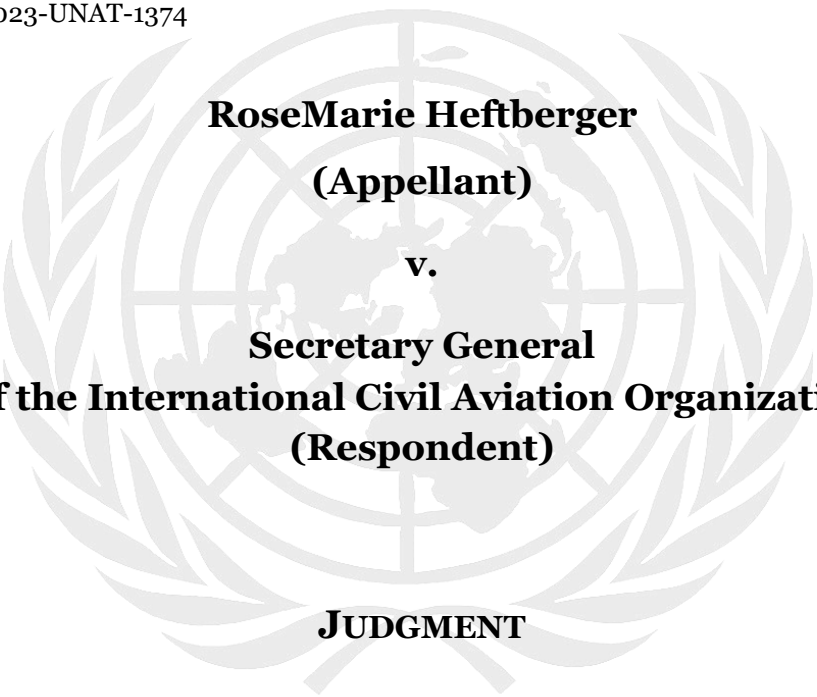




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2023-UNAT-1374



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

JUDGMENT

Before:	Judge Dimitrios Raikos, Presiding Judge Graeme Colgan Judge Sabine Knierim
Case No.:	2022-1740
Date of Decision:	30 June 2023
Date of Publication:	4 August 2023
Registrar:	Juliet Johnson

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 Appeals Tribunal (UNAT or Appeals Tribunal).
4. For the reasons set out below, the Appeals Tribunal dismisses the appeal and affirms the impugned Decision.

Facts and Procedure

5. The events with which this case is concerned date back to 2014 and have been the subject of several decisions and judgments. We will only summarize briefly the pertinent events leading to the present appeal.
6. Dr. Heftberger had been employed by ICAO since January 2006. Since 2009, she worked as Standards and Procedures Officer, Legislation, Organization and Airworthiness at the P-4 level.²
7. On 27 June 2014, Dr. Heftberger received notice of the decision to appoint someone else to the Acting Chief position of ICAO's Safety and Air Navigation Oversight Audit Section (Acting Chief position), a decision that she challenged and which the Appeals Tribunal disposed of this year.³

¹ *RoseMarie Heftberger v. Secretary General of the International Civil Aviation Organization*, Decision No. ICAO/2022/004.

² Dr. Heftberger's application of July 2014.

³ *RoseMarie Heftberger v. Secretary General of the International Civil Aviation Organization*, Judgment No. 2023-UNAT-1312. In its Judgment, the Appeals Tribunal dismissed Dr. Heftberger's appeal contesting the Acting Chief appointment decision.

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. Heftberger applied for the position.⁴ She was interviewed by the interview panel on 12 September 2014 and recommended to the Appointment and Promotion Board (APB) as the third-ranked candidate.⁵
10. On 16 October 2014, the APB reviewed the top three ranked candidates' applications and endorsed the recommendation of the interview panel.
11. On 28 October 2014, the ICAO Secretary General decided to appoint the first-ranked candidate to the Chief position. On 31 October 2014, Dr. Heftberger was informed by e-mail that she had not been selected for the Chief position.
12. On 18 November 2014, Dr. Heftberger requested the ICAO Secretary General to review both the Acting Chief and Chief appointment decisions.
13. On 11 December 2014, the ICAO Secretary General sent a letter to Dr. Heftberger in which he confirmed his decision regarding the Chief appointment.
14. On 9 January 2015, Dr. Heftberger filed an appeal with the ICAO's Advisory Joint Appeals Board (AJAB) contesting both the Acting Chief and Chief appointment decisions.
15. On 9 September 2019, the AJAB provided its opinion to the ICAO Secretary General and recommended to dismiss Dr. Heftberger's appeal. On 16 September 2019, the ICAO Secretary General rejected Dr. Heftberger's appeal.⁶ Dr. Heftberger filed an appeal against this decision before the Appeals Tribunal.
16. On 27 June 2020, the Appeals Tribunal remanded the case to the AJAB for reconsideration and a decision independent of the opinion of the ICAO Secretary General by a neutral first instance body in accordance with Article 2(10) of the Appeals Tribunal Statute.⁷

