



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

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Judgment No. 2021-UNAT-1130

**Van Khanh Nguyen  
(Appellant)**

**v.**

**Secretary-General  
of the International Seabed Authority  
(Respondent)**

**JUDGMENT**

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Before:	Judge John Raymond Murphy, Presiding Judge Graeme Colgan Judge Sabine Knierim
Case Nos.:	2020-1429
Date:	25 June 2021
Registrar:	Weicheng Lin

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Counsel for Appellant:	Self-represented
Counsel for Respondent:	Alfonso Ascencio-Herrera

**JUDGE JOHN RAYMOND MURPHY, PRESIDING.**

1. On 18 May 2019, Van Khanh Nguyen (Ms. Nguyen) contested the decision of the International Seabed Authority (ISA) to withhold her within-grade salary increment, after her supervisor had found her performance to fall below expectations. On 6 May 2020, the ISA Joint Appeal Board (JAB) dismissed her appeal finding that the case was moot and without merit since she had been granted the salary increment retroactively, when her supervisor upgraded her performance rating following a conciliation process. Ms. Nguyen now seeks review of the JAB decision on the premise that it erred on matters of fact and law, resulting in a manifestly unreasonable decision that violated her basic rights. For reasons set out below, we dismiss the appeal and confirm the JAB decision.

**Facts and Procedure**

2. Ms. Nguyen became a staff member of the ISA on 14 February 2018 as a Finance Officer on a two-year fixed term secondment from the United Nations Population Fund (UNFPA), which ended on 13 February 2020.

3. On 1 February 2019, the Director of the Office of Administrative Services (D/OAS) informed Ms. Nguyen that her within-grade salary increment, which was due in February 2019, would be withheld because of concerns regarding her conduct and her performance (the Contested Decision). This action was undertaken by the Organization pursuant to Section 11.2 of Administrative Instruction ISBA/ST/AI/2017/3 (Performance Management and Appraisal System) which states: “Under staff rule 3.5 (a), the granting of salary increments is subject to the satisfactory performance and conduct of staff members as evaluated by their supervisors, unless otherwise decided by the Secretary-General in any particular case.”

4. On 22 March 2019, Ms. Nguyen submitted a request for management review of the Contested Decision. She formulated her challenge as follows: “With reference to the memo dated 1 February 2019 (...) from Director, Office for Administrative Services (D/OAS), in which the D/OAS decided to impose a disciplinary measure on me to withhold my within-grade increment which was due in February 2019, (...) I would like to seek your review of the administrative decision by D/OAS.”

5. In her request of 22 March 2019, Ms. Nguyen took issue with various allegations made by the D/OAS regarding her conduct and performance and stated there were no justifiable reasons to withhold her salary increment. She contended further that the D/OAS had not followed the required disciplinary procedures before deciding to withhold the salary increment. She said:

By withholding my step increase, D/OAS violated Staff Rules 10.1 since he imposed a disciplinary measure on me on an arbitrary manner [sic], when he doesn't have the right to do so. (...) By immediately withholding my step increase, D/OAS also violated Staff Rule 10.4, when he did not follow a due process before imposing the disciplinary measure on me. As specified under Staff Rule 10.4.c, "no staff member shall be subject to disciplinary measures until the matter has been referred to a Joint Disciplinary Committee for advice as to what measures, if any, are appropriate (...) For the reasons above, I believe there are no justifiable reasons for D/OAS's [sic] to withhold my within grade increase, therefore I hereby request your review of the administrative decision, pursuant to Staff Regulation 11.1 and Staff Rule 11.2.

6. On 19 April 2019, the ISA Secretary-General responded to Ms. Nguyen informing her that the Contested Decision was made on the grounds of the performance management and appraisal system under ISBA/ST/AI/2017/3. It was not a disciplinary measure under Chapter X of the Staff Rules of the ISA. The ISA Secretary-General also said that the content of the 1 February 2019 memorandum only referred to issues of performance and appraisal and not to disciplinary measures.

