

**IN THE SUPREME COURT OF BELIZE, A.D. 2022**

**CLAIM No. 759 of 2020**

**BETWEEN**

**MIGUEL LOPEZ**

**CLAIMANT**

**AND**

**BELIZE ADVISORY COUNCIL**

**DEFENDANT**

**DECISION OF** The Honourable Madam Justice Patricia Farnese

**HEARING DATE:** March 16, 2022

**APPEARANCES**

Ms. Stevanni Duncan Ferrera for the Claimant

Ms. Agassi Finnegan ad Mr. Jorge Matus for the Defendant

**DECISION ON JUDICIAL REVIEW**

**Introduction**

[1] The claimant, Mr. Miguel Lopez, was granted leave for judicial review of the Belize Advisory Council's (the Council) decision to uphold the Public Service Commission's (the Commission) decision to terminate his employment as a District Lands and Survey Officer with the Ministry of Natural Resources and Immigration (the MNR). In addition to general and special damages, Mr. Lopez seeks orders quashing that decision and the reinstatement of his appointment. In the alternative, Mr. Lopez asks that the court order the Council to rehear his appeal.

[2] The parties dispute whether Mr. Lopez remained in a temporary position or whether he held a permanent position, subject to the successful completion of his probationary service. The nature of his position as temporary or permanent determines which process outlined in the *Public Service Regulations (PS Regulations)* the Commission had to follow to lawfully end his employment. Mr. Lopez further argues that he was not afforded the opportunity to be heard before the Commission and that the Council's unreasonably delayed decision did not provide sufficient reasons.

[3] I find that Mr. Lopez was a temporary public officer when he was dismissed because only the Commission can make appointments to the Public Service. I further find that whether the Commission and the MNR created, by their conduct, a legitimate expectation that Mr. Lopez held a permanent appointment and was completing a year of probationary service is of no consequence to this claim. Mr. Lopez faced the same standard and process for dismissal as a temporary public officer as he would have faced if he was dismissed within his probationary service as a newly appointed permanent public officer. Mr. Lopez did not have the right to access the disciplinary proceedings of the *PS Regulations* because the dismissal did not flow from discipline.

[4] Mr. Lopez, however, was not provided with an opportunity to be heard before the Commission made the decision to dismiss him. Mr. Lopez's rebuttal to his final performance appraisal is not a substitute for his right to be heard. I also find that the Council's decision to uphold the dismissal was unreasonably delayed and lacked sufficient reasons.

[5] I order the Council's decision to uphold Commission's decision to dismiss Mr. Lopez quashed and the matter remitted to the Council for a rehearing. Costs of this claim are awarded to Mr. Lopez as agreed or assessed. Finally, no damages are awarded at this time, I will remain seized of this matter and decide the issue of damages in the event Mr. Lopez is successful after his rehearing.

### **Statutory Framework and Background**

[6] Section 106 of the *Belize Constitution* vests the authority to appoint persons to the Public Service with the Commission. Unless a person is appointed to the Public Service for a fixed term, section 20 of the *PS Regulations* directs that a person in a temporary position be appointed after 6 months if their performance is satisfactory. The *PS Regulations* outline that the temporary public officer undergoes an in-depth assessment after 3 months by their head of department:

20 (1) Where a person is employed on a temporary basis against a vacant post, subject to subregulation (2) he shall be appointed within six months of employment if his performance is satisfactory.

(2) For the purpose of subregulation (1), the head of department shall conduct an in-depth assessment of the public officer's performance at the end of the first three months and that assessment shall be considered in the determination of appointment to a vacant post.

(3) Where an in-depth assessment shows that the service of a public officer employed on a temporary basis is unsatisfactory, the Commission may terminate the employment of that public officer.

The decision to appoint to a permanent post is based on the results of that assessment. If the assessment finds an unsatisfactory performance, the Commission may dismiss the temporary public officer. If the performance is satisfactory, the Commission has the remaining 3 months of the temporary appointment to finalize the permanent appointment.

