



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

Judgment No. 2023-UNAT-1312

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

JUDGMENT

Before:	Judge Graeme Colgan, Presiding Judge Kanwaldeep Sandhu Judge Dimitrios Raikos
Case No.:	2022-1685
Date of Decision:	24 March 2023
Date of Publication:	24 March 2023
Registrar:	Juliet Johnson

Counsel for Appellant:	Self-represented
Counsel for Respondent:	Christopher M. Petras

JUDGE GRAEME COLGAN, PRESIDING.

1. Dr. RoseMarie Heftberger, a now-retired staff member of the International Civil Aviation Organization (ICAO), appeals against the 17 January 2022 decision of the Appeals Board of ICAO (Appeals Board) rejecting as not receivable her appeal against her non-appointment to the position of Acting Chief of ICAO’s Safety and Air Navigation Oversight Audit Section (impugned Decision). We will call this decision the “Acting Chief non-appointment decision”.¹ For the reasons set out below, the United Nations Appeals Tribunal (UNAT or Appeals Tribunal) dismisses the appeal.

Facts and Procedure

2. The events with which this case is concerned date back to 2014 when Dr. Heftberger first sought the position of Chief, Safety and Air Navigation Oversight Audit Section. Because these events are recorded in other judgments, we will only summarise them briefly. More importantly and most recently, in 2019, Dr. Heftberger challenged both Acting Chief and Chief non-appointment decisions before the ICAO’s Advisory Joint Appeals Board (AJAB) which provided its opinion to the ICAO Secretary General and the latter rejected her appeal. Dr. Heftberger’s case then came before the Appeals Tribunal and was remanded to the AJAB for a judgment independent of the opinion of the ICAO Secretary General.² The AJAB was replaced by the Appeals Board in October 2021. On 29 December 2021, the ICAO Secretary General sought summary judgment in the present matter from the Appeals Board against Dr. Heftberger. He submitted that Dr. Heftberger’s appeal was not receivable because she had failed to take the prior mandatory jurisdictional step of seeking the ICAO Secretary General’s review of the decision not to appoint her to the role of Acting Chief.

3. The relevant particular events concerning the referral by Dr. Heftberger of her complaints of non-appointment to the positions of both Chief and Acting Chief are as follows.

¹ *Heftberger v. Secretary General of the International Civil Aviation Organization*, ICAO Appeal No. 2015-003. Dr. Heftberger is also contesting her non-appointment as the Chief, Safety and Air Navigation Oversight Audit Section before the United Nations Appeals Tribunal (Case No. 2022-1740). We will call this decision the “Chief non-appointment decision”. This appeal will be considered separately.

² *Heftberger v. Secretary General of the International Civil Aviation Organization*, Judgment No. 2020-UNAT-1012.

4. On 27 June 2014, Dr. Heftberger received notice of the first decision to appoint someone else to the Acting Chief position which she challenges.³ She had a period of 30 days within which to seek from the ICAO Secretary General an administrative review of that decision to appoint a named individual as Acting Chief pending a permanent appointment being made. She submits that she was advised on 9 July 2014 that the Acting Chief position was to be on a rotational basis. Therefore, she argues that as a result of having been misled about the non-rotating nature of that Acting Chief position for which she would not become eligible, it is unclear when the time for seeking administrative review of it began to run. It is notable, however, that the 27 June 2014 and 9 July 2014 advice to Dr. Heftberger and other staff members of the appointment of an Acting Chief named only that person and said that his appointment would last until a permanent appointment was made. That was a clear indication that there would not be a revolving series of acting appointments of other staff members, including Dr. Heftberger, until the appointment of a new Chief.

5. In 2014, the relevant ICAO Staff Rule 111.1.(5) to (8) provided:⁴

5. (...) 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.

³ While Dr. Heftberger claims that she was so notified on 9 July 2014, the Appeals Board concluded that her first notification was on 27 June 2014. Even if it is the later date as contended for by Dr. Heftberger, this makes no difference to the outcome of the appeal.

⁴ The quoted ICAO Staff Rules are in their 2014 form as was applicable to events then occurring including what Dr. Heftberger had to do to challenge the relevant decision. The requirement in ICAO Staff Rule 111.1(8) to seek from what was then the AJAB, a waiver or suspension of the management review time limits was not made to that body by Dr. Heftberger. The reference to the AJAB making a recommendation thereon to the ICAO Secretary General for his decision of it must now, in the light of subsequent UNAT judgments, be read as requiring such a decision to have been made by the Appeals Board itself. The decision of the current appeal does not turn on these differences however because Dr. Heftberger made no application to the AJAB for waiver or suspension.

