



International Civil Aviation Organization

APPEALS BOARD

Case No.: ICAO Appeal No. 2015-003

Date: 17 January 2022

Original: English

Before: Judge Rowan Downing QC President
Ms Marisa Collis, Member
Mr. Ciaran Carolan, Member

Registrar: Arie Jakob

ROSEMARIE HEFTBERGER

v.

SECRETARY-GENERAL
OF THE INTERNATIONAL CIVIL
AVIATION ORGANIZATION

DECISION ON RECEIVABILITY (Rule 22)

Counsel for Applicant: Self-represented

Counsel for Respondent: Christopher Petras

Introduction

1. On 9 January 2015 the Applicant filed an appeal with the ICAO Advisory Joint Appeals Board (AJAB) in respect of the appointment of the position of Chief, Safety and Air Navigation Oversight Audit Section, as well as against the “related appointment of the Acting Chief in July 2014”.

2. On 19 September 2019 the AJAB provided its Opinion to the Secretary General in respect of the appeal by the Applicant. On 27 June 2020 the United Nations Appeals Tribunal (UNAT), in *Heftberger v. Secretary General of ICAO* UNAT 2020-1012, determined that the opinion of AJAB did not amount to a determination of the matter, directing that the appeal of the Applicant had to be reheard by an independent body which made a determination of the matter, not merely giving its opinion.

3. In October 2021 the Appeals Board was operationally established by ICAO, replacing 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.

4. On 29 December 2021 the Respondent requested summary judgment under Rule 22 of the Rules of Procedure of the Appeals Board challenging the receivability of the Applicant’s appeal of the Organization’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 Secretary General review of the decision, a mandatory first step in the appeals process.

5. By Order No.3 (2022) the following orders were made:

“1. By an application dated 29 December 2021, the Respondent pursuant to Order No. 2, paragraph 4, in this matter and the Rules of Procedure, has requested summary judgment in respect of the receivability of the Applicant’s appeal of the Respondent’s decision of 27 June 2014 to appoint the selected staff member to serve as Acting Chief, Safety and Air Navigation Oversight Audit Section, because she altogether failed to request Secretary General review of the decision, asserted by the Respondent to be a mandatory requirement pursuant to Staff Rule 111.1(13).

2. The Board finds that this application by the Respondent is a threshold matter which is to be determined by written responses prior to the hearing in this matter.

3. The Applicant shall have until noon, Montreal time, on Monday 10 January 2022, noting that the Applicant is resident in Austria and the time difference is such that this would be 18.00 hours for her, to provide submissions in respect of the application for summary judgment.

4. The Respondent shall have until the close of business, Montreal time, on 11 January 2022 to file any reply to such submissions.”

6. The Applicant filed her Response to the application for summary judgment on 7 January 2022. The Respondent filed his reply to the response on 11 January 2022. The Respondent filed an informal rejoinder by email on 13 January 2022, which the Appeals Board noted was repetitive of her Response.

7. The Response the Applicant is brief and set out in full below :

“As far as the interim appointment of Mr Waffo as Acting Chief is concerned, I claim that the appointment was supposed to be on a rotational basis as per an announcement by my first level supervisor, Mr Gourdji.

This announcement to all then Continuous Monitoring Oversight (CMO) Section personnel had been the reason why I only appealed against this decision once it was not implemented. The then ICAO Secretary General had not reviewed the irregularities and breaches related to the appointment of Mr Waffo, as requested in my IOM dated 18 November 2014. Hence, I also included this element in my appeal. The meaning of timeliness should be determined based on the unique facts in this case.

It was not predictable at that time that Mr Gourджи would unethically make such an official announcement, supposedly coordinated with the then ICAO Secretary General, and the Section personnel could not trust him in his function as first level supervisor.

Moreover, it was unclear when the selection of a candidate would be finalized and when he/she would report on duty. Therefore, I and other colleagues expected a written decision on rotating the role of the Acting Chief to another staff member, as it has happened before in case of the Standards and Procedures Officer Coordinator role. If the numerous flaws in the selection and recruitment processes had been detected by any of the involved entities, the vacancy might also have been re-advertised.

