

2023-UNAT-1374, RoseMarie Heftberger

UNAT Held or UNDT Pronouncements

The UNAT held that the ICAO Appeals Board implemented internal changes in its law to satisfy the requirements of Article 2(10) of the Appeals Tribunal Statute. It found that the Appeals Board no longer provided only advice or mere recommendations to the ICAO Secretary General, but rather final decisions and, therefore, was a neutral first instance process. It further found that while it might have been open to ICAO to consider using the UNDT for resolution of staff member disputes, it was free not to do so and cannot be criticised for doing as it did. It concluded that the Appeals Board's Decision was that of its Chair and not of a unanimity or of a majority of members so that Dr. Heftberger's fear that the two ICAO staff members on the Appeals Board may be beholden to ICAO was an illusory one not based in statutory fact. The UNAT rejected the Appellant's argument that, contrary to the provisions on representation in Article 13 of the Appeals Tribunal Rules of Procedure, ICAO Staff Rule 111.1(15) limited representation for a party to self-representation or representation by an active or retired staff member serving or residing at the duty station where the hearing was conducted. It recalled that it was the internal laws of ICAO that governed exclusively procedural issues before the Appeals Board.

The UNAT held that there was no evidence forthcoming from the Appellant to corroborate her contentions that she had not received full and fair consideration, that the selection process was pre-arranged and improperly motivated, that no verification of the skill set of the candidates had been performed, that the selected candidate was not qualified for the Chief position or that some members of the interview panel were biased. The UNAT further found that the Appeals Board relevantly took into consideration and put considerable weight on the ICAO Secretary General's witness. It agreed and upheld the Appeals Board's holding that the Appellant's witnesses were not involved at all in any part of the selection process and that they expressed an opinion 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. The UNAT concluded that the Appellant was given full and fair consideration in respect of her application for the Chief position, that there was no countervailing evidence that there had been a predetermination of the appointment or that ICAO Secretary General did not fully consider the recommendations of the APB and that, therefore, the selection decision was a legitimate exercise of the Administration's discretion.

The UNAT held that the Appellant had been treated in the same manner as the other candidates and had failed to establish that the selection decision was tainted by improper motives, resulting from bias against her and favour of the selected candidate. In this regard, the UNAT found the Appellant's claim that the Appeals Board erred in its application of the gender and geographical diversity policies to be without merit. It concluded that under the existing ICAO Staff Regulations, Rules and pertinent administrative issuances governing the appointments and promotions of ICAO staff members, the Appellant had no right to a promotion or selection solely on the basis of gender factors.

With regard to the due process issues alleged by the Appellant, the UNAT found the Appeals Board's management of the case at hand to be correct with no substantial procedural irregularities.

The UNAT held that the Appellant merely voiced her disagreement with the Appeals Board's findings and resubmitted her arguments to the Appeals Tribunal and, therefore, has not met the burden of proof in demonstrating an error in the impugned Decision such as to warrant its reversal.

Since no illegality was established, the UNAT rejected the Appellant's claim for compensation for the damage to her reputation, career prospects and health.

The UNAT dismissed the appeal and affirmed Decision No. ICAO/2022/004.

Decision Contested or Judgment/Order Appealed

The Appellant, a retired staff member of the International Civil Aviation Organization (ICAO), contested her non-appointment to the position of Chief of the ICAO's Safety and Air Navigation Oversight Audit Section. In its Decision No. ICAO/2022/004, the Appeals Board of ICAO (Appeals Board) concluded that the selection process was in

compliance with ICAO regulatory framework, that the Appellant's candidacy was given full and fair consideration and that she failed to show any reasonable apprehension of bias against her or in favor of other candidates. Therefore, the Appeals Board dismissed her application.

Legal Principle(s)

Pursuant to Article 2(10) of the Appeals Tribunal Statute, in order to establish the UNAT's jurisdiction, an agency, Organisation or entity must utilize a neutral first instance process that includes a written record and a written decision providing reasons, fact and law. The head of an agency or organization whose decision is under appeal cannot be the final decision-maker of that first instance process.

It is the internal laws of ICAO and not those of the Appeals Tribunal Rules of Procedure that govern exclusively procedural issues before the Appeals Board. The applicability of ICAO Staff Rules and Regulations stems from them being part of the ICAO staff members contract of employment and the UNAT does not have the authority to amend or not to apply them.

The Administration has broad discretion in staff selections. There is always a presumption that official acts have been regularly performed. This is called a presumption of regularity. If the management is able to even minimally show that the Appellant's candidature was given a full and fair consideration, then the presumption of law stands satisfied. But this presumption is a rebuttable one. Indeed, an administrative decision not to appoint, promote or transfer can be challenged on the grounds that the Administration has not acted fairly, justly or transparently. The staff member has the burden of proving through clear and convincing evidence that such factors played a role in the administrative decision and that he or she was denied a fair chance of appointment, promotion or transfer.

When judging the validity of the Administration's exercise of discretion in administrative matters, the first instance tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The first instance Judge can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the first instance tribunal to consider the correctness of the choice made by the Administration amongst the various courses of action open to it. Nor is

it its role to substitute its own decision for that of the Administration.

It is not an entitlement for a staff member to be given priority consideration for a post in a competitive selection exercise solely on the basis of being a woman or an internal candidate. "Priority consideration" cannot be interpreted as a promise or guarantee to be appointed.

The first instance Tribunal has broad discretion to determine the admissibility of any evidence and the weight to be attached to it. The Appeals Tribunal will not lightly interfere with the broad discretion conferred on the first instance tribunal in the management of its cases to enable cases to be judged fairly and expeditiously and for dispensation of justice. It will intervene only in clear cases of denial of due process of law affecting a party's right to produce evidence.

Compensation cannot be awarded when no illegality has been established; it cannot be granted when there is no breach of the staff member's rights or administrative wrongdoing in need of repair.

Outcome

Appeal dismissed on merits

Full judgment

[Full judgment](#)

Applicants/Appellants

RoseMarie Heftberger

Entity

ICAO

Case Number(s)

2022-1740

Tribunal

UNAT

Registry

New York

Date of Judgement

4 Aug 2023

President Judge

Judge Raikos

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Discrimination and other improper motives

Bias/favouritism

Due process

Access to justice

Jurisdiction / receivability (UNAT)

Appeal

Legal services (OSLA or other) and self-representation

Legal representation

Staff selection (non-selection/non-promotion)

Full and fair consideration

Selection decision

Gender

Applicable Law

ICAO Staff Regulations

- Regulation 11.2
- Regulation 11.3
- Regulation 11.5

ICAO Staff Rules

- Rule 111.1 (18)

UNAT Statute

- Article 2.10

Related Judgments and Orders

2020-UNAT-1012

2013-UNAT-377

2020-UNAT-1034

2012-UNAT-261

2016-UNAT-627

2010-UNAT-070

2010-UNAT-033

2021-UNAT-1095

2019-UNAT-932

2020-UNAT-1054

2018-UNAT-870

2021-UNAT-1082

2015-UNAT-540

2017-UNAT-762

2022-UNAT-1208

2019-UNAT-960