[7] Although the *PS Regulations* do not expressly provide for an extension of temporary employment where a person receives an unsatisfactory performance appraisal after 3 months, I find that subsection 20(3), which states that an officer "may" be dismissed, can be interpreted to allow for an extension. The use of "may" grants the Commission discretion not to dismiss a temporary public officer following an unsatisfactory assessment. General principles of statutory interpretation hold that drafters can be taken to have intended to give effect to the language used; the discretion found in subsection 20(3) must serve a purpose. If the discretion does not permit an extension, the only other option available to the Commission would be an appointment. The public interest is not served by interpreting subsection 20(3) as limiting the Commission's discretion in that way. Such a restrictive interpretation may result in persons incapable of performing the job being appointed or persons who, through no fault of their own, are terminated without having had a fair opportunity to prove their abilities.

[8] Subsection 20(1), however, prohibits extensions of temporary appointments once a public officer demonstrates satisfactory performance. Multiple extensions where there has been unsatisfactory performance without good cause are also inconsistent with the intent of the *PS Regulations*. Despite the *PS Regulations* distinguishing temporary employment from probationary service after appointment, temporary posts allow them to serve as probationary positions. The MNR assesses whether the officer has the skills required for the vacant post. Both the MNR and the temporary public officer also can decide if there is a good "fit" with the workplace culture before committing to permanent appointments. By limiting the length of a temporary appointment in a vacant post, the *PS Regulations* recognize that after an initial trial period, the temporary public officer is entitled to the job security protections and benefits associated with a permanent appointment if they meet performance standards. As a result, the *PS Regulations* provide clear timelines for performance assessments. Failing to conduct timely performance assessments in the absence of good cause will not justify an extension.

[9] Section 22 of the *PS Regulations* directs that new public officers with permanent appointments complete one year of probationary service. During that time, officers receive

opportunities to learn, are evaluated and given feedback on their performance, and are given the chance to correct any deficiencies that may prevent them from being appointed. During their probationary service, officers are subject to the disciplinary proceedings located in *Part 10* of the *PS Regulations*. Probationary officers receive a performance appraisal half-way and at the end of their probationary service year. The end-of-year performance appraisal report either results in the probationary officer's appointment being terminated if the performance is unsatisfactory, or confirmed if the performance is satisfactory.<sup>1</sup> Upon confirmation, public officers can be dismissed for reasons related to consistent poor performance or major misconduct in accordance with *Part 10*.

[10] Mr. Lopez began working for the MNR on 24 May 2016 in a temporary position. In August 2016, in accordance with the procedure outlined in subsection 20(2) of the *PS Regulations*, Mr. Lopez received an in-depth assessment by the National Estate Officer, Mr. Bobadilla, 3 months after he was hired. Based on the assessment, the Commission used the discretion granted to them by subsection 20(3) to extend Mr. Lopez's temporary appointment by 3 months to address areas needing improvement to meet the standard of a satisfactory performance.

[11] In December 2016, a letter was sent to the Human Resources Department of the MNR from Mr. Bobadilla after he conducted a further assessment of Mr. Lopez. Mr. Bobadilla recommended confirming Mr. Lopez's appointment on the condition that Mr. Lopez's performance improved. He noted that while Mr. Lopez had developed his skills, knowledge, and initiative, he was learning at a slower rate than hoped. It was Mr. Bobadilla's opinion that with proper guidance and assistance, Mr. Lopez could reach the Department's standard of operations if he had the mind to do so.

