



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2016-UNAT-702



**Siciliano
(Appellant)**
v.
**Secretary General
of the International Civil Aviation Organization
(Respondent)**

JUDGMENT

Before: Judge Deborah Thomas-Felix, Presiding
Judge Richard Lussick
Judge John Murphy

Case No.: 2016-933

Date: 28 October 2016

Registrar: Weicheng Lin

Counsel for Mr. Siciliano: Edward Patrick Flaherty

Counsel for Secretary General: Christopher M. Petras

JUDGE DEBORAH THOMAS-FELIX, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Mauricio Siciliano against the decision of the Secretary General of the International Civil Aviation Organization (ICAO), dated 22 February 2016, to accept the recommendation of ICAO's Advisory Joint Appeals Board (AJAB) in Appeal No. 191 (Opinion No. 136) to summarily dismiss Mr. Siciliano from service. Mr. Siciliano filed the appeal on 24 May 2016, and the Secretary General of ICAO filed an answer on 22 July 2016.

Facts and Procedure

2. Mr. Siciliano first joined ICAO in 1997 as a consultant under a Special Services Agreement (SSA), and continued thereafter through 7 July 2006 under substantially identical SSAs. Mr. Siciliano was appointed to a P-3 position in August 2006 and subsequently promoted, with effect from 1 December 2007, to a P-4 position. With effect from 1 January 2009, Mr. Siciliano was granted a fixed-term appointment (P-4 Technical Officer, Machine Readable Travel Documents (MRTD) Program) for a duration of three years, which was subsequently renewed in 2011 and again on 6 October 2014 for another period of three years, commencing on 1 January 2015. On 31 October 2014, Mr. Siciliano was promoted to the P-5 level as Chief, Facilitation Section, Aviation Security and Facilitation, Air Transport Bureau.

3. On 11 December 2014, Mr. Siciliano was arrested and taken into custody by United States (U.S.) authorities while transiting in Los Angeles on his way back to Montréal from an ICAO mission. The arrest was based on an indictment filed with the U.S. District Court (Northern District of California, San Francisco Division), which contained allegations of various criminal offences under U.S. law, including Honest Services Wire Fraud and conspiracy to solicit and give bribes involving a Federal Program. Mr. Siciliano, “[i]n essence ... was alleged to have accepted payments from representatives of a Ukrainian business consortium (EDAPS) which supplied a variety of identification and security products ... in exchange for advancing certain business opportunities for EDAPS while being in the employ of ICAO”.¹

4. In the week that followed, ICAO attempted directly and through the U.S. Mission to ICAO to determine the basis for Mr. Siciliano's detention. On 19 December 2014, ICAO received the previously sealed indictment document via the U.S. Mission to ICAO.

¹ AJAB Opinion No. 136, para. 2.6.

5. On 22 December 2014, the ICAO Secretary General sent Mr. Siciliano a letter, informing him that he was to be “suspended without pay with immediate effect from 22 December for a period of one month, until 20 January 2015, pending investigation of [his] alleged misconduct in relation to [his] recent detention by US authorities”,² in accordance with ICAO Staff Regulations 10.1 and 10.2 as well as Staff Rule 110.1(f). The letter further informed him that, in accordance with Staff Rule 110.1, during this period of suspension his building pass would be deactivated and he would only be able to access the ICAO headquarters building with prior permission.

6. The same day, the ICAO Secretary General approved the Terms of Reference for an investigation under Staff Rule 109.5, paragraph 4, into allegations of misconduct by Mr. Siciliano. ICAO also blocked Mr. Siciliano’s e-mail access and sequestered all historic mail information available on servers controlled or used by ICAO.

7. On 23 December 2014, Mr. Siciliano was informed by e-mail of the internal investigation and interviewed via telephone conference on 30 December 2014. The interview was recorded at the request of Mr. Siciliano. On 31 December 2014, Mr. Siciliano was provided with a written interview record with a request for comments, if any, by 5 January 2015. On 4 January 2015, Mr. Siciliano provided his edits of the written record.

8. On 8 January 2015, the investigation report entitled “Report on the case of Mauricio Siciliano” was submitted to the ICAO Secretary General. The report concluded that Mr. Siciliano had “violated fundamental obligations under the ICAO Service Code: in particular he had used his position as staff member with the MRTD program to elicit funds from a private company in order to assist with the growth of that company in an area of business that was directly relevant to the MRTD program[] [and] did so in the expectation of potential further employment by the company”.³

9. On 12 January 2015, the ICAO Secretary General provided the investigation report to Mr. Siciliano, inviting him to submit comments by 28 January 2015.

