



International Civil Aviation Organization

APPEALS BOARD

Case No.: ICAO Appeal No. 2015-003

Decision No. ICAO/2022/004

Date: 21 July 2022

Original: English

Before: Judge Rowan Downing QC President
Mr. Anda Djojonegoro, Member
Mr. Ciaran Carolan, Member

Registrar: Arie Jakob

ROSEMARIE HEFTBERGER

v.

SECRETARY-GENERAL
OF THE INTERNATIONAL CIVIL
AVIATION ORGANIZATION

DECISION

Counsel for Applicant: Self-represented

Counsel for Respondent: Christopher Petras

1. INTRODUCTION

1.1 By letter to the Secretary of the Advisory Joint Appeals Board (AJAB) of the International Civil Aviation Organization (the Organization) dated 9 January 2015 the Applicant, Dr. RoseMarie Heftberger, lodged an appeal against the "result of the review with respect to the appointment of the position Chief, Safety and Air Navigation Oversight Audit Section" (C/OAS) (Vacancy Notice 2014/ 6/PI 01206) (the Post), together with an appeal against the "related appointment of the Acting Chief in July 2014".

2. PROCEDURAL HISTORY AND BACKGROUND TO THE APPLICATION

2.1 On 26 June 2020 by its judgement in the case of *El Sehemawi v. The Secretary General of the International Civil Aviation Organization* Judgment No. 2020-UNAT-1034, the United Nations Appeals Tribunal (UNAT) found that the former ICAO Advisory Joint Appeals Board (AJAB) did not meet the requirement that it be a "neutral first instance process" pursuant to the agreement between the United Nations and ICAO in respect of the UNAT being the appeal tribunal to review decisions appealed in respect of the first instance review ICAO administrative decisions, and there was a consequent failure to comply with the requirements of Article 2(10) of the Statute of the United Nations Appeals Tribunal. This finding was based upon the fact that the AJAB did not render a decision, rather it expressed an opinion which was either adopted, or not, by the ICAO Secretary General. UNAT held that the ICAO Secretary-General was not neutral, but a party of the litigation. It was clear that the Secretary General was the ultimate decision maker in respect of both the original decision and the appealed decision. There was clearly a conflict and consequent lack of neutrality. Thus, the case was remanded "to the AJAB under Article 2(10) of the Appeals Tribunal Statute for a decision which is binding on the parties and which also constitutes the neutral first instance process". Following the decision in *El Sehemawi* the UNAT handed down its decision in *Heftberger v. The Secretary General of the International Civil Aviation Organization* Judgment No. 2020-UNAT-1012 to like effect.

2.2 Consequent upon these two decisions, ICAO suspended hearings of staff member appeals by the AJAB, putting in place a new internal justice framework providing for a "neutral first instance process".

2.3 In October 2021, the Appeals Board was operationally established by the Organization, replacing the AJAB. By Order No.1 (2021) of 7 December 2021 this matter was transferred to the Appeals Board to be reheard pursuant to the order of UNAT.

2.4 On 29 December 2021 the Respondent requested a summary decision under Rule 22 of the Rules of Procedure of the Appeals Board challenging the receivability of the Applicant's appeal of the Respondent's 27 June 2014 decision to appoint the selected staff member to serve as Acting Chief, Safety and Air Navigation Oversight Audit Section, as she failed to request the Secretary General review of the decision, a mandatory first step in the appeals process.

2.5 Following the determination of the application for a summary decision, the Appeals Board published its decision on the issue of receivability, making the following order on 17 January 2022:

Insofar as the Application relates to a review or appeal in respect of the decision relating to the appointment of the Acting Chief, Safety and Air Navigation Oversight Audit Section, on 27 June 2014 it is found not receivable *ratione materiae*.

2.6 No other issues in respect of receivability were noted or considered by the Appeals Board.

2.7 The Appeals Board, by Order No.1 of 3 December 2021, ordered:

Within 21 days of the date hereof, the Respondent shall produce to the Appeals Board a copy of all documents contained in any files, paper or electronic, in respect of the appointment decision in respect of Vacancy Notice Chief, Safety and Air Navigation Oversight Audit Section; 2014/36/P101206 and the appointment decision of Acting Chief of the Safety and Air Navigation Oversight Audit Section on 09 July 2014, save for documents the subject to legal profession privilege. All details which may permit the identification of any applicants for the position in Vacancy Notice 2014/36/P101206, other than the details of the Appellant, shall be redacted by the Respondent. The Appeals Board shall review the files produced and provide such documents to the Appellant, save that the Appeals Board may redact any further matters which are irrelevant to the Appeal or otherwise subject to confidentiality. The Respondent shall make submissions in respect of any documents produced where he claims confidentiality.

2.8 On 20 and 21 January 2022, the Appeals Board conducted a hearing in respect of the review of the application, but limited to the appointment to the Post, as the review in respect of the Acting position had already been considered.

2.9 On 22 March 2022 Ms. Collis, a member of the Appeals Board, recused herself due to a conflict which arose after the hearing of the matter, but before the completion of the decision. It is noted that Ms. Collis made a very useful contribution to the Appeals Board. The recusal of Ms. Collis caused the need to reconstitute the Appeals Board. On 27 April 2022 a new member of the Appeals Board was appointed to the Board and the newly constituted Board proceeded with the matter.

2.10 Due to commitments of the members of the Appeals Board a hearing was not possible to be scheduled with the parties to discuss the way forward until 19 May 2022. During this hearing it was agreed that the matter would proceed with the new member of the Appeals Board, reading the contents of the file, listening to audio tapes of the hearing of the 20th and 21st of January 2022 before the former Appeals Board and that the Appeals Board would direct any additional matters to the parties, if required. The Appeals Board would otherwise proceed on the basis of a consideration of the matter on the papers and audio recordings.

2.11 The newly constituted Appeals Board deliberated on 19 May 2022, the new member of the Appeals Board noting he had read the papers and listened to the audio of the hearing prior to the 19th of May 2022. A second deliberative meeting was held on 24 May 2022.

3. BASIC PROCEDURAL FACTS LEADING TO THE APPEAL AND GROUNDS OF REVIEW

3.1 On 10 July 2014, the Organization issued Vacancy Notice 2014/36/P 101206 for the P-5 post of Chief, Safety and Air Navigation Oversight Audit Section, for which the Applicant applied. She was interviewed, along with eight other candidates for the Post. The Applicant was recommended as the third ranked candidate for the position, as was disclosed by the Candidate Selection and Assessment Report. The recommendations of the Interview Panel were endorsed by the Appointments and Promotions Board (APB), as is recorded in its Executive Summary of its considerations of the recommended candidates of 16 October 2014 sent to the Secretary General of the Organization.

3.2 On 28 October 2014, the Secretary General decided to appoint someone other than the Applicant to the Post, the Applicant learning about the appointment on

31 October 2014 when she received a circular email announcing the appointment decision taken by the Secretary General.

3.3 On 18 November 2014, the Applicant sought a review by the Secretary General of the decision to appoint the selected candidate to the Post and the appointment of the Acting Chief in July 2014. The grounds of review in respect of the appointment to the Post were that she had been subjected to an "unfair, biased and discriminatory treatment" with respect to "the majority of the selection process" and that the selected candidate did not meet with the essential professional experience and knowledge of the post especially "five years management level experience" in the area of safety oversight, whereas she did.

3.4 On 11 December 2014, the Secretary General advised the Applicant of the decision to maintain the appointment of 31 October 2014. On 9 and 11 January 2015 the Applicant lodged her appeal to the AJAB against the appointment decision as regards the Post and the "related appointment decision of the Acting Chief on 9 July 2014".

4. **GROUND OF THE APPEAL**

4.1 The grounds of appeal set out in the appeal of 9 January 2015 and a subsequent Inter-Office Memorandum of 11 January 2015, which is taken to form part of the application, are:

- a) That the decision was in "breach of Article IV of the ICAO Service Code, the 2001 Standards of Conduct for International Civil Service laid down in the Staff Rules, and established recruitment policies, processes and procedures";
- b) The selection and recruitment processes totally lacked transparency, fairness and compliance with applicable policies, processes, and procedures;
- c) The processes followed were flawed and based on favouritism/nepotism, as described in the Anti-fraud and Corruption Policy (C-WP14196);
- d) The decision was tainted by bias; and
- e) There was a failure to comply with the policy for the promotion of females.