The interim appointment of the Acting Chief, Mr Waffo, on 09 July 2014 was particularly embarrassing and humiliating to other competent colleagues and me as most senior officer in the Section and as Mr Waffo's offsite and onsite on-the-job trainer after he was removed from his previous position as Acting Chief ISD Security in 2009 based on the entire personnel's initiative and his total lack of

Evidence: Testimony of Captain Peter Budd and my own testimony (referring to Rule 36 of the ICAO Appeals Board Rules of Procedure); written statement from Captain Budd to the AJAB and the UNAT dated 26/11/2019.

The appointment of Mr Waffo as Acting Chief in July 2014 was not in accordance with the ICAO practice insofar as the most senior officer in the Section was not designated. As such, the ICAO did not adhere to its established administrative practices which affected me adversely.

In this context, I uphold my contention that the selection and recruitment processes were prearranged and manipulated, pre-eminently involving Mr Gourджи and the then D/ANB Ms Graham.

In view of the atypical scenario along with the unethical conduct of Mr Gourджи with respect to the appointment of the then Acting Chief Mr Waffo, I request the ICAO Appeals Board to reject the Respondent's request, drawn up in his IOM dated 2021, and decide to sustain this element of my appeal."

8. The Reply of the Respondent is also brief and is set out below (omitting the footnotes):

"In response to the Applicant's 7 January 2022 submission in respect of the receivability of her 11 January 2015 appeal against the Organization's 27 June 2014 decision to appoint the selected staff member to serve as Acting Chief, Safety and Air Navigation Oversight Audit Section (see attached), the Respondent submits these comments and, pursuant to Staff Rule 111.1(13) and Rule 22 of the Appeals Board Rules of Procedure, requests the Board issue a Summary Decision dismissing said appeal due to lack of receivability, because the Applicant did not request Secretary General review of the decision, which under Staff Rule 111.1(5) was a mandatory first step in the appeals process.

1. The Appeals Board lacks competence to deal with this particular appeal as a matter of law, because Dr. Heftberger failed to request administrative review of the contested administrative decision in accordance with Staff Rule 111.1(5) and, thus, consistent with the judgment of the UNAT in Gorelova, her appeal is not receivable *ratione materiae*.

1.1. In Gorelova, the UNAT, *inter alia*, considered the merits of the AJAB's finding that Ms. Gorelova's appeal was time-barred. The Appeals Tribunal noted, "it is uncontested that Ms. Gorelova did not request administrative review of the first decision which had considered that the grade of her post was correct, i.e., the decision taken on 9 November 2011." The Tribunal thusly held,

Having not requested administrative review of the contested administrative decision dated 9 November 2011,... [Ms. Gorelova's] appeal to the AJAB was indeed time-barred[,]... and also, as she failed to request administrative review under Staff Rule 111.1(5), the appeal to the AJAB was not receivable *ratione materiae*.

1.2. Staff Rule 111.1(5) required that staff members seeking to appeal an administrative decision must first request Secretary General review of the contested decision, wherein it provided:

A staff member who wishes to appeal the decision referred to in Regulation 11.1 shall, as a first step, address a letter to the Secretary General requesting that the decision be reviewed. Such a letter shall be sent within 30 calendar days of the time the staff member received notification of the decision in writing.

1.3. Staff Rule 111.1(7) further provided that a staff member who failed to observe Staff Rule 111.1(5) shall lose the right to appeal, unless the deadline was waived.

1.4. As the former UN Administrative Tribunal observed in *Abdul Rahim v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgments U.N. Admin. Trib. No. 968, U.N. Doc. AT/DEC/968 (2000):

... [A]dministrative review is a very important internal procedure. It gives the Administration an opportunity to redress a grievance before it is taken any further... It is of the utmost importance that the Administration be given this opportunity, not only because it could result in avoidance of complicated and extended litigation but because it is only fair that the Administration be given the opportunity to reconsider and re-evaluate its decision before that decision is litigated. This is also the manner in which the process of settling grievances is generally structured in international administrative law.

1.5. Thus, where the applicable law requires that, as a first step, the staff member request administrative review of the impugned decision, the UNAT recognizes a timely request for review as a "jurisdictional requirement" for a follow-on appeal—to wit, as previously noted, the Appeals Tribunal in Gorelova expressly held that a staff member's non-compliance with the ICAO Staff Rules' mandate to request administrative review of the contested administrative decision prior to submitting an appeal rendered the appeal not receivable *ratione materiae*.

1.6. In the case at hand, that Dr. Heftberger altogether failed to comply with the mandate of Staff Rule 111.1(5) to request Secretary General review of the Acting Chief appointment decision prior to submitting an appeal is not in dispute, nor is the fact that the Staff Rule 111.1(5) time limit was not waived. The rules were clear, she could not forego submission of a request for review altogether and proceed directly with an appeal.

In view of the Appeals Tribunal judgment in Gorelova, the Board need not consider any other of Dr. Heftberger's contentions in order for it to adjudge the receivability of her appeal of the Acting Chief appointment decision—her appeal against this decision is not *ratione materiae* as a matter of law.

2. In view of the foregoing, the Respondent is entitled to a Summary Decision pursuant to Staff Rule 111.1(13) and Rule 22 of the Appeals Board Rules of Procedure rejecting the Applicant's appeal against the Acting Chief appointment decision on grounds that it is not receivable."

The relevant facts

9. On 27 June 2014 the Applicant was notified by an Inter-Office Memorandum of the decision taken to make an appointment of the Acting Chief, Safety and Air Navigation Oversight Audit Section. She asserts that she was misled in respect of the nature of the acting appointment, as she was advised on 9 July 2014 that the appointment to the acting position was to be on a rotational basis. The Applicant has produced a statement to support her assertion. She states that this was the reason she did not file for a review of the decision within the 30 day period prescribed. She states that she only became aware at a later time that there would be no rotation into the position.

10. By letter of 18 November 2014 to the Secretary General the Applicant sought a review of the decision in respect of the substantive post and the acting post in the following terms:

"Pursuant to Article XI, paragraph 11.1 of the ICAO Staff Regulations and ICAO Service Code, Rule 111.1, paragraph 2, I request the formal review of the decision taken on the appointment of the selected candidate for the position Chief, Safety and Air Navigation Oversight Audit Section.

The rationale for this request is that I have received significant unfair, biased and discriminatory treatment with respect to the majority of the selection process. [it is my contention that I met all the essential and desirable criteria outlined in the relevant Vacancy Notice, whereas as it is not verified that the selected candidate meets all the selection criteria including but not limited to five years at a management level.

I applied for the above indicated vacancy on 17 July 2014 and underwent an interview on 12 September 2014. In this context, I wish to draw your attention that as a staff member, I have not received a notification in writing of the decision taken in conformity with ICAO Staff Rule 111.1, paragraph 5. However, on 31 October 2014, Ms Nancy Graham sent an e-mail to All ANB announcing the approval of Mr Nicolas Rallo as Chief of the Monitoring and Oversight Audit Section (enclosed as Attachment 1).

Furthermore, I would like to advise that the appointment of the Acting Chief in July 2014 was not in accordance with ICAO practice insofar as the most senior officer in the Section was not designated. I am the most senior officer in the Section and as a result of this decision I was deprived of the opportunity to demonstrate my competency and receive the associated salary payment at the P-5 level."

11. Reply from the then Secretary General dated 11 December 2014 was in the following terms:

“Dear Ms. Heftberger,

I wish to refer to your inter-office memorandum dated 18 November 2014, by which you request a revision of my appointment decision to the post of Chief, Safety and Air Navigation Oversight Audit Section on the basis that you were allegedly unfairly during the recruitment process.

I have carefully reviewed the contents of your memorandum as well as the recruitment process that was followed leading up to the selection stage. It should be noted that after a competitive process, you were among the candidates recommended and shortlisted and thus given due consideration, but in the end not selected. I would like to assure you that the decision to appoint someone else to the post was not based on any bias or discrimination against you, but was the result of a professional assessment and I am satisfied that there were no deficiencies in either the substantive or the procedural aspects of the selection.

I have to advise therefore that my decision on the appointment for the position of Chief, Safety and Air Navigation Oversight Audit Section is maintained.”

12. The Secretary General did not address the request in the last paragraph of the letter of the Applicant of 18 November 2022 for a review of the decision in respect of the position of Acting Chief, Safety and Air Navigation Oversight Audit Section, but for reasons set out below, as the request was out of time, nothing turns on this.

The Law as it stood in 2014 and was applicable to this matter

13. Staff Rule 111.1, in so far as is relevant, provided:

“5. A staff members should, where appropriate, first attempt to resolve any grievance through the channels described in 1 above. A staff member who wishes to appeal the decision referred to in Regulation 11.1 shall, as a first step, address a letter to the Secretary General requesting that the decision be reviewed. Such a letter shall be sent within 30 calendar days of the time the staff member received notification of the decision in writing.

6. If the staff member wishes to appeal against the answer received from the Secretary General, the appeal in writing shall be submitted to the Secretary of the Board within 30 calendar days from the date of receipt of the answer; if no reply has been received from the Secretary General within 30 calendar days of the date the letter was received by him, the appeal shall be submitted within the following 30 calendar days. A copy of the letter of appeal shall be sent by the staff member to the Secretary General.

7. A staff member who fails to observe the time limits indicated in 5 and 6 shall lose the right to appeal, unless the delay is waived under 8 below.

8. The staff member may request that in view of exceptional circumstances, the delay in filing the appeal be waived. The Board shall examine such request as a preliminary issue and make its recommendations thereon to the Secretary General for his decision.”

Consideration and findings

14. The Respondent argues that the application is not receivable as Applicant failed to make an application to the Secretary General for review of the decision to make the appointment of the Acting Chief, Safety and Air Navigation Oversight Audit Section, at all, or

alternatively, within the 30-day period after she was notified of the acting appointment, and that time limits are to be strictly applied.

15. The Applicant argues she did make a request for a review of the decision to appoint the Acting Chief, Safety and Air Navigation Oversight Audit Section, but that she delayed as she told, and had believed, that the acting position would be on a rotational basis.

16. It is clear that the decision to appoint somebody to the position of Acting Chief, Safety and Air Navigation Oversight Audit Section was made known to the Applicant in writing on 27 June 2014. Under Staff Rule 111.1(5) the 30 clear days for the request of the review of that appointment ran from that date. The Appeals Board finds that the Applicant did make a request for review in her letter of 18 November 2014. This request was, however, out of time.

17. No application was made by the Applicant under Staff Rule 111.1(8) in respect of any exceptional circumstances which may have justified a delay in seeking a review.

18. The Applicant clearly knew of the relevant Staff Rule 111.1, as she refers to it in her communication of 18 November 2014 to the Secretary General. In any event UNAT has made it clear that staff are taken to know the rules applicable to them. See *El-Khatib v Commissioner – General of the United Nations Relief and Works Agency for Palestine Refugee in the Near East* 2010-UNAT-029.

19. While the Appeals Board may have some sympathy for the position of the Applicant, as she asserts she was misled and thus did not make a timely application, the Appeals Board is bound to strictly apply the Staff Rules of ICAO. The Applicant acted to her detriment in not making a timely request for review or in asking for a delay in the time for filing the request for review of the decision on the basis of asserted exceptional circumstances. The UNAT has often stressed that time limits must be strictly observed. See *Ademagic et al v. Secretary General of the United Nations* Order No. 114 in Case 2012-UNAT-385, *Trajanouska. Secretary General of the United Nations* 2010-070 and *Nikwigizev v. Secretary General of the United Nations* 2017-UNAT-731.

Where there is a right to apply for an extension or waiver of a time limit, an application for such must actually be made, which the Applicant did not do.

20. The Appeals Board has no alternative but to find that the Applicant did not seek a review of the decision in respect of the appointment of the Acting Chief, Safety and Air Navigation Oversight Audit Section under Staff Rules 111.1(5) within time.

Order

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*.

Entered in the Register on this day of 17 January 2022

Rowan Downing QC
President