[12] In June 2017, the MNR wrote to the Ministry of Public Service (MPS) and relayed their decision not to recommend appointment based, at least in part, on a letter written on May 1, 2017 by Mr. Bobadilla not recommending that Mr. Lopez's appointment be confirmed.<sup>2</sup> Mr. Bobadilla's letter highlighted significant deficiencies in Mr. Lopez's performance that were not remedied by additional time in the position. No evidence was tendered of the Commission expressly communicating to Mr. Lopez that a decision had been made either extending his temporary position further or appointing him to a permanent position. Nonetheless, Mr. Lopez remained employed until April 2018 when the Commission wrote to him. Relying on section 20 of the *PS Regulations*, the Commission terminated his appointment because of an unsatisfactory performance "despite numerous guidance and coaching on how to improve the tasks assigned to you."

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<sup>1</sup> *PS Regulation* s.25.

<sup>2</sup> A complete copy of this correspondence was not provided to the court, so it is unclear what, if any other factors, the MNR considered.

## Issues

[13] After reviewing the parties' evidence and the submissions, four questions require consideration to decide this matter:

1. Did the Commission comply with the *PS Regulations* when they dismissed Mr. Lopez?
2. Did the Commission provide Mr. Lopez with a fair hearing?
3. Was the Council's decision to uphold the Commission's decision to terminate unreasonably delayed?
4. Did the Council provide sufficient reasons for their decision?

## Analysis

[14] The recent decision of *Vacarro and Waight v The Public Service Commission*<sup>3</sup> requires that I begin the analysis by confirming that Mr. Lopez correctly asked this court to quash the Council's decision to uphold his dismissal. In *Vaccaro*, Chabot J held that no appeal lies to the Council from promotion decisions within the Public Service because subsection 111(1)(a) of the *Belize Constitution* only applies to disciplinary decisions. Subsection 111(1)(a) provides that "...*any decision* of the Public Services Commission ...to remove a public officer from office *or* to exercise disciplinary control over a public officer..." [italics added] can be appealed to the Council. To limit the subsection's application to removals following discipline requires that I ignore the usual meanings of 'any decision' and 'or'. I find no justification for adopting such an interpretation. *Vacarro* can be distinguished as this case does not involve a promotion.

[15] The subtitles and subdivision headings cannot supersede a plain reading of the text in the context of a dismissal, which unlike promotion, can result from discipline. Similarly, the clear language of subsection 111(a) cannot be ignored because subsidiary regulations are non-exhaustive. The fact that the provisions that deal with the Council are found in Part 10 of the *PS Regulations* where disciplinary procedures are found is less significant because subsection 111(1)(a) explicitly references *any* removal decision. Section 22(g) also states that Part 10 applies during probationary service. To adopt a narrow interpretation would mean if a public officer's appointment was not confirmed because of discipline, they would be able to appeal the decision to the Council, but for any other reason they would need to seek judicial review. This distinction would unnecessarily create confusion over which procedure to follow and likely result in disputes to determine whether the dismissal decision had a disciplinary component.

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<sup>3</sup> Claims No. 730 and 731 of 2021.

1. *Did the Commission comply with the PS Regulations when they dismissed Mr. Lopez?*

[16] Mr. Lopez asserts that the Commission cannot rely on section 20 to terminate his employment because he was no longer a temporary public officer. Mr. Lopez argues that the directive in section 20 that temporary public officers “shall” be appointed after 6 months necessarily results in a finding that he was appointed to a permanent post in December 2016 when he received a satisfactory assessment of his performance and continued to be employed without receiving notice that his temporary appointment was extended. In response, the defendant argues that Mr. Lopez remained in a temporary position. The Commission never communicated that he had been appointed to a permanent post because his performance was unsatisfactory while a temporary public officer.

[17] I find that a failure to meet the statutory timelines for making an appointment decision does not result in an appointment. Section 106 of the *Belize Constitution* vests the authority to appoint someone to the Public Service with the Commission. Non-compliance with statutory timelines does not strip the Commission of this authority. A probationary appointment cannot occur without a satisfactory assessment. Mr. Lopez’s first assessment resulted in an extension. The second assessment, completed in December 2016, contained a qualified recommendation for appointment.

