



International Civil Aviation Organization

APPEALS BOARD

Case No.: ICAO Appeal No. 2020-003
Decision No.: ICAO/2023/003
Date of issue: 19 May 2023
Original: English

Before: Judge Sir Goolam Meeran: President
Ms. Katherine Rooney: Member
Ms. Haaba Baldeh: Member

Registrar: Mr. Arie Jakob

ALVEAR

v.

SECRETARY-GENERAL
OF THE INTERNATIONAL CIVIL
AVIATION ORGANIZATION

DECISION

Counsel for Applicant: Mr. David Wilkinson

Counsel for Respondent: Mr. Christopher Petras

1. **DECISION AND ORDER**

1.1 It is the Decision of the Appeals Board that the Appeal is not receivable.

1.2 The Appeals Board Orders that the appeal be dismissed.

2. **REASONS**

2.1 It is settled law that whether or not a party raises the question of receivability of an appeal the Board has power, and indeed a duty, of its own initiative to consider and determine as a preliminary issue whether there has been compliance with any of the mandatory requirements for filing an appeal against an administrative decision in accordance with the appropriate ICAO Staff Rules. If the appeal is not receivable the Board has no jurisdiction to consider the merits of the appeal. *Chahrour2014-UNAT-406, para. 25; Babiker2016-UNAT-672, para. 45.*

2.2 Although this Decision will of necessity focus on the receivability of the appeal it should be noted that in the event that the Appeals Board were to find that the appeal was receivable, they would have had to rule on the question whether the comments of the Secretary General, the Reply, was submitted within the period of 60 calendar days of receipt of the Application as required under Rule 9 of the ICAO Appeals Board Rules of Procedure. Given the Board's factual findings in relation to the receivability of the Appeal it is not, in the circumstances, necessary to examine this question since receivability of an appeal may in appropriate circumstances, as in this case, be determined by way of summary judgment.

2.3 There are two principal issues affecting the question whether this appeal may be receivable. First, in accordance with the applicable jurisprudence, the administrative decision being appealed against must be identified as clearly and as precisely as possible so that the administration will know with certainty what is the contested decision, the date when it was notified, if known, the person or persons who made the decision. Such details are necessary to enable the administration to resolve the problem as quickly as possible without recourse to litigation and, if an appeal is filed with the Appeals Board for the Board to know what is the impugned decision and whether there has been compliance with the mandatory requirements under ICAO's internal law and procedures. The second issue is whether the Applicant sought an administrative review of the decision within the applicable time limits. A determination of this question will require objective and verifiable evidence of the date the decision was notified to the staff member and the date that administrative review was requested. In the absence of clear evidence of written notification of the decision there may, in appropriate circumstances, be sufficient and legitimate grounds upon which it may be inferred, from an examination of the facts, that an appealable administrative decision had been made and acted upon to the detriment of the staff member. It is vital that there is certainty in the calculation of the applicable time limits. When an appealable administrative decision is notified in writing it will have the necessary ingredient of certainty. However, when reliance is placed on an implied decision, the Board will have to establish the date when the staff member could reasonably have concluded that an appealable administrative decision had been made. It is generally unsafe for a staff member to rely solely on an implied decision unless there are reasonable grounds to sustain such an inference. The Board comments further on this matter in our recommendations to the Secretary-General.

2.4 On 20 March 2020 the applicant submitted Form 177, “Staff Member Request for Administrative Review by the Secretary-General.” At section V the applicant was required to provide details of the contested administrative decision. He identified two “decisions” in the following terms:

a) A Desk Audit Report with classification results of my assigned duties was completed in July 2019, however a copy (including the final rating and supporting comments) was not provided to me, in accordance with United Nations Classification Standards.

b) September 2017 to present, I have been subject to the discriminatory and arbitrary application of Staff Rule 105.3, in contravention of United Nations overtime policies governing staff in my field of expertise (ie. conference services).

2.5 The Secretary to AJAB, the Advisory Joint Appeals Board at the time, considered that Form 177 was incomplete and wrote to the Applicant on 24 March 2020 advising him that further details were required of the contested decision: “you have to identify by whom it was taken, the date when it was taken, as well as the date you received written notification thereof. These formal steps are very important to comply with, including the deadlines that ought to be observed.”

2.6 On 9 April 2020 the applicant submitted his amended form 177 which in essence described the same administrative decisions as at paragraph 4a and b above with an additional comment regarding the failure on the part of A/D/ADB to respond to his request to intervene to resolve the issues.

2.7 On 15 April 2020 the Applicant received a written communication from the Secretary-General rejecting his request for administrative review citing as reasons that Form 177 had not identified an administrative decision as required under Staff Regulation 111.1 and further that the request for administrative review was not submitted within the period of 30 days as required under Staff Rule 111.1

2.8 The Secretary-General stated that the deadline was 27 March 2020 and that the request for administrative review, was time barred. This deadline was based on the fact that the Applicant stated on form 178 that the decision was made on 26 February 2020 explaining that on 27 January 2020 he “delivered an IOM addressed to A/D/ADB soliciting his guidance and intervention. None was forthcoming within 30 days, and I consequently filed Form 177, Staff Member Request for Administrative Review on 24 March 2020.” The Board finds that the Applicant is relying on the legal principle that, in certain circumstances, a failure or refusal to notify a decision could be construed as a decision. However, an examination of the IOM to A/D/ADB seeking guidance and intervention cannot be construed as a request for administrative review by the Secretary-General but could possibly be construed as a request to the administration for notification of a decision on the classification of his post and disparity in the allocation of overtime.

2.9 The Board observes that since the Applicant is relying on an implied decision it will be necessary to examine any objectively verifiable evidence that may have been submitted to support the reasonable inference that an implied decision crystallized within the period of 30 days prior the submission of a proper request for administrative review to the Secretary General as required under the Staff Rules. An examination of the evidence regarding the date of submission of a request for administrative review by the Secretary-General shows that Form 177, dated 20 March 2020, was first submitted on 23 March 2020. It was considered to be deficient and the Applicant was advised by the Secretary to AJAB to resubmit it with the required particulars. The revised Form 177, dated

24 March 2020, was submitted on 9 April 2020. If the Board were to take a generous interpretation of the IOM submitted to A/D/ADB as a request for a decision and failure by the administration to respond to it as constituting an implied decision contrary to his interest, the request for administrative review by the Secretary-General was not filed within the period of 30 calendar days as required under Staff rule 111.1(5) and became time barred on 27 March 2020.

2.10 Irrespective of the question as to whether any request for administrative review by the Secretary-General was filed within the required 30 days the Board has to consider whether an appealable administrative decision had been identified in the request for administrative review. If no such decision had been identified on Form 177 it will not be necessary to explore the matter further since the mandatory preconditions under the system of internal justice in ICAO will not have been satisfied.

2.11 On 14 May 2020 the applicant submitted his formal appeal on Form 178, to AJAB. In essence, apart from minor changes the appeal raised the same two issues relating to post reclassification and discriminatory allocation of overtime. In relation to both issues the applicant referred, as he had done on form 177, to contraventions of United Nations Rules and Procedures, rather than to ICAO's internal law and procedures, which do not apply unless specifically incorporated into ICAO's Service Code, Regulations and Staff Rules. Aside from this fact any appeal is not admissible if the necessary precondition of a properly drafted request for administrative review by the Secretary-General had not been submitted in accordance with Staff Rule 111.1(5).

2.12 **Applicable Legal Principles:**

ICAO Staff Regulation 11.1 (Amendment 31)
In effect from 1 January 2020 to 16 June 2020

Article XI APPEALS

11.1 Each staff member shall have the right to a review in accordance with the rules established pursuant to this Article in the following cases:

- a) any disciplinary measure imposed under Article X as well as summary dismissal under Regulation 9.17;
- b) an order of discharge under Article IX, Regulation 9.5 or 9.7;
- c) any administrative decision which it is alleged constitutes non-observance of a contract of employment, or of the terms of the ICAO Service Code, or non-observance of established administrative practices in such a way as adversely to affect the individual.

ICAO Staff Rule 111.1(5) and (6)]
In effect from 1 February 2020 to 22 December 2020

Staff Member Request for Administrative Review

5. A staff member who wishes to appeal the decision referred to in Staff Regulation 11.1 shall, as a first step, submit a properly completed Form 177, *Staff Member Request for Administrative Review by the Secretary General*, to the Secretary of the AJAB within 30 calendar days of the date the staff member received written notification of the decision. Failure by the staff member to properly complete Form 177 shall not stay or otherwise affect the deadline for submission. The Secretary of the Board will forward the staff member's properly completed Form 177 through the Legal Affairs and External Relations Bureau (LEB) to the Secretary General.

6. The Secretary General's answer shall be communicated to the staff member in writing within 30 calendar days of the staff member's submission of a properly completed Form 177.

The question whether the Appeals Board may consider an issue of receivability of an appeal without a hearing and, in appropriate circumstances, by summary judgment, was affirmed in the Judgment of the United Nations Appeals Tribunal ("UNAT") in *Heftberger v ICAO Secretary General 2023-UNAT-1312 at paras. 32-34*:

32 "A summary judgement is permitted in cases including where, irrespective of the merits, an application or appeal cannot succeed. The receivability of the application or appeal is one example of the appropriate use of the summary judgment procedure. If the case is not receivable, because of non-compliance with necessary preliminary steps to give the tribunal the jurisdiction or competence in law to consider it, its merits cannot be considered, let alone adjudicated upon."

Heftberger is the most recent appeal where UNAT affirmed previous rulings and clarified the importance of compliance with the mandatory preliminary steps relating to receivability. UNAT considered ICAO Staff Rule 111.1(5) and (6) and reiterated that

33. "the first step to challenge an administrative decision must be taken by the staff member within 30 days of receipt of that decision..."

34. "Dr Heftberger's failure to seek a review of the decision to which she objected within the period of 30 days after she received notice of that decision, coupled with her subsequent failure to seek from the ICAO Secretary-General a waiver or suspension of that time limit on grounds of extraordinary circumstances, caused her appeal to the Appeals Board to be not receivable by operation of law."

[It should be noted that the Applicant did not seek from the Secretary-General a waiver or extension of the time limit. Moreover, he was not relying on written notification but on an implied decision arising from the failure and/or omission on the part of A/D/ADB to respond to his IOM summarizing his concerns and seeking a resolution in the following terms:

In view of the numerous best practice deviations I cite above vis-à-vis the litany of (documented) injustice done to me over the course of my twenty-six-year career at ICAO, I base my request for your kind review and intervention on humanitarian grounds].

The applicable legal principles regarding what constitutes an appealable administrative decision have been addressed by UNAT in a long line of appeal judgments from which the following principles are relevant to a determination of the question whether the contested decision in this case constituted an appealable administrative decision and complied with the required timelines and procedures:

"...before an administrative decision can be held to be in non-compliance with the contract of employment of a staff member, it must be shown to adversely affect the rights or expectations of the staff member and have a direct legal effect. The impact or consequences of a disputed decision must be based on objective elements that both parties can accurately determine" *Collas v. Secretary-General of the United Nations, Judgment No.2014-UNAT-473, at para.41*.

"a decision is only an administrative decision if it is of an administrative nature, adversely affects the contractual rights of the staff member and has a direct, external legal effect." *Michaud V Secretary-General of the United Nations Judgment No. 2017-UNAT 761, para 50*.

2.13 THE ISSUES

2.13.1 In the absence of any notification of a decision is the Applicant correct in stating that there was an implied decision on the basis that not providing him with a decision despite his several attempts at eliciting such a decision was in fact a decision?

2.13.2 What precisely did the Applicant identify as the contested decision/s in the request for administrative review (Form 177) and the appeal (Form 178)?

2.13.3 If such decision/s could be implied what was the date by which it would have been reasonable for the applicant to infer that there had in fact been a decision not to upgrade the post which he encumbered such as to entitle him to commence proceedings?

2.13.4 If the Board were to find that the Applicant had reasonable grounds to infer that there had been an implied decision what precisely was the administrative decision or decisions which he had submitted on Form 177 requesting an administrative review by the ICAO Secretary General? Did they in fact meet the definition of what constitutes an administrative decision?

2.13.5 If one or more decisions could be identified did the Applicant seek an administrative review of the impugned decision/s within the period of 30 days?

3. FINDINGS AND DISCUSSION ON THE ISSUES

3.1 The Applicant made several enquiries seeking to know the outcome of the desk audit review, and a copy of the report, relating to the grading of his post. He was given reasons for the delay but no decision was communicated to him. The Board considers it appropriate to offer comments and guidance in the Section on “Recommendations to the Secretary-General” given the provisions of Staff Rule 102.2(14).

3.2 On 19 September 2019 the Applicant wrote to Mr. Jossai stating his understanding that the desk audit had been completed and a recommendation had been submitted to HR on 28 July 2019. He was informed that Ms. Irons was dealing with the matter. On 17 October 2019 the Applicant wrote to Ms. Irons requesting a copy of the desk audit report and in the absence of a response he wrote to Mr. Jossai with a copy to Mr. Detchou requesting a copy of the notice of classification results pointing out “it’s been 94 days since the desk audit was completed and the results submitted to RCP.” Mr. Jossai replied on 30 October informing him that since ICAO only had one classification officer and that Ms. Irons was on sick leave she would deal with the matter on her return to the office. It should be noted that the classification had been carried out not by Ms. Irons but by Ms. Murray, an external classification expert.

3.3 It would appear to be uncontested that there was no explicit decision communicated to the Applicant. Accordingly, the Applicant contends that the failure to notify him of the outcome of the desk audit means that there was an implied decision which crystalized at some point early in 2020. The Board has been provided with an undated IOM which the Applicant sent to A/D/ADB on or about 27 January 2020. Under the sub-heading “Desk Audit-Classification of Post” which includes the complaint: “Between 2012 and 2018, I was subjected to an array of recruitment, classification, and resource allocation inequities which culminated in an appeal for a “desk audit” in July 2018. He added that “in accordance with UN guidelines” he should have been provided with a copy of the desk audit report. His reliance on UN guidelines is misplaced since these guidelines have not been incorporated into ICAO’s staff Regulations or Staff Rules.

ICAO Staff Rule 102.2(13) and (14) provides:
In effect from 1 February 2020 to 22 December 2020

Implementation of classification decisions

(...)

13. All classification decisions shall be communicated to the requesting office of the post, along with a copy of the approved job description. A copy of the vacancy notice, or reclassification notice, as applicable, shall be provided to the requesting office prior to publication.

Recourse procedure

14. Within one month of being notified of the classification decision, the supervisor and/or incumbent of a post who disagree(s) with the classification decision may request a second classification review of the job description in question. The second classification review shall be carried out independently by Human Resources personnel with job classification experience who did not participate in the first classification review. Following completion of the second classification review, if the supervisor, the incumbent or both continue to disagree with the classification decision, they may submit a statement explaining the grounds for disagreement to DD/ADB-HR; this statement will be part of the official classification record.

3.4 The IOM referred to his right of appeal: “Please note that I reserve the right to appeal the classification decision, pending an appropriate resolution and/or compensation for any pay equity abuses.”

3.5 Reading this IOM as a whole in the context and background of this case it would appear that at the very least at the end of January 2020 the applicant had formulated in his mind the belief that a decision had been made not to upgrade the post he encumbered to G-7 but that it should remain as being appropriately assessed as G-6. That said, an examination of the request for administrative review does not identify upgrading of the post as the appealable administrative decision.

3.6 In relation to the alleged disparity in the assignment of overtime duties the Applicant complains that he ought to have been allocated overtime duties including those occasions when preference was given to external consultants. Whilst it is permissible, in appropriate circumstances, for a staff member to file a complaint that a generally applicable policy or practice has a direct and individual impact it is not sufficient to make the allegation without providing specific dates and instances showing a disparate and individual impact which had been the subject of a request for administrative review within a period of 30 days of the said decision. This principle applies even where it is alleged that there is a continuing pattern of disparity of treatment arising from a certain policy decision or practice. It will be necessary to identify the last occasion when the practice resulted in an individualized impact specific to him. Unless such relevant details are clearly identified in the request for administrative review it is not possible for the Secretary General to investigate and take corrective action relating to any alleged wrongful act. It is also unacceptable to allege discriminatory action without providing precise and specific instances particularly in the allocation of overtime duties in relation to which specific particulars are generally capable of being determined.

3.7 An examination of the Request for Administrative Review (Form 177), dated 20 March 2020, indicates in relation to the details of the contested administrative decision that:

- a) no administrative decision had been communicated to him so he was unable to name the decision maker or the date that the decision was made,
- b) no allegations were made of specific breaches of ICAO's internal law but it was alleged that United Nations Classification Standards and overtime policies were breached,
- c) the claim that he should have been provided with a copy of the Desk Audit Report including final rating and supporting comments may be construed as being consistent with the Applicant's acknowledgement that there was no contestable administrative decision of which he was notified and if he believed that a decision had been made that the post that he encumbered was not rated at G-7 or higher he did not specify this as the contested decision,
- d) the claim regarding disparity of treatment in the allocation of overtime was not adequately particularized and in any event the Applicant's reliance on United Nations overtime policies was misplaced. In essence no contestable administrative decision with specific application to the Applicant had been identified.

3.8 Similar considerations apply to the Appeal on Form 178.

3.9 The Applicant failed to identify a contestable administrative decision of individual application to him so the question whether the Applicant could in the circumstances infer that there was an implied decision/s is difficult to answer simply because no such decision had been identified in the request for administrative review. Even if it could be said that the Applicant had identified one or more contestable administrative decisions, he failed to submit a timely request for administrative review by the Secretary-General within 30 calendar days of any such implied decisions as required under Staff Rule 111.1(5).

3.10 Other issues raised in the Appeal do not arise for consideration because of failure to comply with the mandatory requirements of first presenting a properly formulated request for review, by the Secretary-General of ICAO, of an appealable administrative decision.

4. RECOMMENDATIONS TO THE SECRETARY-GENERAL

4.1 In the interest of justice and to enhance the promotion of good employment relations the Board respectfully draws to the attention of the Secretary-General the administrative oversight or failure in this case to notify the staff member of the outcome of the decision reached on his request that the post which he encumbered should be upgraded.

4.2 At paragraph 3.3 we set out the provisions of ICAO Staff Rule 102.2(13) and (14) and refer in particular to "Implementation of Classification Decisions" and the "Recourse Procedure."

4.3 The Staff Rule is silent on notification to the staff member and assumes, understandably, that the requesting office will notify the staff member. The Staff Rules as currently drafted create a lacuna when the requesting office fails to notify the staff member who is left to infer that an implied decision has been taken. However, you may feel that a more deleterious effect to the staff member and to the Organization is that in the absence

of such notification the staff member may effectively be deprived of the benefit of the “Recourse Procedure” conferred on her/him under the Staff Rules.

5. **CONCLUSION**

5.1 The Application is not receivable. The Appeals Board has no jurisdiction to consider the merits of the appeal.

5.2 It is Ordered that the Application be dismissed.

Any communication to the Appeals Board is to be sent to appealsboard@icao.int.



Sir Goolam Meeran
President

Entered in the Register on 19th May 2023