7. In conclusion, the ISA Secretary-General stated: "Consequently, since you have not been made subject to any disciplinary measure, there is no basis for me to review the decision made by your supervisor. It seems to me that Director of OAS did not act in an unjustified or arbitrary manner and that he did follow the applicable procedures related to issues concerning performance management and appraisal."

8. On 18 May 2019, Ms. Nguyen brought an appeal before the JAB pursuant to Rule 11.2 (a) of the Staff Rules of the ISA, challenging the Contested Decision. The appellant submitted that the withholding of her salary increment constituted a disciplinary measure and violated Rule 10.1 (c) and Rule 10.4 (c) of the Staff Rules of the ISA. In her statement of appeal, Ms. Nguyen included a series of allegations pertaining to harassment and discrimination that she argued were related to the administrative decision.

9. On 6 June 2019, after the parties had started the conciliation process, the D/OAS notified human resources that the overall performance for Ms. Nguyen for the period of February 2018 to March 2019 was rated as “successfully meets expectations” and as such, the salary increment should be granted retroactive to February 2019.

10. On 29 August 2019, the Chair of the JAB notified the parties that conciliation was not successful and the matter would proceed to appeal.

11. Ms. Nguyen requested the following relief in her statement of appeal: (i) an order granting her salary increment retroactive to February 2019; (ii) the removal of adverse information from her Official Status File; (iii) the censure and reprimand of the D/OAS for abuse of authority; (iv) the censure and reprimand of the D/OAS for harassment and discrimination; and (v) payment of USD 25,000 in moral damages.

12. On 6 May 2020, the JAB issued its decision dismissing the appeal. It held that of the five claims, only the first one specifically regarding the Contested Decision was receivable. The JAB found only the salary increment issue was the subject of the administrative decision and was timely reviewed by management prior to being brought on appeal.

13. Regarding the removal of adverse information from her Official Status File, the JAB explained that there may have been an administrative decision at some point in that regard, but there was no evidence of Ms. Nguyen ever requesting management review of this decision. Therefore, it was not receivable. However, the JAB noted that during the conciliation process, the contested documents had been removed from the appellant’s file.

14. As to the claims for censure and reprimand of the D/OAS and the accompanying damages claim, the JAB noted there were no administrative decisions related to the allegations of abuse of authority or harassment and discrimination. Moreover, and decisively such allegations are required to be handled in accordance with Chapter X of the Staff Rules under a Joint Disciplinary Committee. Ms. Nguyen had not followed that procedure.

15. The JAB held that the first claim concerning the salary increment was moot and without merit given that relief in that regard sought by Ms. Nguyen had been granted on 11 June 2019 retroactively to 1 February 2019. The removal of the documents from her file during conciliation also rendered that claim moot.

16. On 18 August 2020, Ms. Nguyen filed an appeal against the JAB decision with the United Nations Appeals Tribunal (Appeals Tribunal or UNAT) under Case No. 2020-1429. On 16 October 2020, the ISA Secretary-General filed his answer.

### **Submissions**

#### **Ms. Nguyen's Appeal**

17. Ms. Nguyen submits the JAB erred in matters of fact and law resulting in a manifestly unreasonable decision, which violated her status and her basic rights. She submits that the withholding of her salary increment (the administrative action) should be analyzed in the context of a series of incidents in which she was the victim of discrimination, harassment, abuse of authority and retaliation because she had raised concerns regarding misuse of financial resources and other integrity issues at the Organization.

18. She claims that she did not just challenge the withholding of her salary increment, she also challenged the reasons behind the administrative action, and the JAB did not review whether there was improper motive behind the administrative action. The accusation of misconduct was in retaliation for her raising concerns on misuse of financial resources.

19. Ms. Nguyen also submits the JAB erred in failing to recognize that the administrative decision regarding the placement of adverse information in her Official Status File was made by the D/OAS on 1 February 2019, as he clearly marked such instructions at the bottom of his memorandum.