[18] To accept Mr. Lopez’s argument that he was entitled to an appointment based on Mr. Bobadilla’s recommendation in December 2016 alone would make the recommendation binding contrary to section 20 of the *PS Regulations*. As the appointing authority, the Commission is empowered to decide if Mr. Lopez met the requirements for an appointment. It is a mistake to treat a numeric score on a performance evaluation or recommendations to the Commission as binding. Section 20 explicitly states that for the purposes of deciding whether “performance is satisfactory,” assessments conducted by the head of department will be “considered.”

[19] Even if I am incorrect and the timelines in section 20 must be strictly observed, whether Mr. Lopez’s performance met the standard of being satisfactory in December 2016 is unclear. Mr. Bobadilla’s recommendation was provided with the conditions that “he remains interested, that he understands and respects the chain of command and that he execute (*sic*) the duties to the best of his abilities.” This recommendation also followed an assessment that he was “learning at a slower pace than what the Department would want” and would need “proper guidance and assistance” to reach the Department’s standards of operations. The Commission could decide that an appointment was not warranted based on this conditional recommendation.

[20] Mr. Lopez asks that I find the Commission and MNR’s conduct created a legitimate expectation that he held a permanent post and was completing his probationary service when he was dismissed. Such a finding, however, is unnecessary. Mr. Lopez faced the same standard for

dismissal as a temporary public officer as he would have faced if he was dismissed within his probationary service as a newly appointed permanent public officer. Subsection 22(4) of the *PS Regulations* requires that the MNR provide an end-of-year performance appraisal report to the MPS “as soon as possible” after the end of a permanent public officer’s probationary service. Based on the report, the public officer’s appointment will be confirmed or terminated by the Commission.<sup>4</sup> While providing more discretion with respect to timelines, this provision is substantively indistinguishable from subsection 20.

[26] Mr. Lopez argues that the procedures for discipline in Part 10 of the *PS Regulations* should have been followed when he was dismissed because subsection 22(g) extends access to Part 10 to public officers during probationary service. As previously explained, an assessment during a probationary period, even where that assessment leads to a decision to dismiss, is not a disciplinary proceeding.

[27] Dismissal is not normally a penalty that can be imposed on a public officer for minor misconduct.<sup>5</sup> Minor misconduct includes not carrying out duties promptly and diligently, failure to carry out instructions, insubordination, and negligence in the performance of duties.<sup>6</sup> Minor misconduct, however, can justify dismissal after probationary service because the standard for confirmation of appointment is satisfactory performance. Part 10 procedures are only available if a public officer is facing a formal allegation of misconduct during probationary service. For example, Part 10 procedures must be followed to dismiss a public officer for major misconduct prior to the expiration of their probationary service.

## 2. *Did the Commission provide Mr. Lopez with a fair hearing?*

[28] I find that Mr. Lopez was not provided a fair hearing. The basis for Mr. Lopez’s claim that he did not receive a fair hearing is his assertion that he was not provided with an opportunity to be heard prior to the Commission’s decision to not appoint him to a permanent position. The Council argues Mr. Lopez was heard when he provided a rebuttal to his February 2018 performance evaluation because the Commission’s decision to terminate was based on the performance evaluation.

[29] The standard of what natural justice demands in the form of procedural protections is specific to each circumstance. It is widely accepted that the demands heighten with the significance of the decision for the parties involved. Undoubtedly, the Commission’s decision had significant consequences for Mr. Lopez. At a minimum, Mr. Lopez had the right to know the charge against him and the right to reply to that charge before the decision was made.

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<sup>4</sup> *PS Regulations*, section 25.

<sup>5</sup> *PS Regulations*, subsection 83(5).

<sup>6</sup> *PS Regulations*, subsection 82(1).