4.2 In the Inter-Office Memorandum of 11 January 2015 the Applicant made the following assertions of fact in support of the grounds of Appeal:

- a) Her "supervisor indicated on numerous occasions that she was the best candidate";
- b) That the Director would not support her application to the as the Appellant "had not agreed to move to the front office in January 2014 and that she was not used to having anybody not obey her orders";
- c) Two members of the interview panel were close friends of the successful candidate and should have recused themselves or not accepted appointment to the interview panel;
- d) During the interview one of the members of the interview panel made the comment "terrific" on three occasions related to the comprehensive replies given to questions during the interview. One member of the panel stated after that the Applicant "did very well contrary to other candidates";

- e) The selected candidate lacked the “essential professional experience and knowledge of the post, in particular five years at a management level, and also the desirable criteria, as outlined in the Vacancy Notice. The decision to recruit him despite not possessing the required professional experience and knowledge was improperly motivated and prejudicially tainted”;
- f) That the Secretary General must “ensure that each candidate is given full and fair consideration and that the procedures are correctly followed”;
- g) That there was favouritism shown to the selected candidate which occurred due to irregularities and circumvention of procedures;
- h) The Applicant was supported by numerous Contracting States, organizations and individually and that her “PACE” reports were consistent in acknowledging outstanding performance exceeding expectations;
- i) The flawed and biased decision denied her a full and fair consideration for the appointment to the position; and
- j) The “policy on promoting female competent candidates was totally ignored”.

5. **REMEDY**

5.1 The Appellant seeks an order for the retrospective promotion/reclassification to an equivalent P-5 post as of 01 July 2014 and damages in the sum of USD 300,000.

6. **FURTHER PROCEDURES**

6.1 On or about 5 April 2019, in his written comments in reply to the application, Counsel for the Secretary General asked the Appeals Board to reject in full the appeal by the Applicant. He made the following submissions:

- a) In respect of the Applicant’s assertions that the selected candidate for the position lacked the necessary minimum experience at the management level of five years, that the selected candidate did meet the requirements as was demonstrated by the finding of the Recruitment, Classification and Post Management (RCP) Section of ADB which showed he had combined total work experience of 16 years, of which more than five years included management experience, comprising three years and four months in the role of Airport Noise Programme Manager with the DGCA of France and five years and eight months in the role of Aircraft Accident Investigator with the French Bureau d’Enquete et d’Analyse pour la Sécurité de l’Aviation (BEA).
- b) If counsel was found to be incorrect about the calculation of the management experience, then the second ranked candidate would have been selected ahead of the Applicant, who was ranked third. Counsel referred to *Dualeh* Judgment No. 2011-UNAT-175.
- c) In respect of the assertions by the Appellant that two members of the interview panel were biased, there was no evidence to support this.
- d) The Applicant was deemed “well qualified,” as she was short listed with 9 others, out of the 65 applicants. It was asserted that the Applicant had been given a full and fair consideration for the post and that Staff Regulation 4.1 did not provide for the promotion of a lesser qualified candidate over a more qualified candidate based on gender.

7. APPELLANT'S WRITTEN RESPONSE

7.1 In response to the comments from Counsel for the Respondent, the Applicant provided a written submission on 16 April 2019 in which she joined issue on all assertions of the Respondent. She claimed that the selection process was "prearranged and manipulated", further claiming that the Director of ANB (Ms. Graham) had prior to the selection exercise tried to remove the Applicant from the process by transferring her laterally to D/ANB's "front office." She referred to evidence which was provided by Captain Budd. She again asserted that the selected candidate did not have the necessary managerial experience, referring to an Organigram of the French BEA, and also asserted that the second ranked candidate did not meet the requirements set forth in the Vacancy Notice for the Post. She repeated her earlier contentions and that she should have been selected as her superior qualifications and experience had not been properly considered.

7.2 The Applicant maintained that the selected candidate did not have the required management experience and that the interview panel was not only biased, but lacked the necessary experience to be able to make the required assessments properly. The Applicant repeated her contention that, even prior to the issuance of the Vacancy Notice, an attempt had been made to transfer her to a different post in the Paris Office or elsewhere in the "front office". She claimed that, when compared to the No. 2 ranked candidate, she had more seniority in the field of safety audits, which she alleged was evidenced by the fact that Captain Budd and herself had to keep the section "operational" when Mr. Gourджи was away from the office. The Applicant also claimed that a potentially more impartial person, Mr. Catalin Radu, Deputy Director, Aviation Safety, Air Navigation Bureau, who knew the qualifications of both the Appellant and the selected candidate, was to have served on the Interview Panel, only to be withdrawn by Ms. Graham once she had found out that Mr. Radu and the Applicant knew one another. The Applicant also asserted that the successful candidate had been treated preferentially at an earlier occasion when he was moved to the Paris Office. She repeated her assertion that two members of the Interview Panel lacked "particular knowledge" in the field of aviation safety audits to have been able to have properly assessed her. The Applicant claimed that the official records of her interview responses did not properly reflect her answers as she had recorded them for herself.

7.3 The Applicant considered the whole interview process a "sham", as she had received very favourable feedback from a member of the Interview Panel, Mr. Gourджи ("you were the best") to be only told later that "Nancy [D/ANB] does not like you" (apparently a reference to Ms. Graham). She also asserted that specific questions as regards Annex 19 and the Continuous Safety Oversight Monitoring Program were notably missing from the interview questions. On the basis of what was presented by her, the Applicant asserted that the presumption of a procedurally correct process had been rebutted.

7.4 On 11 January 2022 the Applicant filed written submissions in which she stated, in part, "...I wish to reiterate that my main question to be determined in my case is that the selected candidatedid not and still does not meet the majority of professional experience and knowledge requirements listed as essential in the Vacancy Notice 2014/36/P 101206 nor any of the desirable elements. The Applicant went on to complain that "Overall, the ICAO failed to verify the accuracy of the content of the selected candidate's application documents throughout all stages". The applicant stated that she relies upon the following breaches of the regulatory requirements:

- a) A breach of the ICAO Service Code, Article IV, in particular the references to "competence" of staff in respect of promotion and appointment and the need to ensure "equal gender representation".
- b) A breach of Staff Rule 104.8 with respect of the lack of impartiality of the Appointment and Promotion Board and a failure in the provision to that Board of "sufficient documentation to verify the suitability of the candidates.

- c) A breach of Staff Rule 101.19: The selected candidate did not provide relevant information both during the application process and on subsequent employment.
- d) Non-compliance with the 2012 ICAO Guidelines on evaluation of applications, which provides “for hiring managers to be responsible for the pre-screening and evaluation of applications. The Staff Employment and Administration Section will continue to....., including monitoring the consistent and appropriate application of procedures”. The Applicant asserts that the Guidelines were not complied with as “only candidates, who fully meet the required minimum specifications for the position.., and are evaluated as well qualified, may be included in the long list and subsequent shortlist for the post. The Applicant also drew attention to the fact that the Guidelines also provides that “any suitable qualified female candidate must be given due consideration...”
- e) That the Employment Unit had a duty to “review the list to ensure that all procedures have been followed in the evaluation of applications....”
- f) That the hiring managers improperly used their position to influence career and employment conditions contrary to the United Nations Charter and ST/SG/2008/5, paragraph 4. *Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority.*

8. ORAL PROCEEDINGS ON 20 AND 21 JANUARY 2022

8.1 Opening remarks

8.1.1 In her opening remarks the Appellant incorporated her written statements previously filed.

8.1.2 The Applicant maintained the view that the pre-interview surroundings demonstrated that the selection process was pre-arranged and flawed and that, as a consequence, she did not have a full and fair consideration of her application. The selected candidate and the second ranked candidate did not possess the qualifications or competencies contained in the vacancy announcement and there was no verification undertaken to ascertain that the assertions that they made in their applications were true and correct. Assumptions were made, rather than an analysis of the actual facts. The selected candidate was a close friend and had a close working relationship with two members of the panel, who should have recused themselves as a result. The Applicant requested a review of the process by the Secretary General, but she received no response at the time. Ms Graham, who was the Chair of the APB, tried to actively stop her from applying for the post and she should have recused herself in respect of the making of the final recommendation to the Secretary General in respect of the appointment of a candidate for the Post. The Applicant further asserted that the lengthy delay in the appeal being heard by the AJAB was evidence of discrimination against her, which resulted in harm to her personal reputation and to her health.

