



Federation of International
Civil Servants' Associations

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Note: This article is directed primarily at international civil servants working for international organizations under the jurisdiction of the United Nations Dispute and Arbitral Tribunals (UNDT and UNAT), and the Administrative Tribunal of the International Labour Organization (ILOAT). Some of the concepts identified could apply to international civil servants under other jurisdictions, but any divergence is beyond the scope of this article.

Preventing, Identifying, and Rectifying retaliatory performance evaluations: an overview

Staff members of international organizations are generally subject to periodic evaluations of the performance of their assigned duties and responsibilities. These performance evaluations or appraisals can be considered cumbersome and tedious by staff members and their managers alike and may be treated as a Pro-forma exercise. However, indifference on the part of the staff members can make negative appraisals difficult to challenge. Many if not most staff members do not keep detailed records in anticipation of such an event. Yet, even a mediocre performance appraisal can have a detrimental impact on the ability of staff members to obtain promotions or to obtain employment elsewhere. And negative performance appraisals—those finding a staff member to fail to meet expectations—can cause even more harm, up to and including termination for “unsatisfactory service.”

Indeed, what many employees of international organizations may not realize is that, in many cases, performance evaluations have been used to retaliate against staff members for filing grievances and whistleblowing. Often this is done to create a pretext for getting rid of such staff members. The case law of the United Nations Dispute and Appeals Tribunals (UNDT and UNAT), and the Administrative Tribunal of the International Labour Organisation (ILOAT), contains several instances of this practice.

This article is designed to help staff members who believe that they or someone they know has been victimized by a retaliatory performance evaluation. It will begin by explaining how performance evaluations are *supposed* to be carried out and laying out the basic legal framework for these evaluations. It will then explain how this process can be abused by management to retaliate against staff members. Finally, this article will provide tips and guidance for staff members to prevent, identify, and (if necessary), rectify this specific form of retaliation if and when it occurs.

¹ Benjamin Katzenberg represents international civil servants in employment-related disputes and has more than ten years of relevant experience. This article is a general overview of a topic and is not considered legal advice. Additional information is available at: <https://www.icsemploymentlaw.com>.

The Legal Framework for Performance Evaluations at International Organisations

Performance evaluations (or appraisals) are periodic reviews of a staff member's functioning in their position. These are typical, though not always, conducted on an annual basis. Performance evaluations are usually provided for in the internal legislation of international organizations. Several levels of regulations may address performance evaluations. For example, the organization's staff regulations may provide for performance evaluations generally, while specific procedures will be outlined in a subsidiary regulatory instrument. Specific forms for the performance evaluation may be further provided by internal management software and/or technical information documents.

In addition to internal legislation, the practice at an international organization may also govern the system of performance evaluation. For example, internal regulations may set specific dates and times for performance evaluations to take place, but it may be a common practice to allow these deadlines to be adjusted as necessary by staff members in agreement with their managers. For a practice to be legally significant, it should be fairly widespread, and familiar to most of the organization's staff members.

Lastly, the jurisprudence of international administrative law tribunals may provide additional rights and entitlements for staff members in addition to those which are explicitly provided for in internal legislation. The ILOAT, UNDT, and UNAT have articulated several procedures international organizations are expected to follow concerning performance evaluations. For example, the ILOAT's jurisprudence provides that performance evaluations should be carried out by a staff member's first-line and second-line managers.² Rights to, *inter alia*, a reasonable opportunity to improve performance before any penalization for unsatisfactory service are also outlined in this jurisprudence.³

At a minimum, staff members are entitled to regular, periodic, fair, objective, and honest assessments of their performance. They must be notified of any alleged deficiencies in performance on time and provided with reasonable opportunities to challenge any negative ratings and/or comments. They must also be afforded reasonable opportunities to improve their performance before any detrimental actions (such as the non-renewal of their contract of employment) take place.

Retaliation through performance appraisal is a form of Abuse of Authority

International organizations are afforded extreme deference when it comes to the evaluation of the performance of their staff members, and appraisals can only be challenged on limited grounds. Such grounds include a formal or procedural flaw, a mistake of fact or law, neglect of some material fact, abuse of authority, or a wrong inference from the evidence. Abuse of authority occurs when an international organization acts for reasons that are extraneous to the organization's best interests and seeks some objective other than those that the authority vested in it is intended to serve.⁴ The use of the performance appraisal process to retaliate

² ILOAT Judgment 3692, Consideration 14: "[I]t is well settled by the Tribunal's case law that if the rules of an international organization require that an appraisal form must be signed not only by the direct supervisor of the staff member concerned but also by her or his second-level supervisor, this is designed to guarantee oversight, at least prima facie, of the objectivity of the report."

³ ILOAT Judgment 2678, Consideration 8: "[a]n organization may not in good faith end someone's appointment for poor performance without first warning him and giving him an opportunity to do better."

⁴ ILOAT Judgment 4437, Consideration 23

against a staff member who reports misconduct (or complains of harassment), with the ultimate aim of getting rid of them, would constitute such abuse and would require that the performance appraisal, and any negative consequences flowing therefrom, be overturned. *However*, the burden of proof is on the staff member in such cases, and it can be very difficult to prove that a performance evaluation is retaliatory.

Prevention, identification, and rectification

A good working definition of retaliation as set for in the UNDT's jurisprudence is as follows:

*“Retaliation as a motive generally eludes precise identification and is often subtle or disguised. Its intended effect is to intimidate or inhibit the staff member from reporting misconduct.”*⁵

The UNDT has set forth the elements of retaliation as follows: participation in a protected activity, being subjected to a detriment, and a causal connection between the protected activity and the detriment suffered.⁶ The first two elements should normally be straightforward for a concerned staff member. They should be able to point to some type of “protected activity: A complaint, a grievance, or a concern expressed, either formally or informally, to their organization’s administration. They should also be able to point to a detriment, such as a negative performance appraisal. In this context, it is important to remember that even an overall positive rating in a performance appraisal (i.e. one which does not subject the staff member to the risk of termination for unsatisfactory services) may nevertheless be detrimental if it contains negative comments which detract from the overall rating in a significant enough way to make the appraisal problematic to show or furnish to future potential employers.

The third element, however, presents more of a challenge. The fact that a negative performance appraisal appears shortly after a complaint to the administration does not, by itself, prove that the two are connected.

To successfully challenge such action, staff members under the jurisdiction of the UNDT will need to demonstrate *prima facie* evidence that the administration would have taken the same action in the absence of their protected activity (e.g. a complaint to management). The burden of proof will then shift to the administration to defend the detrimental actions as unconnected to the protected activities.

In contrast, staff members working for organizations under the jurisdiction of the ILOAT will not be able to discharge their burden of proof with *prima facie* evidence, and instead will need to demonstrate, by a preponderance, that the detrimental action “was not objectively justified and was motivated by bias, malice or ill will against [them].”⁷

So, a detrimental performance evaluation made shortly after a staff member complains of misconduct can be successfully challenged by the concerned international civil servant(s), though probably more easily by staff members of the United Nations than their counterparts at international organizations under the jurisdiction of the ILOAT.

⁵ UNDT Judgment UNDT/2013/176, at paragraph 139.

⁶ UNDT Judgment UNDT/2013/176, at paragraph 127.

⁷ ILOAT Judgment 1342, Consideration 12.

Tips for Staff Members

To rectify a retaliatory performance evaluation, staff members should be able to demonstrate at least some of the following occurrences:

- The existence of threats of a negative performance evaluation in connection with their engagement in protected activities;
- Unexplained downgrading of their rating compared to previous evaluations;
- Factual inaccuracies in the performance evaluation;
- Negative comments which are untrue and/or unjustified;
- The exclusion of positive information from the performance evaluation;
- Other evidence of bias, ill-will, malice, or prejudice.

Demonstrating some or all of these occurrences will require, usually, either documentation or witnesses (or both). International civil servants are therefore strongly advised to keep detailed records concerning their performance and to maintain relationships with co-workers who can support them if the need arises. A logbook, summaries of relevant meetings, positive feedback from co-workers and clients, and examples of satisfactory work produced are (non-exhaustively) examples of the type of evidence staff members can use to demonstrate that a negative performance evaluation is unwarranted and therefore retaliatory.

Staff members subjected to a negative performance evaluation will often need to engage in a rebuttal procedure of the evaluation outlined in internal legislation as a first step. They should familiarize themselves with the relevant internal legislation and seek assistance from their staff associations. The rebuttal procedure may only be open to staff members for certain ratings (e.g. below “meets expectations.”) However, any negative comments in a performance evaluation do, in principle, open it up to challenge, even if the overall rating is above the regulatory minimum (e.g. “meets expectations” or “exceeds expectations.”) In the latter case, staff members may need to avail themselves of a more general procedural for challenging detrimental administrative decisions, rather than a rebuttal procedure outlined in specific regulations on performance evaluations.

Staff members who suspect that they may have been victims of retaliation should also avail themselves of the internal means of redress available to them. This includes following prescribed procedures for protecting whistle-blowers from retaliation (where they exist, such as with the United Nations). They should review their internal legislation carefully to determine what protections (if any) against retaliation exist and how best to avail themselves of these protections.

Lastly, where possible, such staff members should consider obtaining legal counsel. Professional attorneys specializing in the law of the international civil service can assess the circumstances of a staff member concerned about being retaliated against through their performance appraisal and can aid in bringing the issue to an amicable solution or, if that is not comparable, correcting the injustice by representing them before the international administrative law tribunal with jurisdiction over their case.

These resources and articles are provided for the convenience of FICSA members and do not constitute legal advice, are not intended to be a substitute for legal advice and should not be relied upon as such.

You should seek legal advice or other professional advice in relation to any particular matters you or your organisation may have. The views expressed are those of the author(s) and do not necessarily reflect those of FICSA.