[30] It is not enough that Mr. Lopez may have been able to infer from the evaluation that he was about to be dismissed for an unsatisfactory performance. He had a right to know that a recommendation had been made for his dismissal. There is no evidence that Mr. Lopez was aware that the head of his department and the CEO of the MNR had recommended that he be dismissed. The February 2018 performance evaluation does not contain a recommendation. Mr. Lopez's testimony that the evaluation was completed without his involvement and not discussed with him before he sent his rebuttal is also uncontested. Therefore, Mr. Lopez was not given the opportunity to reply to the fact that his continued appointment was expressly unsupported by his superiors. Mr. Lopez was not given the chance to raise any issues outside of the performance evaluation that would have challenged the motive behind or justification for the recommendations.

[31] The case law is also clear that the opportunity to provide oral submission is not required for a party to be heard.<sup>7</sup> Written submissions do not violate Mr. Lopez's procedural fairness rights. But written submissions only satisfy the procedural fairness requirements if they afford the same opportunity to be heard. Mr. Lopez sent his rebuttal to the Commission in accordance with subsection 71(2) of the *PS Regulations* to express his disagreement with his performance appraisal. There is nothing in the rebuttal that indicates that Mr. Lopez intended that it would stand as his complete submission to the Commission on the question of his dismissal.

[32] The test for whether the demands of natural justice have been met is not whether the Commission had all the information it believed it required to make the decision, as the Council asserts, but whether Mr. Lopez has been provided with a fair opportunity to reply to the charge he was facing. The Council cannot know what it does not know. For example, that Mr. Lopez subsequently signed the appraisal form is not evidence that Mr. Lopez agreed with the assessment. Subsection 68(f) of the *PS Regulations* requires that public officers sign their performance appraisal reports. Subsection 71(2) allows a public officer to attach comments before he signs the report. I accept Mr. Lopez's testimony that he inadvertently marked that he agreed with the appraisal when he signed. The rebuttal letter is evidence of his disagreement. He ought to have been allowed to explain that mistake to the Commission in the event they thought otherwise.

3. *Was the Council's decision to uphold the Commission's decision to terminate unreasonably delayed?*

[33] The Council's delay in rendering its decision on Mr. Lopez's appeal was inordinate and excessive. Mr. Lopez appealed the Commission's decision to dismiss him to the Council as permitted by section 90 of the *PS Regulations*. Part II of *The Belize Advisory Council*

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<sup>7</sup> *Rees v Crane* [1994] 1 All E.R. 833, at 848-849.



*(Procedure) Rules 1997 (Council Rules)*<sup>8</sup> pertains to appeals by public officers and establishes timelines for an expeditious appeal process. Mr. Lopez lodged his appeal within 30 days of receiving notice of his dismissal as required by *Council Rule 3(1)* and supplied his written submissions per *Council Rule 4*. The Council was then required to provide a copy of those materials to the Solicitor General and the Commission who had one month to respond. Upon receipt of the Solicitor General and Commission's responses, the Council had 10 days to provide them to Mr. Lopez who was permitted to file a further submission in reply within 14 days. On the expiry of the time for Mr. Lopez to file a reply, the appeal was to be placed on the agenda of the next meeting of the Council.

[34] The Council considered and dismissed Mr. Lopez's appeal at a meeting held on 28<sup>th</sup> August 2020, almost 2.5 years after the appeal was made. The Council has not provided a satisfactory reason for this delay. The Council met the requirement to provide a copy of the appeal to the Solicitor General and the Commission within 14 days of its receipt. The Solicitor General and the Commission failed to respond until February 28, 2020, despite repeated requests from the Council to do so.

[35] In the absence of any evidence that the Solicitor General or the Commission requested and received an extension to the timelines in the *Council Rules*, the Council's delay is unreasonable. The Council is an arms-length body entrusted by the *Belize Constitution* to impartially decide appeals. Mr. Lopez has strict timelines to follow to file his appeal or he loses his right to appeal subject to *Council Rule 3(2)* which allows extensions for "special cause". Fairness requires that the Solicitor General and Commission be held to the same standard. To be clear, I have not decided that the timelines in the *Council Rules* require rigorous adherence. Rather, any non-compliance must consider the fairness to the parties. The Council's decision to wait to proceed with the matter after their repeated requests for submissions were ignored by the Solicitor General and the Commission for over two years, was unreasonable and unfair to Mr. Lopez.

