International Civil Aviation Organization

APPEALS BOARD	Case No.:	ICAO Appeal No. 2022-004
	Decision No.:	ICAO/2022/007
	Date:	21 December 2022
	Original:	English

Before: Judge Rowan Downing QC, President
Ms. Nevin Murad, Member
Mr. Mike Boyd, Member

Alternate Secretary/ Registrar: Mr. Andrew P. Opolot

JAMES WAN

v.

SECRETARY GENERAL
OF THE INTERNATIONAL CIVIL
AVIATION ORGANIZATION

DECISION

Counsel for Applicant: Self-represented

Counsel for Respondent: Mr. Christopher Petras

Introduction

1. The Applicant is the former D-1 level Deputy Director, Administration and Services Bureau of International Civil Aviation Organization (ICAO or the Organization) and has appealed a decision to impose on him the disciplinary sanction of summary dismissal for serious misconduct.

2. The Respondent has replied asserting that the application is without merit.

3. The Appeals Board has reviewed the submissions and hundreds of documents filed in this matter.

Background and the findings upon which the decision was based

4. The Applicant was appointed to work in ICAO in 2009. In 2013 the Applicant commenced full time studies for a PhD at Concordia University. He informed the former Secretary General of his studies in 2013 and the now former Director of the Bureau of Administration and Services in 2016. The Applicant concluded his studies in 2017. During this period his supervisor for his PhD was Dr. Saade. In May of 2017 Dr. Saade applied for the position of Chief, Business Technology and Services Section. This position reported to the Applicant. The Applicant provided Dr. Saade with a copy of the job opening before it was made public, and it was said that they were friends. It was found that the Applicant had a conflict of interest in respect of his involvement in the selection process for the position and that he failed to declare a conflict of interest. The United Nations Office of Internal Oversight Services (OIOS), which conducted an investigation found:

> During the 2017 recruitment process of the P-5 Chief, Business Technology and Services Section (C/BTS), the Applicant did not disclose that one of the short-listed candidates (Dr. Saade) was his PhD thesis supervisor and had served on his PhD Examining Committee;

5. During the period when the Applicant was employed as the Deputy Director, Administrative and Service Bureau and studying for his PhD he executed contracts between ICAO and Drs. Saade and Jones, who were members of the Applicant's PhD examination committee. From 2011 to 2017, Dr. Saade had 9 consultant contracts in respect of which the Applicant was listed as his supervisor or staff member to whom Dr. Saade reported. Two of these contracts predated the commencement of the Applicants PhD, with two post-dating the award of the Applicant's PhD. Dr. Jones had two consultancy contracts with ICAO. The first was from 11 October 2017 to 11 June 2018, the second was from 12 June 2018 to 12 September 2018. The Applicant signed both of these contracts as the approving director and was referred to as the supervising staff member. OIOS found:

> In the conclusion of a series of consultancy contracts who were on his PhD Examining Committee, the Applicant failed to disclose a conflict of interest situation in respect of contracts with Dr. Saade and Dr. Jones, with contract values of CAD 562,500.00 and CAD 58,500.00, respectively.

6. It was alleged that the Applicant had a further conflict of interest which he failed to disclose in respect of being a member of the Business Development Group which had oversight of revenue generating operations of the Organization. It was alleged that in 2019 the Applicant was involved in the review of the business case for a journal entitled the ICAO *Scientific Review* and that he did not disclose his association with either Dr. Saade or Dr. Jones who worked on the project and the Applicant also failed to disclose that both of these gentlemen were on the Boards of Directors of the Informing Science Institute, which hosted the website of the journal from 2017. OIOS found:

> The Applicant failed to disclose a conflict of interest situation arising from the fact that the consultancy contracts of Dr. Saade and Dr. Jones included tasks related to the ICAO Scientific Review Journal Project, for which a business case review was submitted to the Business Development Group (BDG) on 1 April 2019, when the Applicant was a BDG member;

7. It was alleged that three unauthorised letters were issued by the Applicant in inviting three foreign nationals to attend ICAO, that such were to be characterised "visa letters" and that such were issued without due regard for whether the entry of these people into Canada was for the purposes of ICAO activities. OIOS found:

> The Applicant issued unauthorized visa letters to 3 foreign nationals who purportedly were to come to Canada to work for approximately 4 weeks at ICAO on projects under an MOU between ICAO and their home state…;

8. The last finding related to an instance of the hacking of the computer systems of ICAO in 2017. It was alleged that the Applicant failed to provide proper and timely authorisations for action to be taken and that this obstructed the investigation and proper reporting of the matter. According to the Respondent, OIOS found:

> The Applicant in various ways obstructed an investigation into a 2017 cybersecurity incident at ICAO, and prevented (including by threats) [an] ICAO Treasury Officer, (name redacted) from informing the Royal Bank of Canada about the incident.

9. These findings were adopted by the Respondent, leading to the summary dismissal of the Applicant.

Procedural History

10. There were two investigations in respect of the misconduct of the Applicant. The first is referenced as OIOS-2021-00049, ID Case No. 1313/19 and the second as OIOS-2021-01025, ID Case No. 1344/19 (collectively referred to as "the investigative reports").

11. Following the receipt by the Respondent of the investigative reports on 16 November 2021, he wrote to the President of the ICAO Council, as required by Staff Rule 9.9, requesting approval to terminate the appointment of the Applicant on the basis a finding of clear and convincing evidence of serious misconduct by the Applicant.

12. On the same day, the President of the ICAO Council approved the termination of the Applicant's appointment. The Respondent then notified the Applicant by letter of his provisional decision to summarily dismiss him for serious misconduct as disclosed in the investigative reports.

13. The Applicant was offered an opportunity to respond in accordance with Staff Rule 9.7 and 10.1 and Staff Rule 110.1 paragraphs 12 and 14. The applicant provided his response on 29 November 2021.

14. On 8 December 2021, the Applicant was advised by the Secretary General that he confirmed his decision of the disciplinary sanction of summary dismissal of the Applicant, to take effect immediately (the Decision).

15. On 22 December 2021, the Applicant filed a request for administrative review of the decision by lodging a Form 177 request. On 18 February 2022, he received a negative response to his request.

16. On 21 March 2022, the applicant filed his appeal to the Appeals Board in respect of the Decision.

17. On 23 June 2022, a case management hearing was held by video conferencing. The matter was set down for a video hearing on 21 August 2022 and ancillary orders were made in preparation for the hearing. The hearing date was subsequently varied at the request of the Respondent, and with the agreement of the Applicant, to 15 September 2022.

Scope of review by the Appeals Board

18. The administration bears the burden of establishing that the alleged misconduct for which the disciplinary measure has been taken against the staff member has actually occurred. See *Liyanarachchiga* 2010-UNAT-087. The standard of proof required is that of clear and convincing evidence, which requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt, it means that the truth of the facts asserted is highly probable. See *Molari* 2011-UNAT-164, para. 30. This jurisprudence reaffirmed in *Abu Ghali* 2013-UNAT-366, para. 33; *Nyambuza* 2013-UNAT-364, para. 31; *Diabagate* 2014-UNAT-403, para. 30; *Mobanga* 2017-UNAT-741, para. 24.

19. It has been further observed that "Clear and convincing evidence of misconduct [...] imports two high evidential standards. The first ('clear') is that the evidence of misconduct must be unequivocal and manifest. Separately, the second standard ('convincing') requires that this clear evidence must be persuasive to a high standard appropriate to the gravity of the allegation against the staff member and in light of the severity of the consequence of its acceptance. Evidence, which is required to be clear and convincing, can be direct evidence of events, or may be of evidential inferences that can be properly drawn from other direct evidence." See *Negussie* 2020-UNAT-1033, para. 45.

20. In other words, the evidence justifying the potential consequences (including up to the ultimate sanction of dismissal) must be both manifest as opposed to suppositional ('clear') and more than meets a balance of probabilities standard ('convincing'). A sufficient doubt or doubts about the credibility of other evidence (including eyewitness evidence) can be a good indicator that this standard has not been met.

21. If a disciplinary measure of termination is based on several grounds, as in this case, including mitigating and aggravating factors, there must be clear and convincing evidence for all these facts or elements. See *Negussie* 2016-UNAT-700, paras. 23-25 and 28; *Negussie* 2020-UNAT-1033, paras. 11-12.

22. It is well established by the United Nations Appeals Tribunal (UNAT) that the standard of judicial review in disciplinary cases requires the Appeals Board to ascertain:

> (a) whether the facts on which the disciplinary measure was based have been established;
> (b) whether the established facts legally amount to misconduct;
> (c) whether the disciplinary measure applied was proportionate to the offence; and
> (d) whether due process was provided to the Applicant.
>
> (See, for example, *Abu Hamda* 2010-UNAT-022, *Haniya* 2010-UNAT-024, *Portillo Moya* 2015-UNAT-523, *Wishah* 2015-UNAT-537, *Turkey* 2019-UNAT-955, *Ladu* 2019-UNAT-956, *Negussie v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-700, para. 18, and *Nyawa* 2020-UNAT-1024 para. 39.)

23. In determining whether the facts upon which the disciplinary measures have been established, the Appeals Board may take into account matters which are asserted by the Applicant to have not been given the proper weight, were wrongly ignored or were irrelevant, but taken into account. The facts established must be properly established according to law.

Grounds of Appeal

24. The Applicant has provided a significant number of grounds of appeal. These are used by the Appeals Board to assist it in determining whether the facts have been established and whether those facts legally amount to misconduct.

25. The Appeals Board has attempted to isolate the grounds of appeal from the Application, as they are set out in a discursive manner, which is not unexpected or the subject of criticism, as the Applicant is self-represented. The grounds are considered by the Appeals Board, noting, however its task in any review of this nature, as set out in paragraph 22, above. The Appeals Board specifically notes the matters of the alleged failure to take relevant matters into account, the taking into account of irrelevant matters, the failure to give proper weight to matters and the failure to prove matters to the appropriate standard of clear and convincing.