20. Regarding the JAB's finding that there was no administrative decision pertaining to the abuse of authority, harassment and discrimination claims, the appellant submits that she provided a series of incidents in which she was a victim of retaliation, for example when more junior staff members were sent to conferences instead of her.

21. Finally, Ms. Nguyen also argues the fact that the salary increment was granted in the end is not sufficient to compensate her for the harassment and harm she suffered during her tenure at the ISA.

**The ISA Secretary-General's Answer**

22. The ISA Secretary-General submits that the appeal is not receivable *ratione materiae* as it has become moot. The matter that was submitted for management review (salary increment) has since been resolved, and the salary increment has been granted. Although, Ms. Nguyen did not make a specific request for management review regarding the placement of adverse information in her Official Status File, this issue is now moot as well because such information has been removed from Ms. Nguyen's file. Accordingly, there is no live issue before UNAT.

23. The claims of abuse of authority, harassment and discrimination were not submitted for management review and as such are not receivable *ratione temporis*.

24. The ISA Secretary-General contends that the request for disciplinary measures to be imposed on the D/OAS is a matter for the Joint Disciplinary Committee and not for the JAB. The decision to institute disciplinary proceedings is the prerogative of the Administration. The JAB had no jurisdiction to address those claims, which are therefore also not receivable *ratione materiae*.

25. As to the merits of the appeal, the ISA Secretary-General submits that none of the allegations of wrongdoing, abuse of authority, discrimination and harassment have been established. Ms. Nguyen has not provided any evidence of an unlawful act, an actual injury and a causal link in between. As such, the appellant's claim for damages must be denied.

**Considerations**

26. Ms. Nguyen's claims in relation to her salary increment and the removal of documents from her file are indisputably moot. She has obtained the relief she sought. Accordingly, her appeal no longer presents an existing or live controversy in that regard.

27. Any judicial examination of the reasons for the contested actions, as now belatedly requested by Ms. Nguyen, be they proper or improper, would not alter the fact that she has received that which she initially sought. While the reasons for the actions may have had some bearing in a receivable claim of abuse of authority, as the JAB correctly held, there is no receivable claim for abuse of authority. Firstly, there are no administrative decisions regarding any of these allegations; secondly, the claims were not submitted for managerial

review; thirdly, they did not form part of Ms. Nguyen's statement of appeal to the JAB; and fourthly, the JAB had no jurisdiction to deal with these allegations as they are required to be processed in terms of Chapter X of the Staff Rules.

28. Most pertinently, Staff Rule 11.2 provides that a "staff member wishing to appeal an administrative decision pursuant to staff regulation 11.1 shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing." The purpose of management review is to afford the Administration an opportunity to correct any errors in an administrative decision so as to obviate any unnecessary judicial review. For this goal to be met, it is essential for the staff member to identify the contested administrative decision in the request for review. Any subsequent appeal is limited to a review of the contested administrative decision submitted to managerial review. Submission of the contested administrative decision to managerial review is therefore a condition precedent or jurisdictional fact to an appeal to the JAB, which consequently has jurisdiction to determine only those decisions referred to managerial review.

29. The only administrative decision that Ms. Nguyen submitted to managerial review, as appears from her request of 22 March 2019, was that related to her salary increment which is now moot. That is the end of the matter.

30. In the premises, the JAB did not err in its findings.

**Judgment**

31. The appeal is dismissed, and the decision of the JAB is confirmed.

Original and Authoritative Version: English

Dated this 25<sup>th</sup> day of June 2021.

*(Signed)*

Judge Murphy, Presiding  
Cape Town, South Africa

*(Signed)*

Judge Colgan  
Auckland, New Zealand

*(Signed)*

Judge Knierim  
Hamburg, Germany

Entered in the Register on this 29<sup>th</sup> day of July 2021 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar