



## **Introduction**

1. The Applicant is serving as the Chief Security Officer at the P-4 level with the United Nations Special Mission in Libya (UNSMIL). He filed an application on 5 January 2017 with the United Nations Dispute Tribunal (UNDT/the Tribunal) in Nairobi contesting the “rating and comments” of his Second Reporting Officer (SRO) in his 2015-2016 e-performance document (e-PAS).
2. The Respondent filed his reply to the application on 6 February 2017.
3. The Applicant filed a response to the Respondent’s reply on 7 February 2017.

## **Relevant facts**

4. The Applicant joined UNSMIL on 18 April 2015. His First Reporting Officer (FRO) was Mr. Paepae Wiki, the former UNSMIL Chief Security Advisor (CSA), and his SRO was Mr. Martin Kobler, the UNSMIL Special Representative of the Secretary-General (SRSG).
5. For the performance evaluation period 2015-2016, the Applicant’s FRO gave him an overall rating of “successfully meets expectations” with the following comments:<sup>1</sup>

During the reporting period, [the Applicant] was instrumental in the successful planning and implementing of the security mitigation measures of the UNSMIL Headquarters in Tunis – a challenging task involving both UN and host country interlocutors,

player who sets solid standards and possesses the requisite work related knowledge and written skill sets to perform his role and responsibilities. [The Applicant]

9. The Management Evaluation Unit (MEU), by a letter dated 7 October 2016, informed the Applicant that his request for management evaluation was not receivable since no adverse decision directly affecting his terms of appointment had been taken on the basis of his 2015-2016 performance appraisal.

10. The Applicant filed the current application with the Tribunal on 5 January 2017.

11. By Order No. 113 (NBI/2017), the Tribunal directed the parties to submit supplemental evidence by 23 June 2017.

12. The Applicant and Respondent complied with Order No. 113 on 21 and 23 June 2017, respectively.

### **Issues**

13. The issue for determination here is whether the Applicant is contesting an administrative decision within the meaning of the art. 2.1(a) of the UNDT Statute and if so, whether the application is moot.

### **Submissions**

14. The Respondent submits that the application is not receivable *rationae materiae* because the SRO's comments do not constitute a reviewable administrative decision that has direct legal consequences for the Applicant's appointment or contract of employment<sup>2</sup>. Additionally, a staff member may only contest an administrative decision stemming from a final performance appraisal. Lastly, the Respondent submits that the application is moot because the Applicant's 2015-2016 e-PAS is being rolled back for his First Reporting Officer (FRO) and SRO to produce a new performance appraisal for that cycle.

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comments do, in fact, detract from the official rating as they directly contradict the FRO's evaluation and final rating.

## **Considerations**

### **Was there an administrative decision?**

16. Art. 2.1(a) of the UNDT Statute provides that:

1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.

17. Section 15.1 of ST/AI/2010/5 (Performance management and development system) states that:

Staff members who disagree with a "partially meets performance expectations" or "does not meet performance expectations" rating

the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision”.

20. In *Ngokeng*, UNAT held that there was no evidence of any adverse administrative decision stemming from the applicant’s performance appraisal. UNAT held that the FRO’s comment, which was made in a satisfactory appraisal, was not a final administrative decision because “it did not detract from the overall satisfactory performance appraisal and had no direct legal consequences for Mr. Ngokeng’s terms of appointment”.

21. The current case is distinguishable from *Ngokeng* in that the SRO’s comments were not in fact just simple comments but actually constituted an alternative rating that sought to replace the FRO’s overall satisfactory rating with an unsatisfactory one. The FRO evaluated the Applicant’s overall performance as “successfully meets expectations” whereas the SRO evaluated his performance as “partially meets expectations” and provided very strong comments in support of this negative rating. The SRO went on further to recommend the institution of a performance improvement plan (PIP) to address the Applicant’s performance shortcomings. In light of the nature and depth of the SRO’s comments, the Tribunal holds that the SRO’s comments detracted so substantially from the overall satisfactory performance appraisal as to put the FRO’s overall rating in doubt.

22. At the direction of the Tribunal, the Applicant submitted copies of the Letters of Appointment (LoAs) that he has signed since his appointment to UNSMIL in April 2015 and information as to the length of time his current FRO has been serving with UNSMIL.

23. Upon the Applicant’s entry on duty with UNSMIL, he was initially granted a one year fixed-term appointment from 18 April 2015 to 17 April 2016. On 29 September 2016, the Applicant’s current FRO, Mr. Tarakinikini, recommended that his appointment be extended for g 0.99-.0 rg 0.9998 0.0 0.0 1.0 433.68 162.48 Tn

24. Mr. Tarakinikini assumed his duties as CSA and the Applicant's FRO on 23 May 2016. The Applicant submits that he was on certified sick leave from 23 May to 3 June 2016, and that he was away on official training in Italy from 20 to 24 June 2016; and again on certified sick leave from 27 June to 26 July 2016.

25. This means that from the time Mr. Tarakinikini became CSA and the Applicant's FRO up until the time he recommended a six-month contract extension and PIP for the Applicant, he had worked with the Applicant for only about 2.5 months.

The Respondent attached email communication between UNSMIL and Mr. Wiki as evidence that there are continuing efforts to resolve the matter.

29. A matter can only be considered to be moot where a dispute no longer exists. This, unfortunately, is not the case here. The Respondent has continued to assure the Applicant since September 2016 that the 2015-2016 e-PAS would be rolled back and re-created. Based on the emails submitted by the Respondent, it appears that the roll back, regrettably, was not addressed with Mr. Wiki until December 2016, three months after the fact.

30. Seeing as Mr. Wiki did not leave the Organization but merely moved to the United Nations Headquarters in New York, the Tribunal finds that his reassignment is no excuse for the Respondent's delay in rolling back the e-PAS. The emails also do not evince any specific measures or timeline to indicate that action will be taken soon to resolve this matter.

31. Until such time as the e-PAS is in actuality rolled back and re-created, the