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.

6. On 18 November 2014, Dr. Heftberger requested the ICAO Secretary General to review both the Acting Chief and Chief non-appointment decisions.

7. On 11 December 2014, the ICAO Secretary General confirmed his decision of the Chief's appointment but failed or declined to address Dr. Heftberger's request in respect of the appointment of the Acting Chief. Dr. Heftberger then commenced her challenge to those appointments. Before the AJAB, the ICAO Secretary General argued that Dr. Heftberger failed to lodge a timely review application. The AJAB, in its advisory opinion, upheld the ICAO Secretary General's argument and recommended him to dismiss Dr. Heftberger's challenge to the Acting Chief appointment.

8. By the litigation process outlined in the second footnote to this Judgment, the case was remanded for reconsideration and decision by a neutral first instance body, what is now the Appeals Board. The ICAO Secretary General applied for a summary judgment against Dr. Heftberger and this was considered by the Appeals Board as a preliminary issue of receivability. The Appeals Board issued its decision on this receivability issue on 17 January 2022.

9. At paragraph 14 of the impugned Decision, the Appeals Board addressed the nature of the ICAO Secretary General's summary judgment application, recording that it related to Dr. Heftberger's challenge to the appointment of the Acting Chief and asserted either that no application for administrative review had been made or, alternatively if it had, that it was out of time.⁵ The Appeals Board concluded that Dr. Heftberger had been notified of the Acting Chief appointment on 27 June 2014 at the latest and that the 30-day period within which to seek administrative review thereof ran from that date, so that her request made on 18 November 2014 was out of time.⁶ The Appeals Board noted that no application for extension of time was made by Dr. Heftberger pursuant to ICAO Staff Rule 111.1(8).⁷

⁵ Impugned Decision, para. 14.

⁶ *Ibid.*, paras. 9 and 16.

⁷ *Ibid.*, paras. 17-19.

10. The Appeals Board held that it was required to apply strictly these time limitations and that Dr. Heftberger did not seek an extension of time pursuant to ICAO Staff Rule 111.1(8).⁸ The Appeals Board therefore dismissed her proceedings relating to the Acting Chief appointment.

11. On 14 April 2022, Dr. Heftberger filed an appeal of the impugned Decision with the Appeals Tribunal, to which the ICAO Secretary General responded on 17 June 2022.

Submissions

Dr. Heftberger's Appeal

12. First, Dr. Heftberger asserts that the impugned Decision breaches ICAO Staff Rule 111.1(18) and Rule 22 of the ICAO Appeals Board Rules of Procedure (Appeals Board Rules). That is said to be because the Appeals Board received and considered the ICAO Secretary General's application for summary decision against Dr. Heftberger without conducting a hearing and in the absence of consent to this course by her. ICAO Staff Rule 111.1(18) states materially:

18. If the Board deems it appropriate, and both the appellant and the Secretary General (through the Secretary General's representative) consent to the Board's consideration of the appeal without a hearing, solely on the basis of the staff member's Personnel Files, the information contained in the staff member's Form 178 (including supporting documents) and the comments of the Secretary General (including supporting documents), the Board shall consider the matter and render its decision without a hearing.

13. Dr. Heftberger refers to the Appeals Board's Order No. 3 (2022) of 5 January 2022 which advised the parties that the threshold matter of receivability would be considered without a hearing but with their written submissions on the issue and for which a staged timetable for filing these was set. Dr. Heftberger submits that she did make written submissions explaining that her failure to submit a timely request for administrative review was the result of her misunderstanding of what she thought was the predictable and rotational nature of the filling of this Acting Chief role and that she only appreciated her error when it was clear that what she believed would happen, did not. She confirms, however, that the announcement of the appointment of the Acting Chief, which clarified the absence of a rotational acting chiefship, was made on 9 July 2014.

⁸ *Ibid.*, para. 19.

14. Dr. Heftberger explains that when she realised the true position, she made a number of submissions in writing to the Appeals Board about the merits of the appointee and what she said were defects in the appointment process, including by allegedly unethical conduct by an official of ICAO and the existence of documentation supporting her assumption of a rotational temporary appointment. She argues that none of this evidence was considered by the Appeals Board which also did not refer in its decision to those arguments she advanced in her written submissions.

15. Finally, Dr. Heftberger submits that the Appeals Board failed to comply with ICAO Staff Rule 111.1(2) requiring, upon dismissing her appeal, to advise her of the availability of a right of appeal to the UNAT.