² *Ibid.*, para. 2.10.

³ *Ibid.*, para. 2.22, quoting the investigation report.

10. On 19 January 2015, the ICAO Secretary General informed Mr. Siciliano that the investigation into his alleged misconduct was still ongoing and that he was suspended, with pay, with effect from 21 January 2015.

11. On 28 January 2015, having been denied an extension, Mr. Siciliano submitted his comments rebutting the report's findings.

12. On 5 February 2015, the ICAO Secretary General informed Mr. Siciliano of his conclusion that Mr. Siciliano's conduct was in violation of the ICAO Staff Regulations and Standards of Conduct and of his provisional decision to summarily dismiss Mr. Siciliano from ICAO employment. He gave Mr. Siciliano until 13 February 2015 to submit a written statement in response.

13. On 13 February 2015, Mr. Siciliano submitted his response to the provisional decision.

14. On 17 February 2015, the ICAO Secretary General confirmed his provisional decision and summarily dismissed Mr. Siciliano from his employment with ICAO, effective 20 February 2015.

15. On 20 February 2015, Mr. Siciliano submitted his request for review pursuant to ICAO Staff Rule 111.1(5). In it, he requested the ICAO Secretary General to review his decision to summarily dismiss him and to suspend implementation of the decision to dismiss him, pending appeal, pursuant to ICAO Staff Rule 111.1(3).

16. On 5 March 2015, the ICAO Secretary General confirmed his decision of 17 February 2015 and denied the request to suspend the implementation of that decision pending any appeal.

17. On 1 April 2015, Mr. Siciliano lodged an appeal with the AJAB, advancing a number of claims in connection with, *inter alia*, the initial decision to suspend him without pay, the decision to summarily dismiss him and the refusal to invoke his immunity.

18. The AJAB heard the appeal on 25 and 26 June 2015 and, on 12 February 2016, issued Opinion No. 136. In it, the AJAB made 38 findings and unanimously recommended that Mr. Siciliano's appeal be rejected in its entirety.

19. On 22 February 2016, the then-newly appointed ICAO Secretary General issued her decision, accepting the AJAB's unanimous recommendation and rejected Mr. Siciliano's appeal. In the decision, the Secretary General disputed one of the AJAB's findings, Finding No. 1 –

namely, that ICAO had initiated an investigation on 22 December 2014 without first producing a written report and seeking comments from Mr. Siciliano with “the resultant implication ... that the rules may have not been properly followed in this instance”. In her view, this finding was inconsistent with the record as set forth in the opinion and, therefore, was “erroneous”. She further noted the AJAB’s conclusions in Findings Nos. 1 and 38, that Mr. Siciliano suffered no prejudice and that any possible variances in the application of the Staff Rules regarding the production of the written report prior to the initiation of the investigation were not significant and did not vitiate the ICAO Secretary General’s decision of summary dismissal.

20. Mr. Siciliano filed an appeal with the Appeals Tribunal on 24 May 2016, and ICAO filed an answer on 22 July 2016.

21. On 13 June 2016, Mr. Siciliano filed a motion for confidentiality, which the Appeals Tribunal denied on 25 August 2016 by Order No. 269 (2016).

22. On 20 September 2016, Mr. Siciliano filed a motion seeking leave to file additional pleadings/evidence and on 28 September 2016, the Secretary General filed comments on the motion.

Submissions

Mr. Siciliano’s Appeal

23. The disciplinary measures (suspension without pay and summary dismissal) imposed upon Mr. Siciliano violated ICAO rules and due process. Staff Rule 110.1 establishes the conditions and process to be followed before disciplinary measures can be implemented. These were grossly violated, rendering both measures null and void, *ab initio*.

24. Mr. Siciliano’s suspension without pay was ordered the same day that the investigation was requested by the ICAO Secretary General, instead of after its findings; and, no prior report was issued by the ICAO Secretary General, as required. As no misconduct had been established at the time, his suspension was based solely on the charges in the U.S. indictment without Mr. Siciliano having had an opportunity to rebut them. The summary dismissal is similarly tainted. Moreover, when the disciplinary measures were imposed, the charges against Mr. Siciliano had either not been adjudicated or had been dismissed.