8.1.3 In his opening remarks, counsel for the Respondent noted and adopted the submissions already filed. He stated that the documentary record speaks for itself and that the Applicant was given a full and fair consideration of her application and that the rules and procedures were followed. The reason that the Applicant is appealing the selection is that she was not selected. In her view, everybody involved in the process was biased against her, when in fact hers was one of the names advanced to the Secretary General for possible selection. He further stated that when a person applies for a post, part of the selection process is not that there is a general notice sent out calling for objections concerning the candidates, as appears to have been the desire of the Applicant.

8.2 **Witness Evidence**

8.2.1 The Applicant was sworn in. She commenced by formally adopting the matters of evidence which were contained in her various submissions made in documents filed. She then noted that a request for documents disclosing the verification of the qualifications of the candidates for the post had not been provided to her. She wanted to see how the essential criteria for the Post were verified. She believed that there was circumstantial evidence that she would not be getting the job as Ms. Graham had tried to get her to move to the front office and that she should take a transfer to Paris.

8.2.2 The Applicant stated that everything had been pre-arranged and that the hiring manager had even offered the job to another staff member, who subsequently did not apply. She asked the Appeals Board to take into account the Organigrams she filed, which disclosed that the selected candidate in his former positions did not hold posts which met the required qualifications in respect of management. She criticized two members of the interview panel as not having had the necessary experience to be able to assess the answers to technical questions asked by the interview panel.

8.2.3 The gender issue was not assessed properly. She was the only recommended female applicant and the Secretary General should have taken note of her gender and appointed her over the other candidates. The Applicant said that she would have had a great chance of being selected if it had been recognized that the other candidates did not meet the requirements for the position.

8.2.4 The Appeals Board asked the Applicant when she first realized that two of the panel members were friends of the selected candidate. She advised that it was only when she entered the interview, but at that time it was only rumoured that the selected candidate had applied. She agreed that ICAO is a small organization and that within certain areas everybody is known to each other.

8.2.5 There was no cross examination by counsel for the Respondent.

8.2.6 Mr. Radu, the former Deputy Director Air Navigation Bureau in charge of Aviation Safety was called and sworn in as a witness for the Applicant. Mr. Radu gave evidence that he started working for ICAO on or about 3rd or 4th September 2014 and that he was approached by the hiring manager and asked if he wanted to take part as a member of the recruitment team for the post. It transpired that he was not appointed to take part as a member of the interview panel. He did not know why. Mr. Radu had made some adverse observations about the suitability of the selected candidate, whom he knew, and did not believe had the necessary management experience. In cross-examination, he said that when he joined ICAO he did not know the appointment procedures and he had not seen the vacancy notice for the Post until two days prior to giving his evidence before the Appeals Board on 20 January 2022. He also said that he had not seen the CVs of either the first or second ranked candidates.

8.2.7 The Applicant next called Mr. Christian Eigl, who was sworn in. He had worked for ICAO from 1971 until he retired in 2004. A written statement previously filed on 3 December 2019 was adopted by him as part of his sworn evidence. He undertook audits in a voluntary capacity for ICAO until 2010. He held a number of senior positions in ICAO. It was clear from his evidence that he did not know anything about the selection process in this particular matter, but he did have and expressed adverse opinions concerning the successful candidate for the Post. Mr. Eigl met the successful candidate in the Paris Office of ICAO when he visited the office after his retirement. He held the Applicant in obvious high regard.

8.2.8 Mr. Kim Nguyen was sworn in and gave evidence for the Applicant. He referred to, and adopted as part of his evidence, a statement dated 3 December 2019. He knew both the successful candidate and the Applicant. He expressed his view that the selected candidate he had not held a management position when he had worked with him at the Bureau d'Enquetes et d'analyses pour la Sécurité de l'Aviation Civile (BEA). The witness stated that he had supported the candidature of the Applicant for the Post by sending a letter to this effect to ICAO at the time of the selection process.

8.2.9 Captain Budd was sworn in and also gave evidence for the Applicant. He adopted a written statement which had been filed. He made a number of observations concerning the successful candidate and the Applicant. He was very impressed with the abilities of the Applicant. He was not impressed with the selected candidate, whom he felt did not have the necessary managerial experience, as far as he was aware. He was of the view that the Applicant should have been appointed to the Post.

8.2.10 Mr. Jossai was sworn in and gave evidence for the Respondent. The witness currently holds the position of Chief of Recruitment of ICAO. At the time of the consideration of selection process for the Post he was involved as an assistant secretary to the APB and was present during its discussions of the APB on 16 October 2014. He was familiar with the matter, having refreshed his memory from the file held by the Respondent.

8.2.11 Mr. Jossai gave evidence of the recruitment processes involved for the Post, explaining to the Appeals Board that there are in place defined systems for recruitment. The first is that of the preparation of the Vacancy Notice by the hiring manager. This must set out all of the skills and required competencies for the position being advertised. It is an important document, as it is the basis of the consideration of whether candidates are short listed, given their experience and qualifications in respect of the job requirements. Human Resources reviewed all applications and prepared a list of candidates for an interview panel to then consider and short list.

8.2.12 In respect of the interview for this post, the Interview Panel was made up of three people. Two were subject matter specialists and one was from a different department. The hiring manager arranged who was on the Interview Panel.

8.2.13 The next step is the preparation for the interview. The hiring manager submits to Human Resources a list of questions which are to be asked of all candidates. These are checked against the job vacancy to ensure that they relate to the competencies set out in the vacancy notice. They are not reviewed in respect of technical matters. The check is made to ensure that the interview panel is only asking questions which relate to the position and not additional matters which would take the candidates by surprise or would be irrelevant. The interview process involves each of the candidates being asked the same questions. Their answers are noted and ranked by the interview panel members. The ranking is then collated and, in this matter, the top three candidates were ascertained and put before the APB, which is made up of the Directors of the five departments of ICAO. The Board has a Secretary and Assistant Secretary. Mr. Jossai was the Assistant Secretary of the APB on 16 October 2014 when it considered the recommendations in respect of the Post. The APB is tasked with considering the three top-ranked candidates to ensure and verify that they possess the skills and qualifications in respect of the vacancy. They also consider issues of gender and geographical distribution of the candidates. Following its considerations, the APB makes a recommendation, recorded in an "Executive Summary", which is provided to the Secretary General who makes the decision as to whom to appoint. The Secretary General has a discretion to adopt the recommendation or not.

8.2.14 In respect of the duty of Interview Panel members to disclose any conflict of interest, Mr. Jossai stated that ICAO is a small organization and that the area of its work is such that it can be expected that interviewers will know candidates, whether they are internal

or external. As such, familiarity between candidates and interview panel members would not generally be regarded as a conflict of interest, unless there was a friendship. He was not aware of any particular friendships between members of the Interview Panel and any candidates. He said that following an audit of the processes, members of the interview panel members are now asked to sign a declaration of no conflict. This is merely a matter of drawing to the attention of the panel members that they have a duty to consider the issue of a conflict of interest, something which existed under the Code of Conduct at all times relevant and thus is not a new duty.

8.2.15 In respect of the verification of skills and qualifications of applicants, the self-declaration of an applicant is found in the application for a post. When a person first joins ICAO, the statements that they make in the application are verified with the employer of the candidate for a position. There is a request made by ICAO of the former employer which relates to the particular competencies required for the position applied for and generally. The reply from the former employer goes onto the personnel file of the staff member of ICAO. This applies to all staff.

8.2.16 When verifying whether an internal candidate has the requisite experience for a position and that the claims made in their application are correct, verification is conducted by an examination of their performance reports, the last two of which are required to be provided when applying for a post. The whole of the personnel file may also be consulted. It is the role of the APB to undertake a final verification in respect of ensuring that the candidates being considered possess the required skills and qualifications as contained in the job vacancy. Members of the APB have access to the applications, and thus the last two years of performance reports, and can request to see other information from the personnel file of the candidates. In this case this was done. It is evident from the Executive Summary of the APB, dated 16 October 2014, that there was consideration given to the experience and qualifications of the three recommended candidates, as the APB recorded under “Considerations of the Board” that, “The Board also noted that clarification was obtained regarding the experience of the 2nd ranked candidate and how he fully meets the requirements for the post”.