General grounds asserted by the Applicant

- The Organization has the burden of establishing that misconduct had occurred, which burden was not discharged.
- The evidence was neither clear nor convincing.
- No, or no sufficient weight was given to the submissions of the Applicant.
- There was an error in respect of the application of the correct provisions providing for the consideration conflict of interest, as the wrong version of PI/1.6 was referred to by the investigators.
- That the provisions in respect of the consideration of conflict of interest are ambiguous,
- There was an error of fact leading to an erroneous finding of a conflict of interest and there should have been a finding of compliance by the Applicant with the conflict of interest provisions as they were at the relevant time.
- That the decision maker and the investigators failed to consider all matters relevant.
- That the matter was investigated by an independent authority, namely the Federal Prosecutor of Canada, to whom the Organization referred the matter, no criminality was found and thus the decision was wrong.
- There was an error of fact and law in characterizing an “invitation letter” as a “visa letter”.
- There was a failure to take all of the evidence into account, including the fact that the letter had been approved as an invitation letter and that the ICAO stamp had been placed upon it as an invitation letter.
- There was an error of fact or, no evidence to support finding the Applicant was involved in the placement of the ICAO stamp on the invitation letter.
- There was no, or no sufficient, evidence upon which to conclude that the Applicant had abused his authority in respect of the issue of the invitation letter.

In respect of the cybersecurity incident

There was a failure to take into account the following facts:

- There was a dispute between the Secretary General and the head of Administration concerning the matter.
- That the Applicant acted in a professional manner, supporting the investigation.
- That the conclusion reached was not supported by the facts and was thus unreasonable and/or not open to be found.
- That the decision maker failed to take into account the relevant fact that the management actions of the Applicant were proper and prudent at the time and in the interests of the Organization.

26. The Applicant has further raised in the course of pleadings that an internal investigation was concluded in respect of the 2017 recruitment process of the P-5 Chief, Business Technology and Services and that a decision had been made by the then Secretary General dismissing the complaints of a conflict of interest. The matter was improperly reopened and re-examined. This is an argument in respect of *res judicata* or *ne bis in idem.* The effect of both of these concepts is that one cannot be prosecuted for the same offense twice.

27. The Appeals Board notes this submission by the Applicant is not relevant, as disciplinary actions are not criminal in nature. Liberty is not at stake and the sanctions are not criminal in nature, although they can clearly be very serious. See *Molari* 2011-UNAT-164. The Appeals Board will not further consider this submission.

Contentions of the Applicant

1: In respect of the conflict of interest matters:

28. The Applicant stated that before he commenced work at ICAO in 2009 the professors from Concordia University already had a relationship with ICAO and that their continuing relationship was not as a result of his actions, but stemmed from the MOU between Concordia University and ICAO. He further asserted was that there was a misinterpretation of the relevant regulations and facts, as from 2013 the Secretary General knew he was studying for his PhD under the supervision of Dr. Saade. The Applicant also informed the Director of the Bureau of Administration and Services (D/ADB) in 2016, when he took that office. They were thus well aware at all relevant times, of the relationship that he had with Dr. Saade and Concordia University and did not advise the Applicant of any conflict of interest. That the then Secretary General had approved the renewal of the contract of Dr. Saade each year until 2019. The Applicant asserted that "[T]here was no doubt that since 2013, the former Secretary General approved and was fully aware of my academic relationship with Dr. Saade as my supervisor in the research panel...".

29. The Applicant further noted that the decision maker failed to note that the contracts he signed engaging any of the academics from Concordia University were signed by him in a formal sense on behalf of ICAO and not because he was involved in appointing them as consultants. The Applicant noted that "the former Secretary General was fully aware Dr. Saade was a consultant working in ICT areas since 2010. His contract documents were prepared by the ICT section, approved for renewal annually by the D/ADB and the Secretary General." Again, there was a failure to take into account that the reporting lines from such consultants to him was a matter of formality and did not mean that there was any connection between he and the academics from Concordia University related to their work.

30. In respect of the application by Dr. Saade for the position of Chief Business Technology and Service Section, the Applicant asserted that the decision maker failed to take into account, or give sufficient weight, to the fact he did not take part in the consideration of the written tests and that he had not intended to be involved in the oral interviews. He stated that Mr. Vincent Smith, D/ADB, agreed to chair the interviews. Mr. Smith was, however, unable to do this at the last minute and thus as a matter of "necessity", the Applicant had to become involved in the interviews. The Applicant noted that he was not involved in the final selection of the top candidate, as Mr. Smith held special interviews with the candidates and made the final selections and established order of preference of the candidates. The Applicant stated "Evidently the former Secretary General and the former Director of Administration and Services Bureau were fully aware of my relationship with Dr. Saade during the selection process for the Chief post of the BTS section. I made a concerted effort to exclude myself from the process."

31. The Applicant alleged that both the Secretary General and the D/ADB gave false evidence in respect of their knowledge of his relationship with Dr. Saade.

32. The Applicant stated that he gained no personal advantage from any professor with whom he had contact from Concordia University and who undertook work for ICAO. At all times the Secretary General and the D/ADB were aware of the relationship that he had with Dr. Saade. He submitted that neither expressed any issues concerning the relationship, the fact of which they well knew, that both approved the renewal of contracts with Dr. Saade during the course of the investigation.

33. The Applicant also asserted that he was not the hiring manager in respect of the Chief BTS position, he had no interest in the outcome of the appointment or selection process and there is no evidence of the receipt of any benefit.

34. To further demonstrate the knowledge of the former Secretary General the Applicant asserted that he reported to the former Secretary General that he was publishing at least three management related articles and that the former Secretary General asked that her son be involved in one of these articles as a co-author, which occurred. There was no doubt that the former Secretary General was fully aware of the Applicant's relationship with Dr. Saade as the supervisor of his PhD. He also reported to Mr. Smith the then D/ADB, that he was working with Dr. Saade on his PhD. He asserts there is no doubt that the D/ADB was well aware of the relationship he had with Dr. Saade. The Applicant asserted that no concern was raised at the time about a conflict of interest.

35. In respect of the continued renewal of the consultancy contracts with the professors from Concordia, the Applicant stated that the contracts were renewed from 2013 to 2019 with both the Secretary General and the D/ADB approving of such renewal.

36. It was not until 2019 that there were explicit written guidelines in respect of the reporting of conflicts of interest in the recruitment process. Following an internal investigation of the matters above, a conclusion was reached by the Secretary General that the Applicant had not committed misconduct due to there not being any guidelines.

37. The Applicant observed that the investigators made a recommendation for disciplinary measures in respect of having a conflict of interest based on a policy dated 25 June 2019 in respect of alleged conflict of interest, which occurred in 2017. The Applicant asserted that therefore the retrospective application of such policy is legally flawed.

38. In respect of the series of consultancy contracts entered into with Dr. Saade and Dr. Jones and others, the Applicant stated that it was well known that Dr. Yan one of the professors assessing his PhD, had left ICAO in 2012 which was before the Applicant commenced his PhD studies. Dr. Michael Jones joined ICAO as a consultant in 2018 hired by the Acting Chief of BTS. This was after the Applicant had completed his PhD studies. Three out of four professors were not contracted to ICAO during the PhD studies of the Applicant. This information was provided to the investigators, who ignored it. In respect of the continued renewal of the consultancy contracts with the professors from Concordia, the Applicant again stated that the contracts were renewed from 2013 to 2019 with both the Secretary General and the D/ADB approving of such renewal.

39. The Applicant was not the hiring manager who initiated the consultancy contracts with the academics. Drs. Saade and Jones were awarded consultant contracts between 2013 and 2019 which were approved by the D/ADB, the Chief of the Staff Employment and Administration Section (SEA) and the Secretary General respectively.

40. There is no evidence that the Applicant received any benefit whatsoever from the employment of Dr. Saade and the other professors. In 2019 Concordia University, at the request of ICAO, investigated his studies leading to the award of his PhD. These investigations concluded that the research paper and thesis were original and authentic and that there was no conflict of interest between the applicant and any members of the assessment panel. The Applicant's research was not in respect of civil aviation or ICAO related.

41. The Applicant went on to explain that there was no way within the ICAO structures to report an academic relationship of the nature that he had with Dr. Saade.

2: The BDG alleged conflict

42. The Applicant stated in respect of the decision based on investigative report 1344/19, that the Chief of Revenue and Product Management Section, Ms. Brand provided evidence which failed to note that Dr. Saade had already left the project referred to in 2015. There is reference to a business case reported to BDG on 27 May 2019, that is four years later. Dr. Saade ceased as a consultant with ICAO on 23 March 2019 there was therefore no ground to construct a conflict of interest situation between the project and Dr. Saade. The same was true in respect to Dr. Jones, as his contract ended on 12 September 2018. The Applicant was not the project business owner but rather it was owned by the Deputy Director of the Air Navigation Bureau and supported by the Deputy Director of the Air Transport Bureau and did not come under the Applicant's responsibilities. The Applicant stated that he was ADB's representative on the Business Development Group and at the meeting on 27 May 2019 there was no discussion or decision regarding the project which had been presented by the Deputy Director of the Air Navigation Bureau. The Applicant was not chair of the Business Development Group meeting, nor it's secretary. Further, he asserted that the Business Development Group is not a decision making office. The Applicant was never a member of the project team, and thus there was no conflict of interest involved whatsoever.

43. Dr. Jones' contract with ICAO ended on 13 or 12 September 2018. The BDG meeting was held in May 2019, eight months after he had left therefore there was no ground to support a conflict of interest situation as charged.

3: Letters sent to foreign nationals

44. The Applicant asserts that the letters were to be characterised as "invitation letters" and not "visa letters". He asserted that their format is very different from the visa letters used by ICAO.

45. The Applicant stated that it was not within his control as to what an invitation from ICAO may be used to support. It was not the Applicant's intention that the invitation letter be used for the purposes of obtaining a visa. In respect of the letters, its subject line made it quite clear that it was an invitation letter and nothing else. The Applicant requested the office of the D/ADB send to the invitation letter draft to HR for endorsement and to be officially stamped by the Acting Deputy Director, who owned the ICAO stamp and was responsible for its use. One of the recipients of the invitation letter [Mr. Gong] already had a multiple entry visa to Canada, therefore the request for issuing the invitation letter was clearly not for visa purposes for him. The Applicant was provided with copies of his travel documents, and it is evident from the participants list in the report of the event that he attended that meeting, as his name is listed as an attendee. Mr. Gong stayed in Canada to attend the conference for four days, including the arrival and departure days. The two other participants Mr. Lin, and Mr. Zhang, were delayed in their arrival as their passports had expired. They informed the conference focal point of their delay. It was shown that invitation letters for the same event were also issued by Mr. Steve Creamer, the Director of the Air Navigation Bureau (D/ANB). Reference was made to an annex 19 to the Application of the Applicant, where both of these people confirmed that they were using Mr. Creamer's invitation letter for the purpose of internal university process and the Canadian visa application. The Applicant produced to the Appeals Board records of the hotel bookings, meeting invitations and correspondence with ICAO officials during their stay (annex 20 to the Application of the Applicant). Both of these participants were not coming to undertake work. They were invited to ICAO to participate in an event and later to enter discuss specific matters with ICAO officials. They stayed for a week, including their arrival and departure days. The letter of invitation was also sent to the Secretary General's office confirming that there is no issue in respect of the invitation letter (refer annex 21 to the submission of the Applicant). The Applicant further stated that the use of the words "To whom it may concern" on the invitation letter was part of what appears to be the standard format most often used and in this case the invitation letter was prepared by the D/ADB (annex 22 to the Application of the Applicant).

