

UNITED NATIONS APPEALS TRIBUNAL TRIBUNAL D 'APPEL DES NATIONS UNIES

Judgment No. 2023-UNAT-1374



Counsel for Appellant: Self-represented

Counsel for Respondent: Christopher M. Petras

JUDGE DIMITRIOS RAIKOS , PRESIDING .

1. Dr. RoseMarie Heftberger, a retired staff member of the International Civil Aviation Organization (ICAO) , contested her non-appointment to the position of Chief of ICAO's Safety and Air Navigation Oversight Audit Section (Chief position) (contested administrative decision) .

2. By Decision No. ICAO/2022/ 004¹ (impugned Decision), the Appeals Board of ICAO (Appeals Board) concluded that Dr. Heftberger's application for the Chief position was given full and fair consideration and therefore dismissed her application.

3. Dr. Heftberger lodged an appeal of the impugned Decision with the United Nations

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8. On 10 July 2014, ICAO advertised the Chief position at the P-5 level in Vacancy Notice 2014/ 36/ P/ 101206.

9. On 17 July 2014, Dr. Heffberger applied for the position.⁴ She was interviewed C [(N TdA)-401 (PB)T

made

Submissions

Dr . Heftberger's Appeal

28. Dr. Heftberger requests that the Appeals Tribunal grant her appeal, rescind the impugned Decision and “[a]ward [her] monetary compensation for the damage of [her] career prospective, harm of [her] health and wellbeing, of USD 300,000”.

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that she rebutted the presumption of regularity. Instead, she notes that it concluded that there was evidence of minimal compliance by the Organization without specifying such evidence and despite the doubts expressed by the Appeals Board.²⁰ She observes that the Appeals Board mentioned that it was “unable to reach a conclusion as to what was in the mind of the [i]nterview [p]anel 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”, as “[n]one of the members of either the [i]nterview [p]anel or the APB was called to give evidence as to how they undertook the verification process”.²¹

39. With regard to the criteria of the vacancy notice, Dr. Heftberger also submits that the Appeals Board erred by adopting a broad and subjective interpretation of managerial and financial experience, when such requirements were clearly outlined in the vacancy notice. Furthermore, she notes that the vacancy notice required five years at the management level in safety oversight activities. She claims that she was the only one who met all these criteria.

40. Dr. Heftberger argues that the Appeals Board erred in ignoring relevant parts of the witnesses’ testimonies and in failing to address their credibility. More specifically, she notes that the Appeals Board ignored C.E. and K.N.’s testimonies, as well as the organigram of the Bureau d’Enquête et d’Analyse pour l’aviation civile (BEA) that she submitted, and which demonstrated that the selected candidate was not meeting the criteria required in the vacancy notice.

41. She also submits that the Appeals Board erred by misrepresenting and omitting predominate parts of essential testimonies in the impugned Decision. Indeed, while she does not dispute the Appeals Board’s conclusion that P.B. and C.R. were not directly involved in the selection process, she suggests that the same conclusion should also have applied to S.J., the Chief of Recruitment of ICAO. She also argues that the Appeals Board ignored the fact that she and P.B. had known both the selected and second ranked candidates for a long time and, therefore, had a concrete knowledge of their backgrounds.

²⁰ *Ibid.*, paras. 10.1a and 11.2.

²¹ *Ibid.*, para. 10.1b.

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be a decision resulting from a “neutral first instance process”.²⁴ Indeed, the decision in this case had been made by the ICAO Secretary General who could not be said to be “neutral” in the sense that he had been deciding an appeal against his own previous decision.²⁵ As a result, the Appeals Tribunal remanded the matter to the AJAB for decision in accordance with Article 2(10) of the Appeals Tribunal Statute, that is by “a neutral first instance process that includes a written record and a written decision providing reasons, fact and law”.²⁶

61. Dr. Heftberger submits that the Appeals Board, which took up the appeal submitted by her on 9 January 2015 to the former AJAB, does not have the level of independence required

El Sehemawi,³⁰ ICAO implemented changes in Article XI of the ICAO Service Code. Whereas this Article had previously provided for a first instance process in the form of the AJAB comprised of “three members of the staff” that would “submit its findings and recommendations to the [ICAO] Secretary General for his decision”, under the changes implemented in October 2020, Article XI now establishes an Appeals Board, which is chaired by “a non-staff member with legal and judicial expertise[,] (...) who shall serve in [his or her] personal capacity and enjoy full independence”. The Appeals Board “shall, after due consideration, render a decision on the matter comprised of a written record and a written decision providing reasons, fact and law” and “such decision shall be final”. Further, that same Article stipulates that “[a] staff member or the [ICAO] Secretary General may appeal against a decision of the Appeals Board (...)to the (...) Appeals Tribunal under the conditions specified in the Statute of that Tribunal ” and that “[t]he said Statutes shall, *mutatis mutandis* be deemed to constitute a part of the ICAO Service Code”³¹

65. The Appeals Board thus no longer provides only advice or mere recommendations to the ICAO Secretary General, as the former AJAB did, but rather final decisions as a neutral first instance body, per the requirements of Article 2(10) of our Statute.