The ICAO Secretary General's Answer

16. The ICAO Secretary General refers to the effect of ICAO Staff Rule 111.1(5) and (7) requiring a staff member wishing to challenge by appeal an administrative decision to first seek a review of that decision by the ICAO Secretary General within 30 days of receiving the contested decision. Absent a waiver of that time limit, the staff member's right to challenge or appeal that decision is lost. Waivers are addressed in ICAO Staff Rule 111.1(8) as preliminary issues, that is before the merits of the challenge or appeal are embarked upon and require the existence of "exceptional circumstances". The ICAO Secretary General submits that no waiver of the time limit was sought by Dr. Heftberger and that, in any event, there were no exceptional circumstances in her case put before the Appeals Board. The ICAO Secretary General says that in addition to the presumption that staff members know these rules, in Dr. Heftberger's case she actually did know them as illustrated by her timely request for administrative review of the allied decision appointing the Chief position which she also challenged.

17. The ICAO Secretary General submits that Dr. Heftberger has shown no error of fact or law in the impugned Decision.

18. Next, the ICAO Secretary General says that it is not open to the UNAT to suspend or waive the deadlines for administrative review pursuant to Article 7(3) of the Appeals Tribunal Statute.⁹

⁹ What is referred to in the ICAO Staff Rules as "administrative review" is the equivalent of "management evaluation" under the United Nations Staff Rules and the Appeals Tribunal Statute and so it is not open on appeal to grant such a waiver or suspension.

19. In response to Dr. Heftberger's argument that the Appeals Board breached ICAO Staff Rule 111.1(2) by not informing her of her right to further recourse consequent upon her failure before the Appeals Board, the ICAO Secretary General accepts that this requirement is apparently mandatory under ICAO Staff Rule 111.1(2), which provides that "the Secretary General shall (...) advise the staff member as to possible further recourse actions". However, the ICAO Secretary General submits that the clear presence of this provision in Staff Rule 111.1(2) makes the position clear to anyone who reads said Staff Rule. Therefore, Dr. Heftberger must be presumed to have known of that right. Further, both Dr. Heftberger's history of prior timely filing of appeals and the fact that she filed this appeal within time, mean that she did indeed know of that entitlement even if she was not advised thereof expressly by the Appeals Board.

20. The ICAO Secretary General invites the UNAT to dismiss in all respects Dr. Heftberger's appeal.

Considerations

21. We deal first with what we conclude are the only two seriously arguable grounds advanced on appeal by Dr. Heftberger. The first is the alleged breach of the requirement to obtain her consent to dispose of her appeal without a hearing which she says she did not give but which took place in contravention of this requirement for mutual consent.

22. Dr. Heftberger relied on ICAO Staff Rule 111.1(18) which provides materially: "If the Board deems it appropriate, and both the appellant and the Secretary General (...) consent to the Board's consideration of the appeal without a hearing (...) the Board shall consider the matter and render its decision without a hearing."

23. It is common ground that the decision under appeal was made following written submissions to the Appeals Board by the parties, but without a "hearing" in the sense of the parties and/or their representatives presenting *viva voce* evidence or oral arguments in the presence of the Appeals Board members.

24. The usual procedural requirement, relied on by Dr. Heftberger, to obtain the consent of parties if a case is to be decided without a hearing is, however, subject to the Appeals Board Rules allowing it to determine applications for summary judgment in this manner. That is the effect of the following phrase in Rule 22 of the Appeals Board Rules: "The provisions of

Staff Rule 111.1(18) for Appeal[s] Board consideration of an appeal without a hearing *notwithstanding*, the Board may (...) issue a Summary Decision when there is no dispute as to the material facts and a party is entitled to a decision as a matter of law (...).”¹⁰

25. The effect of the word “notwithstanding” is to create an exception, in the case of summary decisions, to the practice of requiring consent to decide a case without a hearing contained in ICAO Staff Rule 111.1(18). Therefore, in this case, Dr. Heftberger’s consent to the foregoing of an in-person hearing was not required.

26. It is also noteworthy that Dr. Heftberger was advised by the Appeals Board of its intention to proceed with a summary decision and that she participated in this process by making submissions without objection to it.

27. Therefore, it was not an error of law for the Appeals Board to have considered and decided the summary judgment without an in-person hearing but otherwise in compliance with due process requirements of participation therein by the parties including Dr. Heftberger.

28. The second ground of appeal advanced by Dr. Heftberger is the Appeals Board’s alleged failure to comply with ICAO Staff Rule 111.1(2) and advise her of her right of appeal to the UNAT. There is no question that the Appeals Board failed to comply with this mandatory requirement as Dr. Heftberger alleges and the ICAO Secretary General did not assert otherwise. Rather, the ICAO Secretary General argues that it was of no consequence that it did not do so.

29. If the ICAO Secretary General’s submission is that the Appeals Board can pick and choose whether to comply or not, then we reject this position utterly. Indeed, we would be surprised if this was the import of the ICAO Secretary General’s argument. Mandatory rules, to which, the ICAO Secretary General argues strongly Dr. Heftberger should be unwaveringly held, are as mandatory for the Appeals Board and the ICAO Secretary General as they are for staff members.

30. However, there is merit in the ICAO Secretary General’s auxiliary submission that this breach had no disadvantageous effect upon Dr. Heftberger or her case. It made no difference to the outcome of the case that the Appeals Board failed in this regard: Dr. Heftberger brought her appeal to the UNAT on time and it is enough that the Appeals Tribunal identifies this issue for the Appeals Board to correct the form of its decisions for the future, if it has not done so already.

¹⁰ Emphasis added.

31. So this ground of appeal, while technically correct, does not avail Dr. Heftberger overall. We turn now to Dr. Heftberger's other appeal grounds.

32. A summary judgment is permitted in cases including where, irrespective of the merits, an application or appeal cannot succeed. The receivability of the application or appeal is one example of the appropriate use of the summary judgment procedure. If the case is not receivable, because of non-compliance with necessary preliminary steps to give the tribunal the jurisdiction or competence in law to consider it, its merits cannot be considered, let alone adjudicated upon. In such circumstances, it is considered to be the best use of judicial resources, to bring the case, or at least unreceivable elements of it, to an early conclusion. The parties, and especially the party facing the draconian finality of a summary judgment, must be informed of the possibility and permitted to make submissions about that outcome. That occurred here. But if, after that process, it is clear that the case must fail because of jurisdictional incompetence, in the legal sense of the word, then a summary judgment may follow.

33. The answer to Dr. Heftberger's appeal lies in the words of ICAO Staff Rule 111.1(5) and (6) set out above. The first step to challenge an administrative decision must be taken by the staff member within 30 days of receipt of that decision. That was, in this case, at the latest, by 8 August 2014. The following time limit, and particularly that which applied when no review decision had been made by the ICAO Secretary General within the specified period, all depended for their application on compliance with the first step, the staff member's timely request for review.

34. Dr. Heftberger's failure to seek a review of the decision to which she objected within the period of 30 days after she received notice of that decision, coupled with her subsequent failure to seek from the ICAO Secretary General a waiver or suspension of that time limit on grounds of extraordinary circumstances, caused her appeal to the Appeals Board to be not receivable by operation of law.

35. The only question remaining is whether Dr. Heftberger's explanations contained in her submissions should have been considered by the Appeals Board to have been an informal application for extension of time or otherwise to have waived the jurisdictional necessity of an application for administrative review by ICAO. That possibility arises because, as we concluded earlier, such an application could and should have been made by Dr. Heftberger to the AJAB.

36. We do not consider that the Appeals Board could reasonably have treated Dr. Heftberger's submissions as an implicit application for suspension or waiver of the time limit. Nor were there any extraordinary circumstances disclosed which would in any event have been necessary even to allow the Appeals Board to use its discretion to exercise its powers, inherited from the former AJAB, pursuant to ICAO Staff Rule 111.1(8). Dr. Heftberger's delay was more than minimal, and the evidence tends to suggest that she was aware of this time limit having complied with it on other occasions in the appellate process. Therefore, this possible ground of appeal does not avail Dr. Heftberger.

37. Dr. Heftberger's failure to seek a review until about three months after the expiry of that 30-day period meant that her right to challenge that administrative decision lapsed, at the latest, on 8 August 2014. Her failure to seek from the ICAO Secretary General an extension to that period meant that her right to challenge the decision expired and the Appeals Board had no alternative but to dismiss it as not receivable. The impugned Decision to that effect was not erroneous in law or in fact. Dr. Heftberger's appeal must fail accordingly.

Judgment

38. Dr. Heftberger's appeal is dismissed, and the ICAO Appeals Board's Decision No. 2015-003 on receivability of 17 January 2022 is hereby affirmed.

Original and Authoritative Version: English

Decision dated this 24th day of March 2023 in New York, United States.

(Signed)

Judge Colgan,
Presiding

(Signed)

Judge Sandhu

(Signed)

Judge Raikos

Judgment published and entered in the Register on this 24th day of March 2023 in New York, United States.

(Signed)

Juliet Johnson, Registrar