[36] Although *Council Rule 8* specifies that the "Council shall consider and determine every appeal on the basis of written submissions," this rule should not be interpreted to mean that the Council cannot proceed in the absence of a submission. Rule 8's intent is reflected in its second half where it continues by authorizing the Council to ask for additional evidence if necessary. Any other interpretation gives the respondents unfair control over the timing of the proceedings and runs counter to the purpose of the Council to serve as an impartial, arms-length appellate body.

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<sup>8</sup> S.I. No. 3 of 1997.

[37] In *Patt v Attorney General & Ors*,<sup>9</sup> the Supreme Court emphasized the importance of the respondent having the *opportunity* to be heard. In *Patt*, only one party was permitted oral submissions to the Council. In Mr Lopez's case, the Solicitor General and the Commission were provided with the same *opportunity* as Mr. Lopez to make submissions. If a party fails to avail themselves of that opportunity, fairness requires nothing more of the Council. It must be remembered that the Solicitor General and the Commission are equal participants with Mr. Lopez in the appeal process and are not the decision-maker. The Council has not been deprived of the jurisdiction to perform a function if, after been given the opportunity to make submissions, the Council proceeds in the absence of a party's submission where no request for an extension of timelines has been made.

4. *Did the Council provide sufficient reasons for their decision?*

[38] The Council failed to provide Mr. Lopez with sufficient reasons for their decision to uphold the Commission's decision. In fact, no reason has been provided for their decision.

[39] In a letter to his lawyer, Mr. Lopez's appeal was dismissed by the Council with the following explanation:

After careful consideration of all the submissions and the available evidence, the Council dismissed your client's appeal and upheld the decision of the Public Services Commission that your client's services be terminated with effect from 19<sup>th</sup> April 2020. This is accordance with section 20(3) of the Belize Constitution (Public Service) Regulations, 2014.

The Council submits that the proper test for the sufficiency of reasons was adopted in *Lord v. The Belize Advisory Council*.<sup>10</sup>

A public authority is not required to give its reasons in a form similar to a judgment of a court. In giving its reasons for a decision, a brief statement of the facts, and a concise statement of the way in which it arrived at its decision are enough...

Even by this test, the Council has failed to provide sufficient reasons. The letter to Mr. Lopez does not contain a statement of either the facts or an explanation of how the decision was reached. The letter merely describes the statutory function the Council was required to perform and the outcome of that function – they considered the submissions and upheld the Commission's decision.

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<sup>9</sup> Claim No 65 of 2010 [*Patt*].

<sup>10</sup> Claim no. 842 of 2010 at para 16, quoting *Gladden v. the Attorney General et al* Claim No. 692 of 2010.

## **Disposition**

[40] I order the Council’s decision to uphold the Commission’s decision to dismiss Mr. Lopez quashed and the matter remitted to the Council for a *de novo* hearing because Mr. Lopez did not receive a fair hearing from the Commission when their decision was made to dismiss him. Subsection 111(3) of the *Belize Constitution* directs that the Council “may make any other decision” the Commission would have made. Section 20 of the *PS Regulations* governs the dismissal decision because Mr. Lopez remained a temporary employee when he was dismissed,

[41] Mr. Lopez is entitled to costs for this claim as agreed or assessed.

[42] Finally, I not awarding damages at this time. I will remain seized of this matter and decide the issue of damages in the event Mr. Lopez is successful after his rehearing.

Dated September 20<sup>th</sup>, 2022

Patricia Farnese  
Justice of the Supreme Court of Belize