25. ICAO's measures were also unlawful because the necessity of an immediate suspension without pay was not legally established as there was no evidence provided by ICAO indicating how Mr. Siciliano, an exemplary and appreciated employee, represented a danger to his colleagues or ICAO. Mr. Siciliano had been incorrectly informed that he was not allowed to have legal counsel during his interview, and ICAO never informed him that he was the target of a disciplinary investigation and that he had a right to refuse to participate and to be assisted by counsel. The investigation's findings were communicated to the ICAO Secretary General before Mr. Siciliano knew the charges against him.

26. The investigations' findings regarding both the payments Mr. Siciliano received and the allegedly incriminating correspondence were based on false statements which Mr. Siciliano made under duress. The truth about those payments and his correspondence are set forth in his 23 May 2016 letter to the ICAO Secretary General (annexed to the appeal) requesting reconsideration of the decision to summarily dismiss him.

27. Because the investigation's findings are vitiated by its procedural irregularities, they cannot be relied upon to support the summary dismissal. The jurisprudence of the Appeals Tribunal provides that a breach of due process in a disciplinary case should not be condoned on the basis that there was evidence of the misconduct in question.

28. The disciplinary measures ordered were disproportionate and contravened ICAO Staff Rule 110.1.2 and paragraph 10.1 of the ICAO Service Code. Separation from service or dismissal is not an appropriate sanction for a first offense.

29. There was unreasonable speed in ICAO's disciplinary process and then delay in the AJAB's issuance of its report. The latter contravenes Staff Rule 111.1(20) that provides that "[t]he Board shall make every effort to send its report to the Secretary General within three weeks after completion of the hearing".

30. It was also procedurally irregular for ICAO to refuse to invoke Mr. Siciliano's immunity without previously consulting him as nothing was proven when the charges were brought against him. By depriving Mr. Siciliano of his immunity, ICAO denied him access to his internal files and, thus, the possibility to properly defend himself. This amounted to a violation of ICAO's duty of care to Mr. Siciliano.

31. Mr. Siciliano requests that the Appeals Tribunal set aside the decisions to suspend him without pay and to summarily dismiss him; retroactively reinstate him to his former position with effect from 20 February 2015 with all corresponding entitlements; order, if necessary, a new investigation; order reimbursement of legal costs; and award moral damages in the amount of USD 500,000, in addition to other relief. Mr. Siciliano asks that the Appeals Tribunal hold an oral hearing.

The ICAO Secretary General's Answer

32. The Appeals Tribunal has no jurisdiction or competence to receive Mr. Siciliano's appeal of the 22 December 2014 decision to suspend him without pay, because Mr. Siciliano failed to request review of that decision as required by ICAO Staff Rule 111.1(5). He also failed to request a waiver of time to file his appeal before the AJAB pursuant to ICAO Staff Rule 111.1(8). As the AJAB found, Mr. Siciliano therefore forfeited his right to appeal that decision.

33. Mr. Siciliano's claims and submissions on appeal, including the 23 May 2016 letter to the Secretary General, challenging the truth of his own admissions (about accepting money from EDAPS and the origins of his related correspondence) are manifestly not credible and without merit. They are also inadmissible pursuant to the Appeals Tribunal jurisprudence, which provides that evidence known to either party and which could have been presented to the AJAB is inadmissible.

34. Moreover, the fact that the U.S. indictment was set aside is irrelevant. As the AJAB correctly found, the setting aside of the indictment was based on jurisdictional grounds and had no bearing on the lawfulness of ICAO's determination that Mr. Siciliano's actions amounted to misconduct under ICAO's rules and the disciplinary measures applied were proportionate. Mr. Siciliano repeatedly admitted to accepting money from EDAPS. In his 5 March 2015 response to Mr. Siciliano's request for review, the Secretary General took note of these admissions and observed that Mr. Siciliano's receipt of this money constituted serious misconduct that alone justified his dismissal. The Secretary General also observed that Mr. Siciliano's correspondence in which he elicited funds from EDAPS similarly amounted to serious misconduct warranting dismissal.

35. Mr. Siciliano fails to show on appeal how it was unreasonable for the AJAB to accept his correspondence as evidence of him having improperly used his ICAO position for ill-gotten financial gains for himself and/or others. Aside from Mr. Siciliano's new claims challenging the truthfulness of his prior admissions made supposedly under duress, Mr. Siciliano merely repeats his arguments before the AJAB, which rejected them.

36. The fact that Mr. Siciliano continued to work with positive performance reviews with ICAO for six years after the incriminating correspondence does not mitigate his misconduct, nor does Mr. Siciliano's claim of his supposed ineffectiveness in advancing EDAPS' business interests or the fact that the U.S. criminal indictment based on separate evidence was ultimately dismissed. The Secretary General enjoys wide discretion in administrative decisions and Article 1 of the ICAO Service Code requires that staff be held to the highest standard of integrity. Summary dismissal for less egregious conduct than Mr. Siciliano's has been upheld.

37. Mr. Siciliano has not demonstrated any error in fact or law relative to the AJAB's findings pertaining to either ICAO's decision regarding the assertion of immunities or its response to his arrest and detention in the United States. His claims in this regard are without merit.

38. Nothing in the appeal demonstrates an error in fact or law in the AJAB opinion that vitiates the Secretary General's 22 February 2016 decision to accept the AJAB's unanimous recommendation confirming Mr. Siciliano's summary dismissal.

39. The Secretary General submits the appeal should be rejected in its entirety and Mr. Siciliano's summary dismissal for serious misconduct confirmed.

Mr. Siciliano's motion seeking leave to file additional "pleadings/evidence"

40. Mr. Siciliano seeks leave to submit additional evidence in response to the Secretary General's answer to his assertion that he had never received any payment or other type of advantage from an outside company or individual and that, consequently, he never acted against the interests of ICAO or damaged the image or reputation of the Organization. He contends that the circumstances of his request result directly from ICAO's refusal to allow him free and unlimited access to critical information in its possession.

41. Mr. Siciliano did not have access, either during the internal procedure or for the purpose of the appeal, to all the files and e-mails stored in the ICAO system allowing him to search for any document that would have supported his defence internally and provided stronger evidence for his appeal, in particular his argument that he never received the amount, mentioned by ICAO and found in one of his e-mails, for alleged external activities and that instead, his son received this amount from EDAPS as compensation for its failure to fulfill contractual obligations.

42. Since Mr. Siciliano was unable to continue his search throughout his personal ICAO files to find evidence on these matters, he, and subsequently his counsel, wrote to the *Banque Royale du Canada* where his son used to maintain an account on which the amount referred to by ICAO was transferred and requested information on that transfer in order to demonstrate that this amount was never received by him. Following his counsel's request, the *Banque Royale du Canada* indicated that documents concerning transactions made in 2008 had already been destroyed. The purpose of these requests was to demonstrate the reason for and the actual recipient of those funds and to show his good faith to disclose any information related to allegations previously advanced by ICAO. Mr. Siciliano requests leave to submit both documents.

The ICAO Secretary General's comments on Mr. Siciliano's motion seeking leave to file additional "pleadings/evidence"

43. The ICAO Secretary General requests that the motion be denied. Mr. Siciliano's claims have already been adjudicated by the ICAO AJAB which, as the neutral first instance process, conducted a hearing and made findings of fact. Mr. Siciliano now seeks to re-litigate the AJAB's finding that he had been provided the opportunity to review his files. The ICAO Secretary General tenders the AJAB's findings as *res judicata* as to the facts determined.

44. There is no evidence on record that Mr. Siciliano was denied access to this or any other evidence and the existence of these records was plainly known to Mr. Siciliano at the time of the AJAB hearing and should have been raised before the AJAB. Even assuming *arguendo* that these records existed, they would not support his new claims that his prior admissions to accepting funds from EDAPS were false.

45. The additional evidence Mr. Siciliano seeks to proffer on appeal is not relevant or material to any issue that is properly before the Appeals Tribunal. Inasmuch as his new claims about the untruthfulness of Mr. Siciliano's prior admissions to accepting money from EDAPS are

inadmissible, the additional evidence he now moves the Appeals Tribunal to admit to support those claims is not relevant or material to any issue properly before it.

Considerations

Oral Hearing

46. As a preliminary issue, Mr. Siciliano filed a request for an oral hearing before the Appeals Tribunal. Oral hearings are governed by Article 8(3) of the Appeals Tribunal's Statute and Article 18(1) of the Appeals Tribunal's Rules of Procedure (Rules). The factual and legal issues arising from this appeal have already been clearly defined by the parties and there is no need for further clarification. Further, we do not find that an oral hearing would "assist in the expeditious and fair disposal of the case", as required by Article 18(1) of the Rules. Thus, the request for an oral hearing is denied.

Motion seeking leave to file additional "pleadings/evidence"

47. Mr. Siciliano seeks leave to submit additional evidence in response to the Secretary General's answer to his assertion that he had never received any payment or other type of advantage from an outside company or individual.