46. There was no ICAO "visa letter policy" established until June 2019. The decision under appeal was based on false present premise, because the terms of the policy of 2019 were used as the basis of an investigation into matters occurring in 2015. It was basically unjust that the Applicant was so dealt with, as his invitation letter was authorised by the ADB office, OSG, and HR. That the recipient participants engaged during their stay with business under Mr. Creamer's responsibility and his letter was used for visa purposes in any case. Mr. Creamer should have been the one held responsible for any errors, as they related to activities of his invitees. The action against the Applicant he maintains is discriminatory.

47. The Applicant further noted that ICAO referred this matter to the Federal Prosecutor of Canada to investigate, however no prosecution was laid, and the applicant received an apology. The investigation showed that a like letter issued by Mr. Creamer was used for the purpose of obtaining visas.

4: Investigation into the hacking of ICAO IT systems

48. In respect of the investigation into the hacking of the ICAO computer systems, the Applicant states that he did not obstruct the investigation and that the allegations that he did were fabricated. There was no evidence to support the cyber attack scenario when the incident occurred. Notwithstanding this, some staff member insisted on conclusively reporting the incident to the Royal Bank of Canada. The Applicant did not wish to make a report without evidence, regarding it as improper to act merely on assumptions. At the appropriate time the Applicant approved all requests to contact the Royal Bank of Canada's technical team and bio security team immediately after being requested for a technical assessment to ensure Royal Bank of Canada's AP link gateway and associated databases were functioning securely. The Applicant was concerned to ensure that no one could consider the incident to be a cyber attack without an evidence based analysis. On 18 August 2017 it was proposed to "freeze the investigation closed" due to lack of business justification. The Applicant asked that the investigation continue notwithstanding the requests that have been made. The Applicant said that on 30 August 2017 he gave approval to continue the investigation and also implemented measures to control the incident situation. The issues were reported to the D/ADB on 31 August 2017. The Applicant approved a request to contact the Royal Bank of Canada for technical support and assessment on 19 September 2017. The Applicant said he approved the engagement of additional assistance in the investigation. A report was concluded on 20 September 2017.

49. The applicant's assertion is that on the facts it is not demonstrated that he obstructed any investigation but rather he supported the investigation and that the conclusion reached by the investigators was wrong as a matter of fact.

The Respondent's case

1: Issues of conflict of interest matters

50. The Respondent asserts that the Applicant does not disagree with the conclusions of fact by the investigators in respect of the matters which have given rise to the finding of there being a conflict of interest in respect of conduct of the Applicant in the 2017 recruitment process of the P-5 Chief, Business Technology and Services Section. As a matter of fact, the Applicant did not disclose he had a close personal relationship with the short-listed candidate, Dr. Saade, who was his PhD supervisor and had served on his PhD Examining Committee. The Respondent adds that the conduct of the Applicant was dishonest, as he only mentioned to the Chief Recruitment, Classification and Post Management (RCP) that he knew Dr. Saade as a consultant who had worked for him for six years. The Respondent further points to the sharing of the job opening details with Dr. Saade before such were public, as additional evidence. That the Applicant during the course of the interview of candidates failed to disclose to his fellow panel members the relationship he had with Dr. Saade.

51. The Respondent noted that the Applicant argued that the rules for disclosing conflicts of interest were not clear. Respondent submitted that the ICAO had regulations in place at the time, explicitly stating "[staff members] does not engage in any activity that is incompatible with the proper discharge of their duties with the organisation", and further made reference to the International Civil Service Commission Standards of Conduct for International Civil Servants (2013) applicable to all staff members in this regard. Paragraph 23 of the Standards of Conduct concerning conflict of interest provides:

> Conflicts of interest may occur when an international civil servant's personal interests interfere with the performance of his/her official duties or call into question the qualities of integrity, independence and impartiality required the status of an international civil servant. Conflicts of interest include circumstances in which international civil servants, directly or indirectly, may benefit improperly, or allow a third party to benefit improperly, from their association with their organization. Conflicts of interest can arise from an international civil servant's personal or familial dealings with third

> parties, individuals, beneficiaries, or other institutions. If a conflict of interest or possible conflict of interest does arise, the conflict shall be disclosed, addressed and resolved in the best interest of the organization. Questions entailing a conflict of interest can be very sensitive and need to be treated with care.

52. The Respondent asserted that the Applicant's participation in the Chief BTS recruitment, where his friend and PhD thesis supervisor was a candidate, clearly calls into question his integrity, independence and impartiality as an international civil servant. The Respondent further argues Dr. Saade was allowed to directly benefit from the Applicant's association with ICAO by allowing Dr. Saade to preview the job description prior to it being made public and by having the Applicant promote his candidacy with other members of the interview panel. Existence for conflict of interest on the part of the Applicant cannot reasonably be disputed.

53. The Respondent also noted that the Applicant had clearly understood that there was a conflict of interest, as he had Mr. Smith, the D/ADB, involved in the process in a most unusual manner. The Applicant was unambiguously obliged by paragraph 4.2 of ICAO Personnel Instruction PI/ 1.61 to disclose the relevant details in writing to the ethics officer, which he did not do.

54. The Respondent further noted that as part of the job description of the Applicant he had to know the rules and regulations of the Organization.

55. The respondent stated that between 2011 and 2018 Drs. Saade and Jones, members of the Applicant's PhD examining committee, were awarded consulting contracts with ICAO. With Dr. Saade having nine consulting contracts from 2011 to 2017. For seven of these contracts, the Applicant was amongst the ICAO senior managers who signed and or approved the contract on behalf of the Organization. The first two of these contracts predated the studies of the Applicant at Concordia University, the next five overlapped with his period of study. Dr. Jones had two contracts awarded. The applicant was listed as the reporting staff member or supervisor and signed both of Dr. Jones' contracts on behalf of the Organization.

2: The BDG alleged conflict

56. The Applicant was a member of the Business Development Group (BDG) within ICAO. In April 2019 a business case for funding of an internet interdisciplinary journal sponsored by ICAO was presented to be the BDG with the project cost of $ 665,000. The applicant participated in the BDG review of the business case but did not disclose the fact of his association with Drs. Saade and Jones who had worked on the project. Nor did the Applicant disclose the fact that Drs. Jones and Saade on the Board of Governors of the organisation whose website had been hosting the journal since 2017. The conflict of interest cannot be disputed. The Respondent referred to paragraph 4.3 of ICAO Personnel Instruction 1.6 which provided:

> "Staff members whose official duties relate to the investment of assets and funds of the organization, or staff members who have direct access to procurement or investment information, need to be particularly sensitive to the potential for conflict of interest in the performance of their official duties and shall be particularly alert to the need to report such potential conflict of interest directly to their supervisor or to the ethics officer."

57. Respondent notes that there was no such reporting by the Applicant and that such amounted to misconduct which was established on it by clear and convincing evidence.

3: The facts relating to the Applicant knowingly issued visa letters to three foreign nationals without authorization and without due regard for whether their entry into Canada related to ICAO activities have been established by clear and convincing evidence and constitute misconduct warranting summary dismissal.

58. The Respondent categorizes the letters sent to three foreign nations as "visa letters", asserting that the Applicant either knew, or should have known, the procedures for the issuance of official ICAO letters in support of visa applications. He asserted that on 12 November 2015 the Applicant either issued or caused to be issued three letters for visa entry into Canada of three foreign nationals and that such was in contravention with the procedures provided for by ICAO. Such issuance was also without due regard for whether their entry into Canada related to ICAO activities. The Respondent asserted that the Applicant's actions "also undermined the legal processes of a Member State and negatively impacted the relationship of trust between ICAO and a host State".

59. It was also submitted that the misconduct of the Applicant "transcends the internal affairs of [ICAO] and impacts on the relationship and the trust between the Organization and a host country." In the judgment of the UNAT in *Thiare* 2021-UNAT-1167, para. 43 and subsequently at 44 it is stated that:

> [s]uch behavior must be treated with the utmost seriousness and ought not to be condoned by any Organization, more so, an Organization like the United Nations, which reports to and is accountable to Member States. It is no coincidence that a paramount obligation of staff members... is that they must "uphold the highest standards of efficiency, competence, and integrity" and the concept of integrity includes, inter alia, "fairness, honesty and truthfulness in all matters affecting their work and status".

60. The facts relating to the allegations that Mr. Wan knowingly issued visa letters to three foreign nationals without authorization thus amounted to serious misconduct and have been established by clear and convincing evidence. Further, on the totality of the evidence, the sanction of dismissal, though arguably harsh, is not disproportionate or manifestly abusive.

4: Investigation into the hacking of ICAO IT systems

61. The Respondent submitted that the decision was correct and that the findings of the investigators were fully justified.

Proportionality

62. The Respondent submitted that the disciplinary measure of summary dismissal was justified in this case due to the seriousness of Mr. Wan's misconduct. His blatant misconduct in failing to disclose his personal relationship with a candidate during a recruitment exercise where he served as hiring manager, sat on an interview panel, and made recommendations to the Bureau Director (D/ADB) overseeing the process with respect to the technical proficiency of the candidates, compromised the objectivity and integrity of the selection process and had the potential to damage the reputation of the Organization and that of the other staff members involved in the selection exercise. Reference was made to *Jenbere* 2019-UNAT-935, paras. 35-36.

63. The Respondent further submitted that in failing to disclose the nature of his relationships with Drs. Saade and Jones, who were awarded consultancy contracts with the Applicant's significant and who also both stood to personally benefit from ICAO's potential investment of $ 665,000 (CAD) in the *Scientific Review,* the Applicant "flouted" the standards of impartiality and integrity required of a staff member exercising procurement functions. This further undermined the transparency of both the

consultancy contracting process and the Organization's oversight of revenue generating activities. Reference was made to as made to the judgment in Masri 2010-UNAT-098, paras. 37:

> "It is the view of this Tribunal that staff members exercising procurement functions are required to conduct themselves, from an objective standpoint, in an impartial and honest way and act in the interests of the United Nations only. To comply with this duty, staff members must be seen to act with integrity, obtain no personal benefit from third parties and not engage in any conduct which could create the impression of favouring third parties, that is to say, they must be and appear to be above reproach, particularly when interacting with persons or entities who could potentially become involved in supplying goods or services to the Organization, or are currently in such a relationship, like vendors."

64. The Respondent stated that managers must act as role models, but the Applicant refuses to concede or recognize the seriousness of the misconduct in which he willingly engaged. Summary dismissal sends out a strong message that serious misconduct of this kind will not be tolerated and is thus an appropriate sanction in this instance.

Considerations

Consideration of each finding

65. The Appeals Board considers first the three issues of conflict of interest: 1a) the selection process for Chief BTS, 1b) the renewal of the consultancy contracts, and 2) the BDG project.

1a: The selection process for Chief BTS

66. The first finding under review is that related to the 2017 recruitment process of the P-5 Chief, Business Technology and Services Section where it was found that "the Applicant did not disclose that one of the short-listed candidates (Dr. Saade) was his PhD thesis supervisor and had served on his PhD Examining Committee".

67. The Appeals Board is mindful of its limited role in reviewing the findings, it notes the submissions of the parties and the grounds advanced by the Applicant. In this context it examines the following questions:

Have the facts on which the disciplinary measure was based have been established?

68. It is apparent that the Applicant does not disagree with the facts as alleged in respect of his involvement in the recruitment process for the position. He confirmed that he provided a copy of the job opening for the position to Dr. Saade before it was publically issued. He clearly identified that there was a conflict situation, as he arranged for Mr. Smith, D/ADB to be involved in the process, rather than he. However, when the Director became unavailable, he then clearly took an active part in the recruitment process. He stated that he did this as a matter of "necessity". Necessity is not and cannot be considered as a justification in respect of acting in a conflict of interest in respect of the selection process for appointment to a post. There is no doctrine of necessity which can be used to counter issues arising from conflict of interest, declared or not.

69. The Applicant stated, by way of explanation and to excuse his conduct, that the Secretary General and the D/ADB both well knew of his relationship with Dr. Saade, but permitted him to continue with his involvement in the recruitment process. He asserted that they had the responsibility to stop him if there was a conflict.

70. It may well be true that others who knew of the existence of the facts which caused the Applicant to be conflicted in the recruitment process did not act to prevent his involvement, but this does not excuse the Applicant from his primary and personal duty to recuse himself from a conflict situation, to notify the Ethics Officer and to inform the others sitting on the interview panel of his relationship with Dr. Saade in this specific instance. This duty was a personal duty. The Applicant cannot rely upon the failure of others to act as a shield in respect of his failure to comply with his obligations when he was in a clear conflict situation, which he had identified himself.

71. Further, the provision by the Applicant of a copy of the then unpublished job notice to Dr. Saade amounted to a form of nepotism or favouritism. It would have provided the person to whom it was given more time to prepare an application for submission. The Applicant stated by way of explanation that he wanted to have a large number of qualified applicants for the position. This is not an excuse for the provision of the details of the job opening in advance. Such provision destroys the notion of a level playing field for all applicants. Applicants for any job within the United Nations system have the right to consider that they are treated fairly and their applications will be received and considered in the same manner. See *Valentine* UNDT-2017-004.

72. The facts clearly show that the Applicant failed to disclose to his fellow interview panel members his relationship with Dr. Saade, both professional and personal and that he failed to make a report to the Ethics Officer. It may well be that the D/ADB knew of the conflict, failing to act upon such, but this in no way excuses the failure of the Applicant to disclose the conflict to his fellow panel members and the Ethics Officer. The investigative report identified correctly that the Applicant was the hiring manager for the post, as he admitted in document 440, Record of Interview, 20 November 2020, lines 3425 to 3431. It is apparent that the Applicant did not set out any issues of a conflict before the Appointments and Promotions Board convened to consider the final recommendations to be made in respect of the appointment to the post. It is noted that one of the roles of the Appointments and Promotions Board is to ensure that all regulations and processes have been fully complied with in the selection process to reach a list of candidates to be recommended to a post.

73. The Appeals Board finds that the facts upon which the disciplinary measures were based in this respect have been established on a clear and convincing basis and that no material submitted by the Applicant has had the effect of disclosing any error in the findings of fact, including any failure to take matters into account which should have been taken into account. The involvement of the Applicant in the recruitment process is patent and admitted. Further, it is apparent that he had the opportunity, as the hiring manager to disclose the conflict he had to the Appointment and Promotions Board, but failed to do so, keeping the matters undisclosed. The Applicant has admitted that he provided a copy of the job opening to Dr. Saade prior to such being publically available.

Do the established facts legally amount to misconduct?

74. The Applicant has submitted that the rules and regulations in respect of a conflict of interest were unclear, confusing and related to financial matters. He asserts that the rules and regulations are directed to essentially issues of procurement. The rules and regulations certainly cover issues involving procurement, but through the ICAO Framework on Ethics it is clear that the concept of conflict of interest is not only involving issues of financial conflict and benefit, but clear issues of ethics, as set out in the Framework. It may well be that there was a lack of training within ICAO at the time, however, staff are expected to know their obligations under the ICAO Service Code and the Staff Rules. It may be that the Applicant did not know or fully understand the nature of a conflict of interest. This is not an excuse for non-compliance. The Applicant is also recorded in the investigative report as saying the "everybody know everybody", thus asserting that within the environment of ICAO a conflict of interest would very easily arise. While this may be the case, it does not remove obligations to comply with the rules and regulations.

75. The Appeals Board sets out below its full understanding of the Rules, Regulations and administrative instruments covering the matter of a conflict of interest at the times relevant to the matters in this case.

76. The considerations of conflict of interest are to be found in the ICAO Service Code, the Standards of Conduct for the International Civil Service set by the International Civil Service Commission and adopted by ICAO, the ICAO Framework on Ethics, ICAO Staff Rules, ICAO Personnel Instructions and the Report of the Secretary General on Personal conflict of interest dated 27 June 2011.

ICAO Service Code, Doc 7350/9, Ninth Edition - 2011

Principles of Ethics
1.3 Staff members shall abide at all times during their service with the Organization by the principles and values of integrity, loyalty, independence, impartiality, tolerance and understanding, non-discrimination, gender equality, accountability and respect for human rights.
1.4 Staff members shall conduct themselves at all times in a manner befitting their status as international civil servants. They shall not engage in any activity that is incompatible with the proper discharge of their duties with the Organization. They shall avoid any action and in particular any kind of public pronouncement which may adversely reflect on their status. While they are not expected to give up their national sentiments or their political and religious convictions, they shall at all times bear in mind the reserve and tact incumbent upon them by reason of their international status.
1.5 The Standards of Conduct for the International Civil Service adopted by ICAO are applicable to all staff members.
1.6 The ICAO Framework on Ethics is set out in Annex I to these Staff Regulations.
1.17 The Secretary General shall require each staff member to sign the following declaration as a condition of employment:
"I solemnly undertake to exercise in all loyalty, discretion and conscience, the functions entrusted to me as a member of the staff of the International Civil Aviation Organization; to discharge these functions to the best of my ability and to regulate my official conduct with the interest of the Organization alone in view; to abide by the rules laid down by the Organization; during the term of my service in the Organization, or following my separation from service, not to disclose any information of a confidential nature; and not to seek or accept from any Government or other authority external to ICAO any instructions in regard to the discharge of my official responsibilities."

ICAO Framework on Ethics Annex I to the Staff Regulations

Principles and Values
3. Staff members shall maintain the highest standards of integrity, including such qualities as honesty, truthfulness, fairness, impartiality and incorruptibility, in all matters affecting their official duties and the interests of ICAO, thus following the concept of integrity as enshrined in the ICAO Standards of Conduct and the Charter of the United Nations.
5. Staff members must remain independent of any authority outside ICAO; their conduct must reflect that independence. They shall not seek or receive instructions from any government or from any other authority external to ICAO. This applies equally to those on secondment from governments and to those whose services have been made available from elsewhere.
Personal conduct
13. All staff members shall conduct themselves at all times in a manner befitting their status as an international civil servant and shall not engage in any activity that is incompatible with the proper discharge of their duties with ICAO.

Conflict of interest

15. Staff members shall perform their official duties and conduct their private affairs in a way that preserves and enhances public confidence in their own integrity and that of ICAO and avoids any conflict of interest.

Note : It is observed in respect of paragraph 15, above, that it provides the overarching requirements. Paragraph 16 below is a specific example of the operation of paragraph 15.

16. No staff member shall be actively associated with the management of, or hold a financial interest in, any profit-making business or other concern, if it were possible for the staff member or the profit-making business or other concern to benefit from such association or financial interest by reason of the staff member's position with the Organization.

Failure to comply with the Rules, Regulations and other administrative issuances is misconduct, as defined below.

Misconduct Definition

38. Misconduct is the non-compliance by staff members, through acts or omissions, with their obligations under the ICAO Service Code, Staff Rules, Personnel and Administrative Instructions and other relevant and administrative texts in force.

39. Misconduct is also the non-observance of standards of conduct expected from an international civil servant.

Unethical conduct

41. Unethical conduct is behaviour that is contrary to the core values and principles that are enshrined in this framework and includes discrimination; harassment, including sexual harassment; intimidation, retaliation and abuse of authority; staying in a conflict of interest situation; corruption; misuse of corporate information and breach of confidentiality; and nepotism, be it for personal benefit or for favors to others.

Appendix to Staff Rule 101.1 (Staff Regulation, Article I) Standards of conduct Conflict of interest

25. It can happen that international civil servants are confronted with a question involving a conflict of interest; such questions can be very sensitive and need to be treated with care. Conflict of interest includes circumstances in which international civil servants, directly or indirectly, would appear to benefit improperly, or allow a third party to benefit improperly, from their association in the management or the holding of a financial interest in an enterprise that engages in any business or transaction with the Organization.

26. International civil servants should avoid assisting private bodies or persons in their dealings with the Organization where this might lead to actual or perceived preferential treatment. This is particularly important in procurement matters or when negotiating prospective employment. At times, international civil servants may be required to disclose certain personal assets so that the Organization can ensure that there is no conflict. They should also voluntarily disclose, in advance, possible conflicts of interest that may arise in the course of carrying out their duties. They should perform their official duties and conduct their private affairs in a manner that preserves and enhances public confidence in their own integrity and that of the Organization.

ICAO Personnel Instruction PI/1.6 – Procedures in relation to the ICAO Framework on Ethics (Staff Regulation 1.6 and Annex I to The ICAO Service Code) Date 2 April 2015

Conflict of Interest

4.1 Staff members shall not put themselves in a situation where they or a member of their family may benefit, either directly or indirectly, from their association with an entity which conducts business with the Organization. Furthermore, they shall not allow third parties to benefit improperly from the Organization's business. In addition to the Declaration of Office referred to in Article 1.17 of The ICAO Service Code, all staff members must sign upon entry on duty the Declaration of No

Conflict of Interest contained in Appendix A hereto, a copy of which shall be kept in the Confidential File of the staff members.
4. 2 Staff members are also required to identify and disclose any interests that might conflict or appear to conflict with their official duties, by submitting to the Ethics Officer the Declaration of Conflict of Interest contained in Appendix B hereto. Furthermore, as soon as a staff member becomes aware of, or suspects, a conflict of interest, he must disclose the relevant details in writing to the Ethics Officer, who will provide a copy of the financial disclosure to the Evaluation and Internal Audit Office (EAO) for assessment when it is determined to be a matter relating to financial disclosure. Any information disclosed in this way shall be treated as confidential.
4. 3 Staff members whose official duties relate to the investment of the assets and funds of the Organization, or staff members who have direct access to procurement or investment information, need to be particularly sensitive to the potential for conflict of interest in the performance of their official duties and shall be particularly alert to the need to report such potential conflict of interest directly to their supervisor and to the Ethics Office.

The version of PI/1.6 referred to by the investigative report NO. 1313/19 and dated 7 October 2018

Section 4. Procedures in relation to conflict of Interest and financial disclosure Conflict of Interest

4.1 Staff members shall not put themselves in a situation where they or a member of their family may benefit, either directly or indirectly, from their association with an entity which conducts business with the Organization. Furthermore, they shall not allow third parties to benefit improperly from the Organization's business. In addition to the Declaration of Office referred to in Article 1.17 of The ICAO Service Code, all staff members must sign upon entry on duty the Declaration of No Conflict of Interest contained in Appendix A hereto, a copy of which shall be kept in the Confidential File of the staff members.
4.2 Staff members are also required to identify and disclose any interests that might conflict or appear to conflict with their official duties, by submitting to the Ethics Officer the Declaration of Conflict of Interest contained in Appendix B hereto. Furthermore, as soon as a staff member becomes aware of, or suspects, a conflict of interest, he must disclose the relevant details in writing to the Ethics Officer, who will provide a copy of the financial disclosure to the Evaluation and Internal Audit Office (EAO) for assessment when it is determined to be a matter relating to financial disclosure. Any information disclosed in this way shall be treated as confidential.
4.3 Staff members whose official duties relate to the investment of the assets and funds of the Organization, or staff members who have direct access to procurement or investment information, need to be particularly sensitive to the potential for conflict of interest in the performance of their official duties and shall be particularly alert to the need to report such potential conflict of interest directly to their supervisor and to the Ethics Officer.

It is to be noted that in both versions of PI/1.6, that in 2015 and that in 2018, clause 4.2 requires that any conflict of interest is required to be reported to the Ethics Officer.

The Standards of Conduct for the International Civil Service (2001)
"Conflict of interest" includes circumstances in which international civil servants, directly or indirectly, would appear to benefit improperly, or allow a third party to benefit improperly, from their association in the management or the holding of a financial interest in an enterprise that engages in any business or transaction with the organization.

The Report of the Secretary-General on Personal conflict of interest dated 27 June 2011 (A/66/98) states: …
II. Personal conflict of interest A.
Definitions and types of conflict of interest
4. Risks of conflict of interest can generally be found at two levels: (a) as organizational conflict of interest; and (b) as personal conflict of interest. An organizational conflict of interest arises where,

> because of other activities or relationships, an organization is unable to render impartial services, the organization's objectivity in performing mandated work is or might be impaired, or the organization has an unfair competitive advantage. A personal conflict of interest may generally be understood as a situation where a person's private interests interfere or may be perceived to interfere with his/her performance of official duties. The present report focuses on personal conflict of interest, in accordance with the emphasis on this subject matter in the request by the General Assembly in its resolution 6 5/247.
> 5. In general, the need to address and manage conflict of interest results from a risk of staff members' potential exposure to competing interests through their work and status as United Nations officials. Certain functional areas, such as procurement, may provide greater potential for exposure to possible conflict of interest. However, other types of conflict of interest result from the risks inherent in all functions of an international civil servant, independent of any particular authority or position held by the staff member.

> As noted above, "Misconduct" is defined in the ICAO Framework on Ethics as Misconduct Definition

> 38. Misconduct is the non-compliance by staff members, through acts or omissions, with their obligations under the ICAO Service Code, Staff Rules, Personnel and Administrative Instructions and other relevant and administrative texts in force.
> 39. Misconduct is also the non-observance of standards of conduct expected from an international civil servant.

> The standards of conduct required include compliance with the ethical requirements of ICAO, thus the definition of unethical conduct is also directly relevant.

> Unethical conduct
> 41. Unethical conduct is behaviour that is contrary to the core values and principles that are enshrined in this framework and includes discrimination; harassment, including sexual harassment; intimidation, retaliation and abuse of authority; staying in a conflict of interest situation; corruption; misuse of corporate information and breach of confidentiality; and nepotism, be it for personal benefit or for favors to others.

77. The Applicant correctly identified that the investigator referred to a version of PI/1.6 which was not applicable in 2017. The version appearing in the investigative report dates from 2018. Notwithstanding the error, the versions of PI/1.6 from 2015 and 2018 both vitally required in clause 4.2 that any conflict of interest is required to be reported to the Ethics Officer. Thus, the error made no difference to the actual obligation to report, which remained constant throughout the versions of the Personnel Instruction. In any event the error does not detract from the application of the ICAO Service Code and the Staff Rules, which are clear concerning the considerations of a conflict of interest, which include not only a benefit to the staff member, but also a benefit to a third party as a consequence of the actions of the staff member.

78. In *Wilson* 2019-UNAT-961, para. 20, UNAT held that in such cases as this:

> The core question for consideration and determination is [ ] whether there was any actual, possible or perceived conflict of interest in the Deputy CEO's participation in the assessment panel during the second selection exercise.

79. In light of the consideration of the Rules, Regulations and other administrative issuances, it is clear to the Appeals Board that the initial provision of the details of the job opening before it was publically available clearly provided a favour to a third party, creating a conflict of interest and was a stand alone breach of the ethical duties of the Applicant. It clearly amounted to actual favouritism. The failure by the Applicant to ensure he had no involvement in respect of the interview process, when he well knew that

Dr. Saade, an apparent close friend and his PhD supervisor was an applicant for the post under consideration, was a clear breach of the conflict of interest provisions generally, but specifically as set forth in The Standards of Conduct for the International Civil Service (2001). The circumstances were such that the Applicant "directly or indirectly, would appear to benefit improperly…. allow a third party to benefit improperly from their association in the management or the holding of a financial interest in an enterprise that engages in any business or transaction with the organization." The transaction in this instance was the application for a post within ICAO where, at the very least Applicant would appear to have provided benefit to Dr. Saade.

80. All actions in the selection process for posts must be beyond reproach. The procedure in this selection process was corrupted by the actions of the Applicant, in direct breach of the conflict of interest provisions applicable to him.

81. The Appeals Board finds that established facts clearly legally amount to misconduct. It is unfortunate that anybody noting what was occurring, and appearing to know the circumstances, did not take action to ensure that the Applicant was warned and removed from the situation.

1.b: the renewal of consultancy contracts

82. The conclusion of a series of consultancy contracts who were on his PhD examining committee, the Applicant failed to disclose a conflict of interest situation in respect of contracts with Dr. Saade and Dr. Jones, with contract values of CAD 562,500.00 and CAD 58,500.00, respectively:

Have the facts on which the disciplinary measure was based been established?

83. The facts on which the disciplinary measure was based have been proven, however there were additional facts which were either not taken into account or given appropriate weight in the reaching of the decision.

84. The Applicant admits that he signed a number of contracts with Dr. Saade and Dr. Jones but asserted to the investigators that he did so as part of a formal administrative process, as he was not involved in the selection process of either of the consultants. He did not draw the contracts. The Applicant noted that while he was listed as a supervisor or in the reporting line for the consultants, this was part of a standard term within the consultant contracts. The reports of the consultants came to his office for collation and to be given to the bureau for which they worked. They were also sent to the D/ADB. The Applicant advised the investigators the contracts between ICAO and Dr. Saade were first entered into before the Applicant commenced his appointment with ICAO, which is clearly the case. It is apparent that the Applicant was not involved in any selection process of either Dr. Saade or Dr. Jones.

85. It is further disclosed in the investigative report that as a matter of fact, the Applicant did not actually supervise either Dr. Saade or Dr. Jones under their contracts. The reporting line of these consultants which included the Applicant was thus a formal reporting line. The actual approvals for the entry into the consultancy contracts came from the Secretary General and the D/ADB, not the Applicant.

86. It is apparent that there had been a contractual relationship between ICAO and Dr. Saade for the provision of consultancy services by Dr. Saade from 2011 to 2019. The Applicant did not initiate any of the contracts. It appears, as the Applicant asserts, that the relationship was a continuing one, but subject to a new contract annually. Dr. Jones had two consultancy contracts signed by the Applicant, both after he had completed his PhD.

Do the established facts legally amount to misconduct?

87. The relevant administrative issuances in respect of acting with a conflict of interest involve a personal action through which a benefit is either received by the staff member or given to another person, where the staff member has personal involvement in the process leading to the entry into some form of relationship by ICAO with, in the context of this case, a third party. It is correct to say that the Applicant had a personal relationship with both Dr. Saade and Dr. Jones. He was not, however, involved in their selection or nomination for selection as consultants. The role of the Applicant was formal, relating to the execution of a contract as an administrative functionary within a formal process. There cannot be said that he had an "actual, possible or perceived conflict of interest". See *Wilson supra.*

88. There needs to be a distinction drawn between personal and an official functional involvement in a matter. There is no personal involvement in the transaction under review, when considering the issue of a conflict of interest.

89. It is necessary to consider the actual provisions, set out above, which are relevant to a finding of misconduct.

> 38. Misconduct is the non-compliance by staff members, through acts or omissions, with their obligations under the ICAO Service Code, Staff Rules, Personnel and Administrative Instructions and other relevant and administrative texts in force.
> 39. Misconduct is also the non-observance of standards of conduct expected from an international civil servant.
> And, in respect of unethical conduct
> Unethical conduct
> 41. Unethical conduct is behaviour that is contrary to the core values and principles that are enshrined in this framework and includes discrimination; harassment, including sexual harassment; intimidation, retaliation and abuse of authority; staying in a conflict of interest situation; corruption; misuse of corporate information and breach of confidentiality; and nepotism, be it for personal benefit or for favors to others.

90. To assist in understanding where the line is to be drawn, the Appeals Board notes the following passage from Report of the Secretary-General of the United Nations on Personal conflict of interest dated 27 June 2011 (A/66/98), as noted above:

> A personal conflict of interest may generally be understood as a situation where a person's private interests interfere or may be perceived to interfere with his/her performance of official duties.

91. In this case, the application of a signature on behalf of the Organization where the Applicant had no direct or indirect involvement in the selection of the consultants or the renewal of an existing contractual relationship it cannot be said that there was "a situation where a person's private interests interfere or may be [reasonably] perceived to interfere with his or her performance of official duties."

92. The Appeals Board is further satisfied that the reporting line through the Applicant was a formal functional matter and not in fact an actual reporting line, as the investigation has failed to provide any evidence of there being any actual reporting to the Applicant beyond a formality, in clear circumstances where the Applicant had no actual involvement in the work of Drs. Saade or Jones under their consultancies.

93. The Appeals Board thus finds that the interpretation of conflict of interest is such as not to cover a formal execution of a document where the Applicant carried out the official duty of applying his signature due to his position, in circumstances where the only involvement in the processes of the Applicant

was as an official, with no personal involvement. If every person were to be excluded from carrying out a formal function in which they had no direct involvement the operations of organisations such as ICAO would come to a halt. Thus, there must be direct personal involvement in the processes where there could be, or is, actual influence or a potential of influence in a decision which may advantage, or disadvantage, a person known to the staff member, or senior official, carrying out the official duty.

94. The Appeals Board thus finds that this complaint against the Applicant is not made out and his appeal in this regard is successful.

2: The BDG project

95. The Applicant failed to disclose a conflict of interest situation arising from the fact that the consultancy contracts of Dr. Saade and Dr. Jones included tasks related to the ICAO Scientific Review Journal Project, for which a business case review was submitted to the Business Development Group (BDG) on 1 April 2019, when the Applicant was a BDG member:

Have the facts on which the disciplinary measure was based been established?

96. Having reviewed the evidence leading to the finding of fact the Appeals Board is satisfied that the facts upon which the disciplinary measure was based in this instance are clearly and convincingly established, as reflected in paragraphs 28 to 57 of the investigative report. Notwithstanding the assertion by the Applicant that he was not directly involved with the Scientific Review Journal Project it is apparent that he was involved as a declared editor and had at all times known of the involvement of Dr. Saade and Jones, with whom he had a close relationship through the Concordia University and, in respect of Dr. Saade, a personal relationship. The fact that when the business case for the Scientific Review Journal Project was reviewed in 2019 Drs. Saade and Jones were no longer involved with ICAO is not the issue. They were involved at an earlier relevant time when the project was established. Issues of conflict of interest must be considered within their context as a whole. The conflict may be seen as having no impact on decision making and thus it could be said that it is illusory. The real issue is whether a person who possess a conflict declares or makes it known at the earliest possible time so that from a governance point of view, if for no other reason, it is ensured that no decision taken by a board or operational unit can be impeached at a later stage on the basis of there being an undeclared conflict of interest in respect of a member of such board or unit. In this case it is clear that the Applicant did not declare the conflict of interest when the Scientific Journal Project was established or when it was being considered by the BDG, he also did not declare that he was an editor, along with Drs. Saade and Jones. The relationship that existed between the Applicant and Drs. Saade and Jones was such that it may be perceived that they would receive an advantage as a consequence of the actions of the Applicant in failing to declare his conflict of interest.

Did the established facts legally amount to misconduct?

97. Given the obligations in respect of the need to notify the Ethics Officer of a conflict of interest and not act under a conflict of interest, already discussed above, the Appeals Board is satisfied, the established facts amounted to misconduct. A clear duty existed to advise of the conflict of interest which was not met.

3: Letters sent to foreign nationals

98. The Applicant issued unauthorized visa letters to 3 foreign nationals who purportedly were to come to Canada to work for approximately 4 weeks at ICAO on projects under an MOU between ICAO and their State of nationality:

Have the facts on which the disciplinary measure was based been established?

99. The Appeals Board has reviewed the facts upon which the findings were based in respect of this complaint. It finds that there were letters of invitation drawn which had the seal of the Organization placed upon them after they had been signed by the Applicant.

100. The Appeals Board is not satisfied that the evidence is such that it can be concluded that the alleged breach by the Applicant was proven on the basis of clear and convincing evidence. The base characterisation of the letters sent is questionable, as they do not have the immediate indicia of being letters issued for the purpose of obtaining a visa. The apparent length to which the Applicant went to ensure that an appropriate form of letter was used also militates against the conclusion reached.

101. The fact of the actual use of the letters provided is also not clearly and convincingly proven. Such may have been used for this purpose, but there was no consideration of whether that was an issue for ICAO, or the acceptance by Canadian authorities of a letter which was not in an agreed format, and was thus an issue for them.

102. Importantly there is also an issue as to whether the letters actually used by the foreign nationals were those provided by the Applicant, or, as alleged by the Applicant, the letters in similar form provided to the foreign nationals by Mr. Creamer. It is unfortunate that the subject foreign nationals were not asked to give evidence. It is noted that no reason for this was given in the investigative report, although the fact that they were not interviewed was noted. This is an issue of significance. Investigators had been provided with much information by the Applicant in which he made a number of assertions of fact, many of which may have exonerated him. Investigators have a duty to search for exculpatory evidence, as well as inculpatory evidence. In this particular matter they did not actually search for exculpatory evidence. As noted, there was no reason given for the recipients of the letters not being located and asked questions which either may or may not have supported the case of the Applicant. On occasions such witnesses fail to answer questions asked, and they cannot be forced to answer such questions. In this matter, however, it is particularly disturbing that the investigators had failed to discover that Mr. Ruichun Lin, one of the recipients of the invitation letter, actually worked for IACO at the time of the investigation. He was thus under compulsion to answer questions of investigators and would have been readily available. The Appeals Board came to know of this fact, as one of its members recalled that Mr. Lin was an employee. On 14 November 2022, Counsel for the Respondent was asked to confirm that this was the case, which he did on 29 November 2022. Indeed, Mr. Lin was well known to ICAO, having been seconded from 11 March 2011 to 20 March 2012, acted as a consultant from 6 May 2012 to 5 December 2012. Mr. Lin joined the staff of ICAO on 25 December 2017 and remains on the staff. The failure to seek out evidence from Mr. Lin and the other recipients of the invitation letter discloses that the investigation was not balanced and could not be fairly relied upon to provide clear or convincing evidence. The matters advanced by the Applicant in his defence appear to have been rejected out of hand by the investigators, in clear breach of their obligations to search for exculpatory evidence and the stated approach of OIOS:

> **Overall approach**
> An OIOS investigation is an administrative fact-finding activity, which means collecting evidence to either support or refute the reported violations. The focus is on possible misconduct by individuals and prohibited practices by vendors/third parties; however, some systemic issues might also be

> analysed at the same time, as part of a full and proper investigation, where investigators are required to be objective and fair.
> **How we investigate**
> Ensure all reasonable lines of enquiry are pursued, including the examination of both inculpatory and *exculpatory* evidence[1]
> (emphasis added)

103. It is essential in circumstances where a staff member has no right to test evidence given to investigators or to provide evidence from witnesses independently, that investigators search for exculpatory evidence, especially when such has been suggested by the staff member under investigation. A failure to do this represents not only a due process breach, but also a failure to act in a fair and objective manner.

104. Further, the evidence is clear that such an invitation letter is provided to somebody attending ICAO for them to be able to produce such letter to their employer to indicate that they have been invited and that arrangements for a journey should be authorised. It was said that the form of letter compromised the relationship between ICAO and the Canadian Government, as the Host country of ICAO. The Protocol Officer of ICAO expressed very great concern that the issuance and use of the letter was entirely improper. The matter was referred to the Federal authorities in Canada, resulting in the Applicant being taken into custody for seven hours. An investigation was undertaken, with no charges being brought against the Applicant.

105. On the evidence before it, the Appeals Board is satisfied that the Applicant made every reasonable attempt to ensure that the letter was in a form which was acceptable, by referring it to a number of appropriate people and that such is not properly set out in the investigative report. The Respondent states, in effect, that the application of the seal on the letter is a mystery, as there is no record of it being attached. The inference invited is that there was some illicit activity on the part of the Applicant. There is no clear and convincing evidence of such activity. There is no evidence that the Applicant had access to the stamp of ICAO or that he pressured anybody to apply the stamp. It would appear that the investigators had clear access to the staff who may have been involved. There also appears to be an inference of there being some kind of ulterior motive in the actions of the Applicant in the wording of the letters. The heading being "To whom it may concern" appears to have raised suspicion. No evidence to support such a contention is to be found. There is no evidence of an abuse of authority. The evidence appears to be somewhat to the contrary, as it appears as though the Applicant acted in a manner to ensure that the form of letter sent by him was in an acceptable form.

106. The Appeals Board uphold the appeal on this complaint, expressing its concern about the way in which this part of the investigation was carried out, with the clear failure to seek out evidence which may well have proven to be exculpatory.

[1] See https://oios.un.org/how-we-investigate
See also the Investigation Manual paragraphs 2.3.4 and 6.2. https://oios.un.org/sites/oios.un.org/files/general/investigations_manual.pdf

4: Obstruction of the investigation into the hacking of ICAO IT systems

107. The Applicant in various ways obstructed an investigation into a 2017 cybersecurity incident at ICAO, and prevented (including by threats) [an] ICAO Treasury Officer, (name redacted) from informing the Royal Bank of Canada about the incident:

Have the facts on which the disciplinary measure was based been established?

108. The Appeals Board has carefully reviewed the evidence and is not able to agree that there is clear and convincing evidence which found the expressed view that OIOS found that the Applicant "in various ways obstructed an investigation into a 2017 cybersecurity incident at ICAO."

109. It is apparent from the witness statements that there were disagreements between the Applicant and staff as to how the cybersecurity incident should be handled. It is also apparent that there appears to be some consideration of an anonymous phone call to one staff member advising him "to drop it and keep your mouth shut". When the officer asked, "who is this", the reply was "you have been warned".

110. One witness appears to have made allegations that the Applicant was obstructing the reporting of the incident "because it was against him". Another witness stated that he was obstructed from reporting the incident externally. It is apparent that the then Secretary General instructed the D/ADB at the time to oversee the investigation of the situations, as recorded at paragraph 140 of the Investigation Report Case No. 1344/19. Disturbingly the findings reached by the investigators in respect of the facts are not the subject of any analysis, other than what appears to be a general statement of credibility of the Applicant in the opinion of the investigators. There is no discussion directed to the cybersecurity incident, just a conclusion by way of a clearly stated finding in paragraph 147 of the Investigation Report:

> "Lastly, it was found that Mr. Wan approved the internal investigation of cyber-security incidents, although delayed the external reporting until conclusive evidence was found on the source of the issue…."

111. There is thus no finding by OIOS which is adverse to the Applicant in this regard. There was, in fact, no conclusion expressed OIOS in the Investigative Report which was consistent with the "finding" expressed in the Inter-Office Memorandum to the President of the Council and in the letter of provisional decision dismissal of the Applicant, both of 16 November 2021 stating that OIOS had found:

> (d) Mr Wan had obstructed in various ways an investigation into a 2017 cybersecurity incident at ICAO, and had prevented the ICAO Treasury Officer, Mr Byrne, from informing the Royal Bank of Canada about the incident.

112. The Appeals Board searched, but been unable to locate where this finding of OIOS is to be found. The search proved unsuccessful.

113. On 3 December 2022, Counsel for the Respondent was sent a request in the following form:

> Counsel for the Respondent is asked to provide to the Appeals Board by the close of business on 5 December 2021 details of where, in the OIOS Investigative Report Case No. 1344/19, the following finding referred to in the Inter-Office Memorandum to the President of the Council, dated 16 November 2021, is to be found.
>
> In case 1344/19, OIOS found that:
> (a)...
> (b)....
> (c)....

(d) Mr Wan had obstructed in various ways an investigation into a 2017 cybersecurity incident at ICAO, and had prevented the ICAO Treasury Officer, Mr. Byrne, from informing the Royal Bank of Canada about the incident.

114. This finding formed part of the basis of the request to the President of the Council for approval for the summary dismissal of the Applicant.

115. It is noted that the same finding is referred to in the letter to the Applicant of provisional decision on 16 November 2021 as part of the reason for the summary dismissal.

116. The attention of Counsel for the Respondent was drawn to paragraph 4 of the OIOS Investigative Report Case No. 1344/19, which states:

> "It was found that Mr. Wan approved internal investigation of cyber-security incidents, although delayed the external reporting until exclusive evidence was found on the source of the issue".

117. The same wording appears at paragraph 147 of the said report under the heading "Findings".

118. In response the reply Counsel for the Respondent replied:

> In regards to the Board's question as to where in the OIOS Investigative Report Case No. 1344/19 the finding that "*Mr Wan had obstructed in various ways an investigation into a 2017 cybersecurity incident at ICAO, and had prevented the ICAO Treasury Officer, [name redacted] from informing the Royal Bank of Canada about the incident*" can be found, the Board is referred, first, to the summary of the witness testimony of Ms. Sachiko Hasumi, the former ICAO Information Security Officer (paras. 114-116, pp. 36-37), wherein the OIOS reported that when interviewed Ms. Hasumi stated
> "that Mr. Wan obstructed the reporting of the incidents in 2017 and 2018 'because it is against him,' [and] he instructed her not to 'talk anymore,' 'don't bother it' and he clearly said to her 'don't dig anymore, just leave it as is'" (footnotes omitted).
>
> The OIOS also recounted that
>
> "Ms. Hasumi recalled that Mr. Byrne, Treasury Officer, wanted to report the incident externally but could not because Mr. Wan obstructed him from doing so. Ms. Hasumi met with someone with the Legal Bureau with Mr. Byrne about the reporting of the incidents and Mr. Wan's behavior. They did this as 'we couldn't find a way out. I have to respond to incident, I have to contain incident, but if I can't do it, I cannot go against James either, so then Andrew brought a legal person to discuss how we should do about'" (footnotes omitted).
>
> Secondly, the Board is referred to the summary of the witness testimony of Mr. Andrew Byrne, Treasury Officer (paras. 117-125, pp. 37-39), which corroborates the testimony of Ms. Hasumi, especially wherein the OIOS reported that "Mr. Byrne thought that Mr. Wan obstructed the reporting of the 2017 and 2018 incidents both internally at ICAO, as well as to external entities such as RBC and national authorities" (paras. 117, p. 37).
>
> The OIOS further reported that while Mr. Wan denied obstructing the internal investigation of the cyber-security incidents and the reporting of these incidents to national and international authorities outside of ICAO (para. 136, p. 41), they found that his testimony and written statements lacked credibility (para. 136, p. 41). And, though the OIOS found that Mr. Wan ultimately approved the internal investigation of the incidents, they also found that he "delayed the external reporting" (para. 147, p. 44), such that, for example, ICAO did not engage the RCMP on the matter until 2019—i.e., many months after the fact (para. 138, p. 42).

119. The Respondent has attempted to base the expression of the "finding" by reference to "Witness Testimony" in the investigation report. Such testimony is merely the recording in the investigation report of the evidence given. It is not the "findings" reached and is not expressed to be such in the investigation report. The other matters referred to in the "Findings of OIOS" are justified by the findings clearly set out under the heading "VII Findings" on page 43 of the investigation report.

120. The actual findings of OIOS are very clearly set out in paragraph 4 of the investigation report under the heading "Overview" and later in paragraph 147 of that Report. If the Respondent had disagreed with this finding of OIOS this should have been clearly stated and reasoned so that it was not represented to the President of the Council in the Inter-Office memorandum of 16 November 2021 as a finding by OIOS.

121. It is most disturbing that such a misquote or misinterpretation could occur. It is apparent that while decision makers are very busy people, they need to check the facts upon which decisions are based so that they may fully and properly consider matters, especially in circumstances where the sanction applied is that of summary dismissal. Reliance by decision makers of the advice of others is not a proper discharge of the obligations of a decision maker. The decision cannot be delegated to others who provide advice, which is then acted upon without a very full and meticulous consideration of the matter. This is especially so where the sanction of termination is the possible result. It is a sanction in respect of which there is no turning back, as even if the decision is rescinded on review, there is little or no hope of reintegration back into the Organization.

122. The Appeals Board upholds the appeal of the Applicant in regard to this particular matter. There has been a failure to properly consider this matter and it was based upon an entirely false premise and false recording of a finding set out in the investigative report.

Proportionality of the disciplinary sanction

123. In respect of the sanction applied, the UNAT has held "that the Administration has a broad discretion in disciplinary matters which will not be lightly interfered with on judicial review. This discretion is not unfettered and can be judicially reviewed to determine whether the exercise of the discretion is lawful, rational, procedurally correct and proportionate. This includes considering whether relevant matters have been ignored and irrelevant matters considered, whether the decision is absurd or perverse, or affected by bias... Assuming compliance with these legal standards, it is not the role of the Appeals Board to consider the correctness of the choice made by the Administration amongst the various courses of action lawfully open to it or to substitute its own decision for that of the Administration". See *Sanwidi* 2010-UNAT-084, para. 40 and *AAD*. 2022-UNAT-1267/Corr 1 paras 38 to 40.

124. The Administration "has wide discretion in applying sanctions for misconduct but at all relevant times must adhere to the principle of proportionality". See *Applicant* 2013-UNAT-280, para. 120. See also, *Abu Hamda* 2010-UNAT-022.

125. "[T]he principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result." See *Sanwidi* 2010-UNAT-084, para. 39. This principle was also confirmed in Applicant 2013-UNAT-280. Once the facts and misconduct have been established, the appropriateness of the level of sanction can only be considered unlawful in case of "obvious absurdity or flagrant arbitrariness". See *Aqel* 2010-UNAT-040, para. 35; *Konate* 2013-UNAT-334, para. 21; *Shahatit* 2012-UNAT-195, para. 25; *Portillo Moya* 2015-UNAT-523, para. 22. 927; *Rajan* 2017-UNAT-781, para. 48; *Negussie* 2016-UNAT-700, para. 28; *Ogorodnikov* 2015-UNAT-549, paras. 30-35.

126. UNAT has clearly stated in *Rajan* 2017-UNAT-781, para. 48, "The most important factors to be taken into account in assessing the proportionality of a sanction include the seriousness of the offence, the length of service, the disciplinary record of the employee, the attitude of the employee, and his [or her] past conduct, the context of the violation and employer consistency."

127. In *Appellant* 2022-UNAT-1216, UNAT made the following statements, in respect of which the Appeals Board is bound:

> 44. Staff Rule 10.3(b) provides, inter alia, that "[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct". In the present case, this means that the Dispute Tribunal as well as this Tribunal must determine whether the Secretary-General's imposition of the ultimate sanction of dismissal from service meets the justice of the case, after due consideration is given to the entire circumstances of the case.
> 45. The matter of the degree of the sanction is usually reserved for the Administration, which has discretion to impose the measure that it considers adequate in the circumstances of the case and for the actions and conduct of the staff member involved. This appears as a natural consequence of the scope of administrative hierarchy and the power vested in the competent authority. It is the Administration that carries out the administrative activity and procedure and deals with the staff members. Therefore, the Administration is best suited to select an adequate sanction able to fulfil the general requirements of these kinds of measures; to wit: a sanction within the limits stated by the respective norms, which is sufficient to prevent repetitive wrongdoing, punish the wrongdoer, satisfy victims and restore the administrative balance. That is why the tribunals will only interfere and rescind or modify a sanction imposed by the Administration where the sanction imposed is blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity. This rationale is followed without any change in the jurisprudence of this Tribunal.23 The Secretary-General also has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose.
> 46. Further, as we stated in *Samandarov:*
> [D]ue deference [to the Administration's discretion to select the adequate sanction] does not entail uncritical acquiescence. While the Dispute Tribunal must resist imposing its own preferences and should allow the Secretary-General a margin of appreciation, all administrative decisions are nonetheless required to be lawful, reasonable and procedurally fair. This obliges the UNDT to objectively assess the basis, purpose and effects of any relevant administrative decision. In the context of disciplinary measures, reasonableness is assured by a factual judicial assessment of the elements of proportionality. Hence, proportionality is a jural postulate or ordering principle requiring teleological application. …The ultimate test, or essential enquiry, is whether the sanction is excessive in relation to the objective of staff discipline. As already intimated, an excessive sanction will be arbitrary and irrational, and thus disproportionate and illegal, if the sanction bears no rational connection or suitable relationship to the evidence of misconduct and the purpose of progressive or corrective discipline. The standard of deference preferred by the Secretary-General, were it acceded to, risks inappropriately diminishing the standard of judicial supervision and devaluing the Dispute Tribunal as one lacking in effective remedial power.
> 47. When the sanction of termination is chosen by the Administration, it must be in line with the following principle, as stated in *Rajan*:
> 48. The requirement of proportionality asks whether termination is the appropriate and necessary sanction for the proven misconduct or whether some other alternative sanction will be more suitable in the circumstances. In this regard, it must be kept in mind that termination is the ultimate sanction and should not be imposed automatically. The question to be answered in the final analysis is whether the staff member's conduct has led to the employment relationship (based on mutual trust and confidence) being seriously damaged so as to render its continuation intolerable. In the case at bar, the Appellant was irrefutably found by clear and convincing evidence.

128. The sanction of separation from service was set out in the letter of the Respondent to the Applicant of 16 November 2021. It is apparent that this sanction was based upon findings of misconduct in respect of five matters, namely: (1) the existence of an undeclared conflict in a recruitment process; (2) an

undeclared conflict in respect of contracts entered into with two consultants; (3) conflicts of interest in respect of a review submitted to the Business Development Group; (4) the unauthorized issue of visa letters to three foreign nationals; and (5) the obstruction of an investigation into a 2017 cybersecurity incident at ICAO. Of these findings, only the first two have been found by the Appeals Board to be justified on a legal basis. Thus, the question is whether the sanction meted out is proportional when the two findings alone are taken into account?

129. The Appeals Tribunal has determined that the ultimate sanction of dismissal is proportional in the circumstances, noting the that it is primarily a matter for the Administration to determine and it is only to be upset in specific circumstances. The Appeals Board has specifically considered that there are fewer findings upon which to base the sanction, however, in his letter giving effective reasons for the application of the sanction of dismissal, the Respondent specifically noted that acting in a conflict of interest situation was unethical and serious misconduct amounting to a substantial violation of ICAO regulations, rules or administrative issuances.

130. The two findings which the Appeals Board has determined are not reversed on review involve serious misconduct, which on their own would have been sufficient in the context for the sanction of dismissal to have been applied. In particular, the subversion of the selection process through the provision of the job description when it had not been made public and taking part in the interview and other phases of the recruitment process when having a conflict of interest, fall directly within the purview of the proper considerations of the Respondent. The Appeals Board will not, in these circumstances interfere with the exercise of the discretion of the Respondent. The sanction is proportionate.

Has there been compliance with due process?

131. Due process is a required matter to be considered by the Appeals Board. This relates not only to the conduct of the investigation, but in respect of all legal requirements which lead to the final decision being made. The Appeals Board finds that, save for the matters expressed in respect of failure of the investigators to act in a fair and objective manner by seeking to look for exculpatory evidence related to the finding concerning the invitation letter, due process has otherwise been accorded to the Applicant during the investigations into Case No 1313/19 and Case No 1344/19.

132. There remains, however, as serious issue of the due process considerations in respect of the gaining of the approval of the President of the Council. Such approval was a precondition to the implementation of the decision of the Respondent to terminate the appointment of the Applicant. This is a final stage in the process and must be correctly and validly obtained.

133. Staff Regulation 9.9 applied to the Applicant in this matter, relevantly providing:

9.9 In cases of termination of appointment of staff at the D-1 and D-2 levels, the Secretary General shall seek the written approval of the President of the Council.

134. It is clear that the Respondent stated in his Inter-Office Memorandum to the President of 16 November 2021 seeking approval to terminate the Applicant, that there was a separate and distinct finding by OIOS that:

> (d) Mr Wan had obstructed in various ways an investigation into a 2017 cybersecurity incident at ICAO, and had prevented the ICAO Treasury Officer, Mr. Byrne, from informing the Royal Bank of Canada about the incident.

135. As discussed above, this was not the finding of OIOS at all, rather, the actual finding of OIOS on the matter was not unfavourable to the Applicant.

136. The President of the Council in his Inter-Office Memorandum of 16 November 2021 to the Respondent, relevantly states the following as being the basis of the approval given to terminate the Applicant:

> In particular, your memorandum highlights that at the conclusion of investigation procedures there is clear and convincing evidence substantiating the allegations of serious misconduct against Mr. James Wan, D1, ICR-IAS, ADB.
>
> Consequently, such approval is being sought in accordance with Staff Regulation 9.9 as a disciplinary measure per Staff Regulation 9.17 and paragraph 12(c) of Staff Rule 110.1.
>
> In this regard, it is noted that the approval of the President of the Council under Staff Regulation 9.9 does not constitute an additional layer of investigation or analysis of the contents of the relevant report and documents. Rather, such assessment relates exclusively to confirmation that an exhaustive, logical, sound, objective and comprehensive investigation has been performed and that due process has been assured.
>
> Based on the contents of your memorandum, I acknowledge that due process has been assured before the determination of the disciplinary measure. In this regard, I also understand that the decision to terminate the appointment of Mr. Wan has been decided on the basis of investigation reports, all supporting documents, and the response and countervailing evidence from the subject staff member.
>
> Consequently, I wish to inform you that based on the above considerations, I approve the termination of the appointment of Mr. Wan.

137. It is thus clear that the decision was based upon the totality of the five findings in the Inter-Office Memorandum from the Respondent, one of such findings not being justified at the time as being an expression of the findings of OIOS. It was thus erroneously included as a finding of OIOS.

138. The Appeals Board has no role, or right, to express a view as to whether one or a number of these matters may have justified the approval by the President of the Council. The President of the Council clearly and correctly took into account all of the matters put before him as findings by OIOS. The role of the Appeals Board is limited to only an examination of the legality of decisions and not to look at the merits of a decision. The Appeals Board does not stand in the stead of the President of the Council and cannot imply a different basis of any approval of the President or make decision to grant such approval.

139. The Appeals Board has considered whether the matters involving obtaining the approval of the President of the Council to termination based in part upon a false statement is merely an irregularity. It has come to the conclusion that it is a specified requirement which must be met and not merely an irregularity in the process. It is clear from the Inter-Office Memorandum that the President of the Council relied very much upon the statements made to him when giving his approval. Further, Staff Regulation 9.9 acts as a check in the system in respect of very senior staff members, as their positions are important to the Organization. The Council has clearly determined that the Respondent is to be the subject of supervision by the Council, through its President, when intending to terminate very senior staff. It is essential that such approval is soundly and properly based. The Applicant has a right to have this procedure properly followed, it is an essential precondition to the implementation of the decision to terminate his employment. The approval of the President forms an essential part of the due process considerations of the Appeals Board.

140. The Appeals Board finds that the statement of the Respondent in respect of one of the findings upon which the request for approval of the President of the Council to terminate the appointment of the Applicant was based, was patently incorrect.

141. The Appeals Board finds that the approval given by the President of the Council to terminate the appointment of the Applicant must, in the circumstances, be considered as *void ab initio,* or a *nullity.*

142. As the approval of the President of the Council is of no effect, then the implementation of the decision to terminate the Applicant is of no effect and was *ultra vires*, as the precondition provided for in Staff Regulation 9.9 was not validly obtained. It remains open to the Respondent to request the approval pursuant Staff Regulation 9.9, based upon a proper statement of the findings against the Applicant. There is no basis for such to be requested with retrospective operation. The Applicant is entitled to receive payment of his salary and benefits, including pension contributions and payments, from the date of their cessation, which is understood to be 8 December 2021, until valid approval, if any, is given under Staff Regulation 9.9, but such payment shall not, in any event exceed the payment of salary and benefits for a period greater than two years.

Orders

A. The Appeal is partially allowed in respect of the findings:

1. That in the conclusion of a series of consultancy contracts who were on his PhD Examining Committee, the Applicant failed to disclose a conflict of interest situation in respect of contracts with Dr. Saade and Dr. Jones, with contract values of CAD 562,500.00 and CAD 58,500.00, respectively;

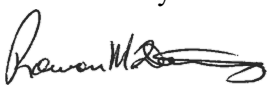
2. The Applicant issued unauthorized visa letters to 3 foreign nationals who purportedly were to come to Canada to work for approximately 4 weeks at ICAO on projects under an MOU between ICAO and their state of nationality; and

3. The Applicant in various ways obstructed an investigation into a 2017 cybersecurity incident at ICAO, and prevented (including by threats) [to an] ICAO Treasury Officer, (name redacted) from informing the Royal Bank of Canada about the incident.

B. The decision of the Respondent to terminate the Applicant is otherwise affirmed. Under the due process considerations of the processes in this matter, it is found that the implementation of that decision was *ultra vires*, as the preconditional approval of the President of the ICAO Council was a *nullity*.

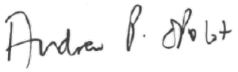
C. The Applicant shall be paid his salary and benefits, including pension contributions, from the date of their cessation in December 2021 until approval, if any, is given under Staff Regulation 9.9. Such payment shall not, in any event, exceed the payment of salary and benefits for a period greater than two years.

Dated this 21 day of December 2022



Judge Rowan Downing KC
President

Entered in the Register on this 21 day of December 2022



Andrew P. Opolot
Alternate Secretary/Registrar