66. Consequently, the Appeals Tribunal does not find any merit in Dr. Heftberger’s claim that “it is not assured the current Board and process constitutes a neutral/independent first instance” and that “the required neutrality is not assured while ICAO continues to opt out from utilising an independent external entity (e.g. the

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Whether ICAO Staff Rules ensure due process

72. ICAO Staff Rule 111.1(3) provides:

A staff member may present that staff member's appeal in person or may be assisted or arrange to have it presented on that staff member's behalf by any other active or retired staff member serving or residing at the duty station where the hearing is conducted ("Counsel").

73. Dr. Heftberger submits that:

Contrary to the provisions on Representation in Article 13 of the UNAT Rules of Procedure, ICAO Staff Rules, 111.1, paragraph 15, limit 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 is conducted. It is not assured ICAO Staff Rules provide a comparable level of due process as other UN/specialist organizations th ie 0.241 T88hem(t)-4.4 (.7

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

-)e(4.3cn)a(a) the vacancy notice; f o i 0ncysti-7.4 (t7.8 (s)4.6 (tg (t)-14.4 (h)5.7 (e)5.-(ca)1.2s)4.6 (td7.8 (s))2 (te)5.1 (s

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

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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 Recourses 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

the challenged selection process to determine whether a candidate ha[s] received fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration. The burden is on the candidate challenging the selection process to prove through clear and convincing evidence that he or 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,

actual selection processes and was not such as to counter the verification processes undertaken by both the Interview Panel and the APB.

93. Relevantly, the Appeals Board took into consideration and put considerable weight on S.J.'s testimony, who was the Assistant Secretary of the APB on 16 October 2014 and testified about the recruitment processes involved for the Chief position, the steps in the preparation to the interviews and the verification of skills and qualifications of the candidates.

94. In this context, during his lengthy examination and cross-examination by Dr. Heftberger, S.J. testified that: ⁴⁶

... [T]here 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.

95.

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98. As we stated in *Lemonnier*.⁵¹

... Whether a non-selected candidate can meet [their] burden to show that he[/she] did not receive full and fair consideration for a job opening depends for the

101. In the present case, having reviewed the evidence on file, the Appeals Tribunal holds the same view as the Appeals Board's finding that Dr. Heftberger was given full and fair consideration in respect of her application for the Chief position and there was no countervailing evidence that there had been a predetermination of the appointment¹

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Anti-Corruption Policy”, and that “ [t] here [was] no evidence whatsoever of the Chair of the APB]

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116. The Appeals Board based its holding on the provisions of ICAO Staff Regulation 4.1 which reads as follows:

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.

117. Similarly, we find Dr. Heftberger's claim that the Appeals Board erred in its application of the gender and geographical diversity policies to be without merit. Even if such "organizational objectives, policy, and continuous encouragement by ICAO Council for women to apply for vacant posts" existed, which this Tribunal does not doubt they did, there was no specific legal requirement that either gender or geography be the dispositive factors in the selection process. Under the existing ICAO Staff Regulations, Rules and pertinent administrative issuances governing the appointments and promotions of ICAO staff members, Dr. Heftberger had no right to a promotion or selection solely on the basis of gender factors. She had been ranked third in the selection exercise and two other candidates were found to better match the requirements for the Chief position. Indeed, it is not an entitlement for a staff

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candidates' skill set against the criteria of the [vacancy notice] along with the clear testimonies of the witnesses should have been classified by the Appeals Board as rebuttal of regularity, leading to questioning on the circumstances of the two candidates shortlisting". She also contends that "apart from the deficient longlist, other evidence was unavailable, including but not limited to: documentation of what was reviewed and decided by the interview panel when compiling the shortlist, notes of the interview panel members (...), and record of deliberations of the APB"

came to the conclusion that her candidacy had received full and fair consideration and no ulterior motives or bias tainted the selection process.

122. Be that as it may, the Appeals Tribunal has thoroughly reviewed the evidence on file and found the Appeals Board's management of the case at hand to be correct with no substantial procedural irregularities.

123. It is obvious that Dr. Heftberger is not satisfied with the impugned Decision. She has
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127. Accordingly, the appeal fails.

Judgment

128. Dr. Heftberger's appeal is dismissed and the ICAO Appeals Board Decision No. ICAO/2022/004 is hereby affirmed.

Original and Authoritative Version: English

Decision dated this 30th day of June 2023 in New York, United States.

(Signed)

JUDGE GRAEME COLGAN 'S CONCURRING OPINION .

1. I agree with the conclusions of my colleagues including that the entity appealed from is now a neutral first instance body in accordance with Article 2(10) of the Appeals Tribunal Statute. The following is an observation only.

2. I do, however, wish to express some concerns about the representation restrictions on ICAO staff members imposed by ICAO. The *rationale* for confining an ICAO staff member's representation to a current or retired ICAO staff member resident, most probably only in Montreal where the Organization is based, is both unexplained but more importantly a significant constraint on what is usually regarded as a fundamental right of an employee to legal representation of his or her choice. For example, if the only representation available to an ICAO staff member may be by a current ICAO staff member in Montreal, then it might be thought that such a representative is, albeit subconsciously, beholden to ICAO and thereby less than independent in that representational role.

3. While such restrictions may affect adversely ICAO staff members needing representation, they may also disadvantage ICAO itself in the sense that the advice of and representation by an experienced, competent and independent counsel may assist in a prompt, sensible and realistic resolution of a dispute with an ICAO staff member so represented.

4. I encourage ICAO, in conjunction with its potentially affected staff members, to reconsider this restrictive practice which limits, potentially significantly, a staff member's important right of representation.