48. There are no exceptional circumstances which would warrant the granting of the motion. We take the view that the thrust of the motion, in so far as the matters contained therein are relevant to the issues in this appeal, is essentially an attempt by Mr. Siciliano to present factual and legal contentions that reiterate the arguments made in his appeal brief. There is nothing "new" about the contentions. Accordingly, the motion is denied.

Receivability of Mr. Siciliano's appeal of the 22 December 2014 decision (suspension without pay)

49. Mr. Siciliano appeals the decision of 22 December 2014 to suspend him without pay. The ICAO Secretary General challenges the receivability of Mr. Siciliano's appeal of that decision on the ground that he failed to request its review as required by ICAO Staff Rule 111.1(5) and also failed to request a waiver of time to file his appeal before the AJAB pursuant to Staff Rule 111.1(8).

50. ICAO's Staff Rule 111.1(5) provides, *inter alia*, that:

... 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.

51. ICAO's Staff Rule 111.1(7) provides that a staff member who fails to observe the time limits indicated shall lose the right to appeal, unless an application is made for the delay to be waived. Mr. Siciliano, like any staff member who wishes to appeal a decision, had to complete the first step of making a formal request for a review of the decision to suspend him without pay. He has not done so and has thus waived his right to appeal that decision.

52. In the circumstances, that aspect of Mr. Siciliano's appeal is not receivable.

Receivability of Mr. Siciliano's 23 May 2016 letter (submitted on appeal) requesting the ICAO Secretary General to reconsider the summary dismissal decision "on the basis of ... facts which [he] was not at liberty to expose" to the AJAB

53. Mr. Siciliano contends that both, the payments received and the allegedly incriminating correspondence, were based on false statements which he made under duress. He further contends that the truth about those payments and his correspondence are set forth in his 23 May 2016 letter to the ICAO Secretary General requesting reconsideration of the decision to summarily dismiss him; they are also attached to his appeal to the Appeals Tribunal. These contentions and correspondence were known to him when he presented his case at the AJAB, yet they were not presented.

54. Article 2(5) of the Appeals Tribunal's Statute provides that in exceptional circumstances, where it is determined that the facts are likely to be established with documentary evidence, including written testimony, it may receive such additional evidence on appeal. However, the Appeals Tribunal will not admit evidence which has been known to Mr. Siciliano at the time of the initial trial and could have, with due diligence, been presented to the AJAB and ICAO. The additional evidence Mr. Siciliano seeks to proffer on appeal ought to have been known to him when he presented his case to the AJAB. Having failed to present this evidence at the relevant time, he will not be allowed to proffer it before this Tribunal.

Were the disciplinary measures imposed disproportionate to Mr. Siciliano's misconduct?

55. The Secretary General has the discretion to impose a sanction on a staff member for serious misconduct. ICAO's Staff Regulation 10.1 provides *inter alia* that:

In accordance with the procedures set out in the Staff Rules, the Secretary General may impose disciplinary measures on any staff member engaged in misconduct. He may summarily dismiss a staff member for serious misconduct. ...

56. The acts of misconduct which Mr. Siciliano admitted that he committed, namely, the acceptance of payments from representatives of an Ukrainian business consortium (EDAPS) which supplied a variety of identification and security products in exchange for advancing certain business opportunities for EDAPS while being in the employ of ICAO are indeed very egregious and serious. This type of conduct undermines the trust and confidence reposed in him by ICAO, trust and confidence which are fundamental to his contract of employment. The misconduct must also be viewed in terms of the nature of the work of ICAO, its purpose and principles and the impact which this type of conduct can have on the Organization's reputation, credibility and integrity.⁴

57. In our view, this type of misconduct is tantamount to a fundamental breach of trust and confidence which goes to the very root of the employment contract. We therefore uphold the Secretary General's exercise of her discretion by imposing the sanction of summary dismissal in these circumstances.

58. We have carefully considered all the other grounds of Mr. Siciliano's appeal and find them to be without merit.

Judgment

59. The appeal is dismissed and the decision of the ICAO Secretary General dated 22 February 2016 to accept the recommendation of the AJAB in Appeal No. 191 (Opinion No. 136) is hereby affirmed.

⁴ See *Ogorodnikov v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-549, paras. 32-34.

Original and Authoritative Version: English

Dated this 28th day of October 2016 in New York, United States.

(Signed)

Judge Thomas-Felix,
Presiding

(Signed)

Judge Lussick

(Signed)

Judge Murphy

Entered in the Register on this 20th day of December 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar