill in the relevant parts of the draft PAR. On the contrary, ■■■ email of 19 March 2015 gives proof that the Applicant was fit to interact with ■■■ duty station ■■■. In addition, none of the submitted medical certificates indicates any kind of serious health based restrictions that could have prevented the Applicant from giving ■■■ input to the PAR.
28. It is not for the Panel to reassess the Applicant's PAR. The Panel has no doubt that the working relation between the Applicant and ■■■ supervisors, including the patrol leaders, was disturbed and tense. Based on the documents on file and the Applicant's own submission, the Panel is convinced that conflicts between the Applicant and ■■■ patrol leaders occurred on different occasions. As highlighted above, the Applicant chose not to contribute to the PAR procedure for unacceptable reasons. Therefore, ■■■ complaints with respect to the outcome of this procedure are rejected.
29. The Panel takes note that according to Article V (7) of Appendix 12 of the Staff Rules and Regulations, the IRB shall submit its report, to the extent possible, within sixty days upon receipt of the reply. In this respect, the Secretary General's reply was submitted on 30 December 2015, whereas the report was rendered on 22 July 2016, i.e. more than 200 days after the receipt of the reply. Thus, the above time-frame has been exceeded more than three times. The Panel cannot see that the complexity of the case is a sufficient explanation for such an excessive delay. It is an established principle of law that excessive delay can amount to a violation of due process.

Therefore, the Panel holds the view that financial compensation is appropriate to compensate this short-coming of the internal appeals procedure. Considering that the Organization has paid such compensation elsewhere on an *ex gratia* basis (see case OSCE PoA 2/2016), the Panel awards 2000 EUR to the Applicant.

30. All other claims are rejected.

Done in Vienna, on 6 April 2017



Thomas Laker  
Chairperson of the Panel



Anna Csorba  
Member of the Panel



Jenny Schokkenbroek  
Member of the Panel