8.2.17 Mr. Jossai stated that the APB found that the selected candidate met all of the qualifications required for the Post and recommended his appointment to the Secretary General, who made the appointment.

8.2.18 Mr. Jossai also noted that a P4 applying to P5 positions is considered normal career progression and it was somewhat expected. That without taking managerial experience at the P4 level into account then there would not be a normal progression through promotion.

8.2.19 Mr. Jossai was cross examined by the Applicant at some length. He stated that it is the Interview Panel who creates the short list of candidates to be interviewed and that they verify the qualifications for a post. It was put to Mr. Jossai that the selected candidate who was a P4 level staff member was not a manager and that such a grading was such that a person at this level coordinated, they did not manage and that they had nothing to do with budget or finance. Mr. Jossai did not agree with the proposition, advising that one had to look closely at the actual tasks undertaken by the staff member in the positions that they held and that one could not categorise by grade level.

8.2.20 Mr. Jossai was asked if there was a document which set forth an analysis of the requisite qualifications for the job and how each candidate met such. He advised that such a document existed, as part of the “long list of candidates”, where there are columns specifying the meeting, or otherwise of the qualifications by each of the applicants for the post. Mr. Jossai was asked about the need for a gender specialist to be present. The evidence was that at the time a gender expert may have been appointed by the Secretary General, but it was a discretionary matter. The Applicant, asked why a separate gender expert was not

present at the APB meeting. Mr. Jossai advised that Ms Graham was the only female there and that the matter was discussed, with the APB noting that the matters of both gender and geographic diversity were both noted in the Executive Summary as having been considered.

8.2.21 After the close of the cross examination of Mr. Jossai, the Applicant gave further evidence to the effect that she did not believe that the selected candidate held the necessary qualifications for the position and that the process of verification of his qualifications was flawed. She suggested that he overstated his experience substantially and should have been dismissed for doing this, as had happened with others who had been found to have misstated their qualifications in order to get a job at ICAO.

9. CLOSING SUBMISSIONS

9.1 The Applicant

9.1.1 In her closing statement, the Applicant reiterated her claim that her candidature had not been given a fair and objective treatment and repeated the assertion that the selected candidate failed to meet the essential criteria laid out in the Vacancy Notice. She also recalled her previous claims concerning the flawed interview process and the composition of the interview panel, also noting that there existed other "circumstantial evidence" such as her receiving an offer for a continuous appointment just prior to her appeal and other efforts by the administration to "keep her quiet." She urged the Appeals Board to hold that the selection process had been flawed, and that there existed a direct link between these irregularities and her non-selection.

9.1.2 In her written closing statement, dated 21 January 2022, the Applicant maintained that the selection "*processes were prearranged, flawed, improperly motivated, and not implemented in compliance with applicable requirements and procedures.*" The Applicant asserted that the hearing confirmed there was no evidence of the confirmation that the skills asserted by the applicants for the post actually met the requirements set out in the Vacancy Notice and that there was a lack of documentary evidence to disclose what happened in the hiring process. She said that neither the selected candidate, nor the second recommended candidate had any financial management background, nor had they held a managerial position for five years, as required. There was a failure to verify the asserted experience and qualifications of the candidates and reference checks were not made for internal candidates. The Applicant asserted that the selection and recruitment processes lacked a properly documented process and that it was tainted with favouritism. The Applicant observed that in her view "[t]he testimony of the Respondent's witness is highly contradictory, diverting from the facts, and based on assumption rather than facts and lacking associated evidence".

9.1.3 In respect of the evidence of Mr Jossai indicating that most people within the ICAO had friendly relationships, the Applicant noted "that there is a difference between a professional/collegial relationship and close personal friendship, whereby conflict of interest scenarios are to be addressed and the persons involved in interviews or other proceedings involving their friends shall recuse themselves".

9.1.4 As part of the selection process the Applicant noted that staff performance reports "do not validate any qualification or experience criteria, but only list tasks and the completion status as basis for the annual salary increment".

9.1.5 The Applicant questioned the modality of the interview process and technical expertise of two of the panel members, and that such lack was permissive of the manipulation of the panel. Moreover, gender equality was not ensured by having Ms Graham involved in the Board recommending a candidate to the Secretary General after she had actively tried to prevent the Applicant from applying for the position.

9.1.6 The Applicant asserted that she “was denied full and fair consideration for the post and my due process rights were violated by staff members, who abused their authority and positions and selected a particularly unqualified and inexperienced candidate purely based on favouritism and politics”.

9.2 The Respondent

9.2.1 In his closing statement, the Representative of the Secretary General invited the Board to consider the evidence which had been provided by Mr. Jossai, which persuasively denoted a fair and proper process in accordance with the rules. The appellant's own statement had shown that she had performed well in the interview, leaving therefore no room to determine that someone had acted with bias. He recalled the argument that consideration regarding gender could not lead to candidates "leapfrogging" in the absence of a substantive tie, as suggested by the Applicant. Mr. Petras stated that the onus lay with the Appellant to demonstrate by clear and convincing evidence that the process was conducted in an irregular manner. He also recalled that, even assuming the Applicant's claims were true, it would have had no impact, given that she was only the third-ranked candidate. No rescission of the appointment decision would therefore be justified.

9.3 Considerations of the Appeals Board

9.3.1 The relevant procedures are set forth in the following regulations, rules and guidelines in respect of the recruitment to the Post.

2001 Standards of Conduct for the International Civil Service:

“ 5. The United Nations and the specialized agencies, including ICAO, embody the highest aspirations of the peoples of the world. Their aim is to save succeeding generations from the scourge of war and to enable every man, woman and child to live in dignity and freedom.

6. The international civil service bears responsibility for translating these ideals into reality. It relies on the great traditions of public administration that have grown up in Contracting States: competence, integrity, impartiality, independence and discretion. Over and above this, however, international civil servants have a special calling, i.e. to serve the ideals of peace, of respect for fundamental rights, of economic and social progress, and of international cooperation. It is therefore incumbent on international civil servants to adhere to the highest standards of conduct because, ultimately, it is the international civil service that will enable the United Nations system to bring about a just and peaceful world.”

STAFF RULE 101.1 (Staff Regulations, Article D):

10. Conduct of staff members

1. Staff Regulation

1.3 states that staff members shall abide at all times 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 further states that staff members shall conduct themselves at all times in a manner befitting their status as international civil servants. In this connection, ICAO has established a Framework on Ethics and has adopted as a reference standard for the conduct of ICAO staff the United Nations Standards of Conduct

for the International Civil Service. All staff members shall adhere to the ICAO Framework on Ethics, provided in Annex I to The ICAO Service Code, and to the Standards of Conduct, provided in the Appendix to this Staff Rule.

11. Any conduct contrary to the ICAO Framework on Ethics or to the Standards of Conduct provided in the Appendix to this Staff Rule may lead to disciplinary proceedings and action in accordance with Article X of the Staff Regulations and Staff Rule 110.1.

12. Regulation 1.9 contains provisions regarding the acceptance by staff members of any honour, decoration, favour, gift or remuneration from any Government. Receipt from a Government by a staff member of any form of supplement to the emoluments payable by the Organization is contrary to the letter and the spirit of Article 59 of the ICAO Convention and Article I of the Staff Regulations and will not be approved by the Secretary General.

The Staff Regulations regarding recruitment, appointment, promotion and development of staff in 2014, provided as follows:

4.8 All staff of the Organization and all Member States shall be notified of vacancies in the Professional and higher categories.

4.11 The Secretary General shall act with the advice and assistance of: b) the Appointment and Promotion Board I (APB I) for P-1 to P-5 level posts; The ...

APB I.....shall be constituted and shall function as set out in the Staff Rules.

4.25 [F]ollowing receipt of the report of the relevant APB, the Secretary General shall

make the appointment decision ...

4.26 In cases where the ranking of the Secretary General is different from that of the relevant Appointment and Promotion Board (APB), he shall inform the President of the Council in writing of the reasons for his choice.

Staff Rules SR/104.8, relating to appointments and promotions, in 2014 relevantly provided:

3. In accordance with Regulations 4.11 ... , the Secretary General shall appoint the staff of the Organization and shall act with the advice and assistance of the following advisory bodies: c) the Appointment and Promotion Board I (APB I) for P-1 to P-5 posts;

These advisory bodies shall provide advice to the Secretary General, or the Senior Official to whom authority has been delegated, with regard to the appointment to the post. In carrying out their responsibilities for advising the Secretary General on appointments and promotions, the advisory bodies shall be guided by the recruitment provisions as laid down in The ICAO Service Code. These advisory bodies shall be constituted and shall function as follows:

7. The composition of APB I shall be as follows:

- All Directors of Bureau as voting members, or in their absence, Acting Directors of Bureau. The Senior Director of Bureau, or, if absent, the next most senior Director of Bureau shall serve as Chairman.

- The ICAO Regional Director (non-voting), to the extent his Regional Office is concerned, shall present the candidatures via telephone conference.
- Observer (non-voting): A gender advisor (from the Professional and higher categories) may be appointed by the Secretary General, when deemed necessary.
- Secretary (non-voting): DD/ADB/HR.

Quorum: Three voting members shall constitute a quorum.

9. In respect of each vacancy to be filled, the appropriate advisory body shall be provided with the following information and documents:

- a) the vacancy notice;
- b) a statement of the action taken to advertise the vacancy;
- c) the complete list of candidates;
- d) the applications of each short-listed candidate, together with a summary of all relevant information concerning the candidate; and
- e) in the case of a candidate who is a staff member of the Organization, a copy of the performance reports.

10. The advisory bodies may also, where deemed necessary and practicable, arrange for candidates to be tested using appropriate assessment methods.

11. On completion of the review of candidates for a particular position, the advisory body shall make a report to the Secretary General containing its recommendations and a ranking list of the candidates in order of the advisory body's assessment of their qualifications for the position.

12. The advisory bodies shall keep minutes which shall be confidential to themselves, the appointing authorities, the Secretary General, as well as the President of the Council, where applicable.

14. The decision to select a candidate shall be implemented upon its official communication to the individual concerned.....

On 28 June 2012, a set of "Guidelines on evaluation of applications," were issued by the Secretary General of ICAO and were applicable in 2014. They provided for " *hiring managers* to be responsible for the pre-screening and evaluation of applications, with effect from 1 July 2012. SEA [The Staff Employment and Administration Section] will continue to provide guidance and support to both managers and members of the selection and APB panels, including monitoring the consistent and appropriate application of procedures". The Guidelines specifically provided:

- a) Hiring managers are deemed to have in-depth knowledge of the work area and the requirements of the posts under their supervision, and are therefore better placed to assess the suitability of applicants. . . .
- c) Only candidates, who fully meet the required minimum specifications for the position ...

and are evaluated as *well qualified* or *qualified*, may be included in the long list and subsequent shortlist for the post. (emphasis in the original)

e) Hiring managers are equally responsible and accountable for ensuring that diversity targets of the Organization are duly considered when evaluating applications. In this regard . . . any suitably qualified female candidates must be given due consideration....

f) The short list of candidates to be invited for further assessment . . . is to be submitted to the Employment Unit (EMP) in SEA. SEA/EMP will review the list to ensure that all procedures have been followed in the evaluation of the applications....

An Inter-Office Memorandum from the Secretary General provided that:

• "...effective 1 July 2012, the new format of the Candidate Assessment and Selection Report will become effective. The main features of the new report are:

a cover page summarizing the entire candidate selection process in a comprehensive way;

an evaluation chart, showing the rating of all candidates in order to improve objectivity and transparency of selection recommendations Following [an] interview, the panel members should agree on the rating for each candidate;

- an interview report balancing technical skills evaluation and competency assessment. Managers need to clearly justify why the candidate is or is not recommended ... ; and

- the APB Summary of Decisions that will be submitted to the final approval authority

9.3.2 **Jurisprudence**

The United Nations Appeals Tribunal provides binding authority for the considerations of the Appeals Board. It is well settled that "[I]t is *not the function of the [reviewing body], or indeed of this Tribunal, to take on the substantive role with which the interview panel was charged*", even in situations where elements of that procedure have been impugned. See *Frohler v. Secretary-General of the United Nations* Judgment No. 2011-UNAT-141, at para 32.

As a general principle, judicial review of non-selection decisions ensures "every stage of the selection procedure is subject to judicial review, in order to ascertain (1) whether the procedure as laid down in the Staff Regulations and Rules was followed; [...] (2) whether the staff member was given fair and adequate consideration", (See *Luvai* 2014 UNAT 471 at para 31) and (3), "whether the applicable Regulations and Rules were applied in a fair, transparent and non-discriminatory manner". (See *Savadogo* 2016 UNAT 642 at para 40.)

It is to be noted that the Administration "has broad discretion in matters of staff selection". (See *Ljungdell* 2012 UNAT 265, para 30) The role of the Appeals Board "is not to substitute [its] decision for that of the Administration". (*ibid*) "[I]t is not the function of [the Appeals Board] to take on the substantive role with which an interview panel is charged, even in situations where elements of that procedure have been impugned. The jurisdiction vested in [the Appeals Board] is to review alleged procedural deficiencies, and if same are established then, by the application of the statutory remedy they deem appropriate in all the circumstances, rectify such irregularity or deficiency as may have been found." (See *Frohler supra*) The Appeals Board's role is limited to a judicial review of "whether the applicable Regulations and Rules have been applied and

whether they were applied in a fair, transparent and non-discriminatory manner”. (*Ljungdell supra*)

In, *Dube v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-674 at paragraph 38, referring to previous Judgments on the discretion vested in the Administration, the Tribunal stated that:

“... the Secretary-General has broad discretion in matters of staff selection. The jurisprudence of this Tribunal has clarified that, in reviewing such decisions, it is the role of the UNDT or the Appeals Tribunal to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner. The Tribunals' role is not to substitute their decision for that of the Administration.¹³”

In *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122, at paragraph 20, the UNAT stated:

“20. The Dispute Tribunal possesses jurisdiction to rescind a selection or promotion process, but may do so only under extremely rare circumstances. Generally speaking, when candidates have received fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration, the Dispute Tribunal shall uphold the selection/promotion.”

In the case of *Dueleh v. Secretary-General of the United Nations* 2011-UNAT-175, UNAT stated:

“1. An irregularity in a promotion procedure will only result in the rescission of the decision not to promote an appellant when he or she would have had a significant chance for promotion. Thus, where the irregularity has no impact on the status of a staff member, because he or she had no foreseeable chance for promotion, he or she is not entitled to rescission or compensation.”

The presumption of regularity, burden of proof and standard of proof

“[I]n non-selection cases [,] all official acts are presumed to have been regularly performed. This is a fundamental, but rebuttable presumption. The presumption stands satisfied if the Administration is able to minimally show that full and fair consideration was given to the candidate. The burden of proof then shifts to the staff member to show, through clear and convincing evidence, that she was denied a fair chance of [selection or] promotion.” (see *Ibekwe* 2011 UNAT 179 at para 1) Accordingly, a candidate challenging a non-selection decision must prove through clear and convincing evidence any of the following grounds: 1) the procedures were violated; 2) the members of the panel were biased; 3) the panel discriminated against an interviewee; 4) relevant material was ignored or irrelevant material was considered; or 5) potentially other grounds depending on the facts of the case.(see *Rolland* 2011 UNAT 122, para 26 and *Majbri* 2012 UNAT 200 at para 30)

Despite Judgment by the United Nations Appeal Tribunal in *Rolland (supra)*, in *Majbri*, (*supra at para 30*), the Appeals Tribunal held that it was expected from a candidate challenging a non-selection decision to prove their arguments through a preponderance of the evidence, instead of clear and convincing evidence. As a result, there was some ambiguity regarding the exact standard of proof in weighing evidence in non-selection cases. For example, in *Luvai 2014 UNAT 417*, UNAT applied the standard of “clear and convincing evidence”, but still referred to *Majbri*. In subsequent cases, UNAT referred to *Rolland*. With the Judgment in *Lemonnier*, 2017 UNAT 762 paragraphs 34-36, UNAT clarified that the standard of proof in weighing evidence in non-selection cases is clear and convincing evidence. UNAT held that “it [is] the staff member’s burden to prove by clear and convincing evidence that the Administration did not give his

candidacy full and fair consideration [...]. The ‘balance of evidence’ [*i.e.*, the preponderance standard] is a lesser standard of proof than clear and convincing evidence.”(*ibid*, at paras 35-36). The Appeals Board is bound to apply the standard of proof of “clear and convincing”.

9.3.3 Issues of bias

It is clear that “a staff member has a right to be fully and fairly considered for promotion through a competitive selection process untainted by improper motives such as bias or discrimination. A candidate, however, does not have a right to a promotion”. (see *Ross* 2019 UNAT 944 at para. 23)

UNAT held in *Mahmoud* 2019 UNAT 964, at para 30 that “[a] decision may be set aside if there is a reasonable apprehension of bias. In other words, there is no need to prove actual bias but only a reasonable apprehension. The test is objective and an inference of a reasonable apprehension of bias must be consistent with the proved facts and a plausible and probable inference.” Bias is thus considered on the basis of a “reasonable apprehension”, but on the basis of the proven facts.

In *Sobier v. Secretary General of the United Nations* 2022-UNAT 1208 starting at 27 that Tribunal usefully observed in respect of considerations of bias:

“27. The first is that, particularly in cases of complaints of non-selection, the UNDT and the UNAT will not usurp the entitlement of the Secretary-General to make selection decisions. That is so, not least, because it is a fundamental principle of staff engagement under Staff Regulation 4.2 and ST/AI/2010/3 as the UNDT pointed out. It sometimes said, in other words, that the tribunals will not substitute their decisions about selection, and in particular who should be or should have been selected, for the decision of the Organization, which is best placed to make the appropriate assessments that go into such decisions. We do not disagree with the generality of this statement. It is, however, subject to the exercise by the tribunals of their roles in ensuring legal compliance with the relevant selection processes in any case. If a selection process is sufficiently flawed in law, then the tribunals can and must set aside unlawfully made decisions. However, the constitutional demarcation line prevents the tribunals from making such selections in substitution as they consider they would have made and that the Secretary-General should have made.

28. The second legal principle we need to address concerns the nature and scope of what is called “bias” in administrative decisions affecting staff members and, in this case, relating to non-selection. The misapprehension of what constitutes bias may be illustrated by passages in the Impugned Judgment in this case. Addressing the legal tests raised by the second broad ground of challenge, the UNDT wrote at paragraph 24 in relation to ill-motive and bias: “[T]he mental state of the decision-maker usually will have to be proved on the basis of circumstantial evidence and inference drawn from that evidence.” Authority for that proposition was said to be the UNAT’s Judgment in He.14 At paragraph 37 of the Impugned Judgment, the UNDT addressed the nature of bias again, saying: “The finding that the selection process was procedurally flawed, and that for the Leadership competency a different question from the one the Applicant was asked was documented in the Interview Worksheet are not evidence of bias, which is defined as “a strong feeling of favor of or against one group of people ... often not based on fair judgement”[]. It may well be the result of negligence.” *He v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-686, para. 39.17

29. Bias is an element of natural justice which examines not only the mind of the decision-maker subjectively but also examines the manifestation of the process of decision-making objectively. Put another way, a decision is not only biased if

made by a decision-maker deliberately intending to favour or disadvantage the subject of it for improper reasons. Bias can also occur unintentionally on the part of the decision-maker if, considered objectively, a neutral, reasonable and informed bystander would conclude that it is likely to have been made to favour or disadvantage improperly the person affected by the decision. This is sometimes called “a reasonable apprehension of bias”. Its ascertainment is an objective exercise, and it arises and is entirely dependent on the circumstances of the case.

30. Unconscious bias or unconscious prejudice, sometimes based on inaccurate stereotyping of persons or classes of people, is a now well-recognised phenomenon in many legal systems. Its application may, if detected objectively, cause a decision to have been made improperly and so be unsupportable. However difficult in practice it may be to make an accurate assessment of the subjective mind of the decision-maker to determine whether a decision was infected by bias, an objective consideration of all other relevant factors may nevertheless bring the tribunal to the decision that bias was established.

31. An ill-motivated decision includes not only one in which the decision-maker is deliberately motivated to maliciously deprive the staff member of what would otherwise have been the staff member’s entitlement: an ill-motivated decision can also include one where the decision-maker’s reasons are simply wrong in law, for example by taking into account irrelevant, or failing to take into account relevant, considerations. While the word “ill” in the phrase “ill-motivated” can include moral wrongfulness, it can also include what might be called innocent or mistaken or negligent wrongfulness. The important element is wrongfulness, not the subjective attribution to the decision-maker's motive for its occurrence.”

In *Charles v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-477 at paragraph 24, the UNAT stated:

“A claim about the non-selection resulting from a contested competitive process must be decided on a case by case basis, by assessing if the selection methods applied during the different stages of the process were in accordance with the applicable norms and provided a fair, objective, and non-discriminatory treatment of all the candidates. If the analysis of this issue leads to an affirmative answer, the contestation cannot succeed, irrespective of whoever was selected, because what counts is that the non-selected candidate's rights were not violated.”

9.3.4 **Were the mandated procedures followed in respect of the consideration of the Applicant for the Post?**

The procedures are set out above in the Staff Regulations, Rules and Guidelines on Evaluation of Applications. The Appeals Board must ensure that the procedures were followed through the stages of the defined selection process that all relevant material was taken into consideration, the procedure was applied in a fair, transparent and non-discriminatory manner, and, as an overarching consideration, the staff member was given fair and adequate consideration.

Having reviewed the procedures applied in this selection process under review, the Appeals Board is of the clear view that the Respondent has more than minimally shown that full and fair consideration was given to the Applicant and the procedures set out were followed. Thus, the Applicant had the burden to "prove through clear and convincing evidence that she did not receive full and fair consideration of his or her candidacy, the applicable procedures were not followed, the members of the panel exhibited bias, or irrelevant material was considered or relevant material ignored”. See *Ibekwe supra*.

The procedural process was in compliance with the regulatory requirements:

- a. An Interview Panel of 3 was formed, including the hiring manager. Two members of the Panel were subject experts, the third member was from outside the hiring department.
- b. The Panel reviewed all of the applications as part of a long list, noting whether they met the criteria for the Post, as set out in the vacancy notice, establishing a shortlist of 9 candidates to be interviewed. This shortlist was reviewed by Human Resources.
- c. The necessary qualifications and experience of the candidates was initially ascertained from the self-declarations made by the candidates in their application forms for the Post and from the knowledge of the Interview Panel members in respect of the positions currently and previously held by the short listed candidates.
- d. The Interview Panel drew a list of questions to be asked of each of the candidates. These were subsequently approved by Human Resources to ensure that they were in conformity with the vacancy notice.
- e. The nine candidates, including the Applicant, were interviewed by the Interview Panel, being asked the predetermined questions. A ranking was given to the candidates by each of the Interview Panel members in respect of the answers given, which was then collated.
- f. The top ranked three candidates, of which the Applicant was the third, were all internal to the Organization. On 16 October 2014 the whole process was effectively reviewed and considered by the APB for recommendation of the final candidates to the Secretary General. The APB was properly constituted, with all members being in attendance.
- g. As part of the considerations of the APB, its members were provided with the applications for the Post of the three most highly ranked candidates. They undertook a separate verification process. The members of the APB were all directors and can be assumed to have knowledge of the experience and qualifications of the candidates from the information provided by the candidates in their application forms. The members of the APB had access, upon request, to the personnel files of the Organization in respect of each of the three candidates. It is apparent that verification of the qualifications and skills required for the Post was undertaken by the APB, as the Executive Summary of its deliberations in respect of the Post contains the following specific reference:

“The Board agreed with the ranking of the top three (3) candidates. The Board also noted that clarification was obtained regarding the experience of the 2nd ranked candidate and how he fully meets the requirements of the post”.

10. FINDINGS

10.1 The Appeals Board makes the following findings in respect of each of the matters the subject of complaint by the Applicant:

- a. The presumption of regularity of the processes followed in the selection process for the Post has not been upset through any clear and convincing evidence. There is evidence well beyond that of minimal compliance by the Respondent. See *Rolland, supra*. The Applicant thus had the burden of proof in respect of rebutting the presumption of regularity.

- b. The Appeals Board finds that both the Interview Panel and the APB concluded that all of the three top ranked candidates met the requirements for the Post. It did so on the basis of the material presented to it by the candidates and upon their verification of such. The APB independently verified the skills and qualifications of the top three ranked candidates. The evidence of the witnesses called by the Applicant was directed to either support for the Applicant in respect of a belief by the witnesses that the Applicant was the best candidate for the post or to provide the views of the witnesses in respect of the selected candidate, and to a lesser extent, the second ranked candidate. This evidence was of little, if any, assistance to the Appeals Board, as it could not be directed to the actual selection processes and was not such as to counter the verification processes undertaken by both the Interview Panel and the APB. The witnesses were not involved at all in any part of the selection process. Insofar as they expressed an opinion in respect of the lack of formal managerial or financial experience of the successful applicant, then they did so from a position of not being fully informed with the vacancy notice, the CVs of the candidates, or direct knowledge of the processes used in the selection process. To the extent that the witnesses for the Applicant gave evidence concerning their views concerning the management experience of the selected candidate, they made an assumption as to what was required, what was verified or what was found by those involved in the selection process as to managerial experience of the selected candidate and the second ranked candidate. The same may be said of the required financial experience. Managerial experience is very broad and it may well be that a view was taken that it need not be specified as part of a job title, but experience in management may well be a question in respect of the actual job undertaken. The Appeals Board recalls the evidence of Mr. Jossai concerning the promotion of staff from P4 to P5 and the fact that at P4 level there are managerial tasks which are taken into account. The Appeals Board is unable to reach a conclusion as to what was in the mind of the Interview Panel members or the members of the APB when they clearly concluded that there was sufficient verification of the experience of all of the top three ranked candidates. None of the members of either the Interview Panel or the APB was called to give evidence as to how they undertook the verification process.
- c. The Applicant was given full and fair consideration in respect of her application. There is no evidence which supports the assertions that the application of the Applicant was not given full consideration or that there had been a pre-determination of the appointment. On the contrary, the Applicant was considered as one of the three top applicants, out of the sixty-five applicants who applied for the Post. The review process of the APB also disclosed that it considered the Applicant, determining that she should be ranked as third in the reference of the appointment to the Secretary General. There is no evidence that the Secretary General did not fully consider the recommendations where they were considered. No evidence has been provided that would disturb the presumption of regularity. There is no evidence that irrelevant matters were taken into account, or that relevant matters were not taken into account, during the selection process or when the decision was taken to appoint the first ranked candidate. There is no clear and convincing evidence that the selection procedure was not fair, transparent and non-discriminatory. The Applicant was treated in the same manner as the other candidates.
- d. While the Applicant asserts that there was bias against her and in favour of the selected candidate, no reasonable apprehension of bias has been demonstrated or disclosed in the evidence to support this assertion.

- e. There is no evidence that the Interview Panel was incorrectly formed in respect of its membership so as to support any bias, or that it, in any event, functioned in a biased manner. There is no doubt that the Applicant was well qualified for the Post. It is evident from the ranking and the final decision of those directly involved in the decision making process that there were others who were found to better match the requirements for the Post. This was a conclusion reached through the interview process and the subsequent considerations of the APB. The Appeals Board, even if it was of the opinion that the Applicant were the best applicant for the position, given its findings in respect of the proper procedures having been followed, cannot upset the appointment unless it finds that there is a reasonable apprehension of bias, or the failure to take relevant matters into account, that irrelevant matters have been taken into account or that there is some other error, in an administrative law sense, which it does not.
- f. Insofar as the Applicant has relied upon the requirements set forth in ST/AI 2010/3 "Staff Selection" and the jurisprudence found in the UNAT case of *Chhikara v. Secretary-General of the United Nations* Judgment No 2017 UNAT 723, to assert that the Interview Panel was not properly constituted, in that it did not have two subject matter experts who could "properly evaluate the responses of the candidates", the Appeals Board notes that ST/AI 2010/3 is the implementing Administrative Instruction for Secretary General's Bulletin ST/SGB/2002/5. Both these administrative instruments have no application to ICAO, operating only in respect of the Secretariat of the United Nations, not its agencies. ICAO has a complete coverage of the selection procedures through its own administrative instruments and practices. ICAO's practice requires that one member of the interview panel be from outside the hiring Office, but there is no requirement that such a person be a subject matter expert.
- g. The Applicant has alleged that there was a close friendship between members of the Interview Panel and the selected candidate and thus they should have excluded themselves from being on the Interview Panel. There is evidence that most people within ICAO know each other, in some manner or another. There was evidence that the selected candidate was known to at least two members of the Interview Panel. There was no clear and convincing evidence which could lead to a finding that there was a close friendship which would have been such as to require a recusal of any member of the Interview Panel. As no member of the Interview Panel was called to give evidence, that evidence that was placed before the Appeals Board on the subject is was not specific enough and amounted to little more than conjecture. If there was a close friendship demonstrated, then this may be reason to quash any decision on the basis of bias or conflict of interest, but that is not demonstrated to be the position. The issue of knowledge of candidates applying for positions, especially when they are internal candidates is a matter which frequently occurs, to varying degrees. In this regard the Board notes the decision in *Alika v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-540, at paragraph 34, where the UNAT agreed with the UNDT where it had been stated that it had not found any merit to the Applicant's claim of bias on the part of the Programme Manager "in favour of the selected candidate, on the grounds that the latter had been a member of the Interview Panel who had selected him as Programme Manager." It was clearly recognized that "this kind of situation can arise in any Administration and this fact alone cannot support the conclusion that the person sitting on such a Panel is not neutral and/or has to recuse him/herself, which, most importantly, is not provided for by the applicable rules." Where an organization, or a unit within an Organization is

small, then there must be a presumption that those sitting on interview panels will act properly, professionally and independently and in conformity with any Code of Conduct when undertaking their assigned task. If this is not the case, then from a practical point of view it may not be possible to make any selection in an informed and properly assessed manner. Such presumption is clearly rebuttable. In this case there is not the evidence to support such rebuttal.

- h. The Applicant has made assertions that the selected applicant has received many favours in the past, giving that example of his transfer to Paris in respect of an appointment which she alleges he had no qualifications. Alleged past events play no part in the considerations of the Appeals Board of the matters raised in the application for the Post and the Appeals Tribunal has no power to examine such. Not only are they not relevant to the matters before the Appeals Board, there is no issue of “similar fact” in respect of the conduct in making a decision. There is a presumption of regularity in respect of past appointments. Further, the Applicant has no standing to question the past appointments of the selected candidate. If the Applicant did, then appeals of this nature would have no end and there would be no certainty. See *Alika v. Secretary-General of the United Nations*, Judgment No. UNDT/2014/042, in which it stated, in paragraph 26 that “... in view of the scope of judicial review ... any event prior to the selection process is immaterial to the considerations with respect to the regularity of the selection process itself and whether the Applicant was given full and fair consideration.”
- i. The Applicant has also asserted that suggestions that she move to a different post in Paris and/or to be “in a front office” position disclosed a bias against her by Ms Graham. The link between the suggested move to Paris and/or to a front office role and any form of bias is not immediately apparent and was not made out by the Applicant. Prior matters of this nature would only be relevant if they went to direct proof of bias and an intention to ensure that there was not a full, fair and transparent process in the application under review. While the Applicant has asserted that there was such a link, there is simply no clear and convincing evidence to support the contentions of the Applicant.
- j. The Applicant has asserted that there has been favouritism and or nepotism in breach of the Anti-Fraud and Anti-Corruption Policy. Paragraph 9 of that policy states that:

"[c]onsistent with existing systems in place under applicable ICAO regulations, rules, and policies, all offices of ICAO shall prevent and detect fraudulent, corrupt and/or collusive practices" by , "maintaining on file records of transactions in accordance with ICAO requirements."

Paragraph 16, in respect of appointments requires that those

"responsible for recruitment and promotion decisions must ensure that such decisions are free from any form of favouritism or nepotism."

It is noted that the Anti-Fraud and Anti-Corruption Policy provides the following specific definitions of favouritism and nepotism:

Favouritism "the practice of giving special treatment to a person or group, usually at the expense of another person or group, in contravention of ICAO policies that require decisions to be made in the best interests of the organisation". A further

note specifically goes on to provide that this definition applies "[p]articularly with concern to ICAO policies on recruitment (including that of consultants), procurement, and performance management."

Nepotism is the "giving advantage or showing favouritism to relatives or members of one's circle, regardless of merit." (emphasis added)

The Appeals Board, having considered the evidence before it, is unable to find on a clear and convincing basis that the evidence leads, in respect of either of the first two ranked candidates, to a conclusion that there has been favouritism or nepotism in the selection and appointment process for the Post in breach of the Anti-Fraud and Anti-Corruption Policy, or at all.

- k. The Applicant has asserted that the Chair of the APB considering the candidates for the post should have recused herself, as she had an obvious conflict of interest as she had made a suggestion to the Applicant that she move to Paris, which suggestion was rebuffed by the Applicant, and that she was otherwise biased against the Applicant.
- l. It is noted that there is no clear and convincing evidence to support such assertions of bias and a need for recusal of the Chair of the APB. There is no evidence to support a contention that the Chair of the APB had an ulterior motive or intention which would lead to a finding of this being evidence of bias against the Applicant. There is no evidence whatsoever of the Chair acting improperly or having undue influence on the other members of the APB. The only witness who was present at the meeting of the APB, Mr. Jossai, gave no support for such contention.
- m. The Applicant asserts that "contrary to Assembly Resolution commitments and slogans, the ICAO policy on promoting female competent candidates was totally ignored"

Relevantly Staff Regulation 4.1 reads as follows:

4.1 The paramount consideration in the appointment and promotion of staff shall be the necessity for securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to ... ensuring equal gender representation. Subject to the foregoing, selection of staff members shall be made without distinction as to race, sex or religion

....

Unless otherwise permitted under these Regulations, appointment and promotion of staff members shall be made on a competitive basis."

The Appeals Board notes that the Staff Regulation directs the appointment of staff members on a competitive basis. No distinction is made as to gender. The Service Code provides no exception in this regard, nor does it mandate the appointment of female candidates irrespective of qualification. It is clear from the Executive Summary of the APB that the matter of gender was considered, with a decision being that no change to the ranking was made on this basis. The applicant disputes the legality of the decision. The Appeals Board finds that there is no evidence of any error in the making of the decision and it has been made in a manner in conformity with the administrative and regulatory requirements.

- n. The Applicant has further alleged that the Secretary General made the decision to appoint the selected candidate "clearly and based on bias favored (*sic*) and subsequently protected the candidate of his own nationality, while supporting retaliatory actions."

Such a claim is serious and must be supported by evidence. There is no evidence at all which has been produced which would cause the Appeals Board to find on the balance of probability, as suggested by UNAT in *Cardwell v. Secretary-General of the United Nations* Judgement No. 2018-UNAT-876, at paragraph 26, or on the basis of clear and convincing evidence, that the Secretary General was biased, acted improperly, in an arbitrary or abusive manner in the exercise of his discretion in making the appointment to the Post. There is simply no evidence that the Secretary General erred in the consideration of the three candidates presented to him by the APB, of which the Applicant was one. The Secretary General was free to choose from any one of the three top ranked candidates as forwarded to him by the APB, or reject them all. A choice was made, with which the Applicant clearly disagrees. Her assertions in this respect are without merit.

- o. The Applicant also asserted that the hiring manager improperly used his position to influence career and employment conditions of the Applicant contrary to the United Nations Charter and ST/SG/2008/5, paragraph 4. *Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority*. It is clear that this Bulletin has application only to the Secretariat of the United Nations and is not directly applicable to ICAO. Paragraph 4 of the Bulletin refers to "Preventative measures". This matter was not fully argued by the Applicant. The Appeals Board is unable to find evidence to support the contention of the Applicant in any event.
- p. The Respondent asserted that even if the selected candidate had not had the required skills and experience, then the second ranked candidate would have been selected. Reliance was put on the case of *Dueleh v. Secretary General of the United Nations*. As noted above at paragraph 1 of the judgment in that case, UNAT determined:

"An irregularity in a promotion procedure will only result in the rescission of the decision not to promote an appellant when he or she would have had a significant chance for promotion. Thus, where the irregularity has no impact on the status of a staff member, because he or she had no foreseeable chance for promotion, he or she is not entitled to rescission or compensation."

10.2 In this matter, if the Appeals Board is incorrect, the Applicant would have had a significant chance of promotion, as she was the third ranked candidate. It was open to the Secretary General to use his discretion to appoint the Applicant. It is noted, however, that the Applicant did not demonstrate on the basis of clear and convincing evidence that the second ranked candidate did not have the required skills and experience for the post and that such were not verified. The Executive Summary of the APB specifically records that there was a separate and specific verification of the fact that the second ranked candidate had the required skills and experience for the post. The Secretary General may or may not decide to follow the ranking given by the APB, the Appeals Board cannot speculate in respect of this.

11. CONCLUSION

11.1 The assertions by the Applicant of error in the procedures of the Organization in respect of the selection process, bias and other misfeasance in respect of the selection for the Post are unsupported by the evidence. The Appeals Board finds that the application of Applicant for the Post was given full and fair consideration. Given the findings of the Appeals Board, and applying the jurisprudence in *Rolland, supra*, the Appeals Board has no option other than to “uphold the selection” and dismiss the Application.

11.2 It may well be that the qualifications and experience of the Applicant are better than those of the selected candidate, a view shared by the Applicant and her witnesses. The process of review undertaken by the Appeals Board is not to revisit the conclusions reached by the decision maker and the decisions along the way and come to a different final decision. The Appeals Board must examine the selection processes and look for error, supported by clear and convincing evidence, which would be such as to rebut the presumption of regularity or otherwise amount to an error which would render the decision to appoint the selected candidate to have been unsupportable and thus to be rescinded. The reversal of the onus of proof based upon the presumption of regularity where minimal compliance is shown by the respondent, as in this case, is such that an applicant must produce clear and convincing evidence to support the contentions of error set forth the application. The evidence in this case has simply not been sufficient to rebut the presumption of regularity, to support contentions of bias or other error, with a number of matters alleged in the application as errors in the application having no evidence proffered to support them. The Applicant admitted in the papers filed at an early stage of the case that many of her allegations were not supported by any apparent evidence. It may well be that she had hoped that during the course of the matter such evidence would be disclosed. It was not, and thus the final order in the matter is made.

12. THE QUESTION OF DELAY, COMPLIANCE WITH ORDERS A MATTER OF CLARIFICATION

12.1 It is most unfortunate that there have been very long delays in respect of this matter coming before the Appeals Tribunal and that the internal justice system of the Organization was found by UNAT to be in systemic error, causing further delay, to which the pandemic added delay. The delay of more than seven years will not have assisted the Applicant, or anybody else involved in the matter. The fact that the Application was not brought to a conclusion earlier than the hearing before AJAB in 2019 is most unfortunate. Participants in the procedures may have retired and thus may not have been available to give evidence which would have assisted the Applicant, the Respondent or the Appeals Board. In this matter issues of conjecture cannot assist, as the Appeals Board acts only on the basis of the evidence before it.

12.2 The Appeals Board notes that the Organization has improved a number of its procedures for appointments since this case was commenced. Such includes the provision for an anonymous test. It is suggested that the record of the deliberations of the APB could be in somewhat more detail, as this would lead to greater transparency. If verification of qualifications is undertaken, the precise manner of such should be specifically recorded. The practice of not having full information makes the task of rebutting the presumption of regularity more difficult for any applicant.

12.3 Further, when an Order is made for the production by the Respondent to the Appeals Board of all relevant materials concerning a case, as set out in paragraph 2.7 above, strict compliance with such order is required. Failure of such compliance can place an applicant disadvantaged for which additional time must be allowed, delay the hearing while the documents are being obtained and delay the considerations of the Appeals Board. In this matter the compliance with the Order to produce was such as to cause counsel for the Respondent some embarrassment, as it was apparent that his requests for the production of all documents, pursuant to the Order, had simply not been complied with, although it was also apparent that counsel had been assured that all documents had been provided.

12.4 The Appeals Board also notes that the use of the expression “managerial experience” in a vacancy notice, if taken to be only a defined task in a previous job description, may deter staff at a P4 level from applying for positions at the P5 level, thus stopping a natural progression of promotion through general experience gained at the P4 level within the Organization. This is a matter which the Organization should consider addressing to avoid confusion.

13. **COMPENSATION**

13.1 There being not finding in favour of the Applicant, the question of compensation is not considered by the Appeals Board.

14. **ORDER**

14.1 For the reasons expressed above and on the basis of the findings made, the Application is dismissed in full.

Entered in the Register on this 21st day of July 2022

Rowan Downing QC
President