⁴ Dr. Heftberger's application of July 2014.

⁵ *RoseMarie Heftberger v. Secretary General of the International Civil Aviation Organization*, ICAO Appeal No. 2015-003, para. 10.

⁶ *RoseMarie Heftberger v. Secretary General of the International Civil Aviation Organization*, Judgment No. 2020-UNAT-1012, para. 5.

⁷ *Ibid.*

17. In October 2021, the Appeals Board was established, replacing the AJAB.

Impugned Decision

18. The Appeals Board held a hearing on 20 and 21 January 2022 regarding Dr. Heftberger's challenge to her non-appointment for the Chief position. The Appeals Board heard from six witnesses: Dr. Heftberger, C.R., C.E., K.N. and P.B., former staff members of ICAO, as well as S.J., the Chief of Recruitment of ICAO.

19. On 21 January 2022, the Appeals Board ordered the ICAO Secretary General to produce additional documents, which he did on the same day.⁸ On 24 January 2022, Dr. Heftberger provided her written comments on the additional documents, to which the ICAO Secretary General responded on 31 January 2022.⁹

20. On 22 March 2022, a member of the Appeals Board recused herself due to a conflict of interest. On 27 April 2022, a new member of the Appeals Board was appointed.

21. On 21 July 2022, the Appeals Board issued the impugned Decision. It concluded that Dr. Heftberger was given full and fair consideration in respect of her application and did not rebut the presumption of regularity in the selection process for the appointment of the Chief position. To the contrary, the Appeals Board noted that Dr. Heftberger was considered the third-ranked candidate out of 65 applicants.¹⁰

22. Moreover, the Appeals Board concluded that the interview panel and the APB both independently reviewed the skills and qualifications of the top three ranked candidates. To this end, the Appeals Board noted that the requirement of managerial experience was very broad and could refer to a specific experience not specified in a job title.¹¹

23. The Appeals Board concluded that Dr. Heftberger provided no clear and convincing evidence to support her arguments that she was not given full and fair consideration. With regard to the witnesses who testified before it for Dr. Heftberger (C.R., C.E., K.N. and P.B.), the Appeals Board found that they were not involved in any part of the selection process and that they

⁸ E-mail of 21 January 2022 to the Appeals Board.

⁹ E-mails of 24 and 31 January 2022 to the Appeals Board.

¹⁰ Impugned Decision, para. 10.1.c.

¹¹ *Ibid.*, para. 10.1.b.

made unsupported assumptions as to the selected and second-ranked candidates' managerial and financial experiences.¹²

24. The Appeals Board found that the selection process was in compliance with ICAO regulatory framework and that the interview panel was correctly formed.¹³ It concluded that Dr. Heftberger did not show any reasonable apprehension of bias against her or in favor of other candidates and that there was no clear and convincing evidence that there was a close friendship between members of the interview panel and the selected candidate.¹⁴ Turning to Dr. Heftberger's argument that the selected candidate had received many favors in the past (for example: a transfer to Paris), the Appeals Board recalled that it has no power to examine past events and that there is a presumption of regularity in respect to past appointments.¹⁵

25. The Appeals Board observed that there was no evidence supporting Dr. Heftberger's arguments that the "ICAO policy on promoting female candidates" was ignored or that the ICAO Secretary General favored a candidate of his own nationality.¹⁶

26. Therefore, the Appeals Board concluded that Dr. Heftberger's application was given full and fair consideration and that the evidence in the case was insufficient "to rebut the presumption of regularity [or] to support contentions of bias or other error".¹⁷

Procedure before the Appeals Tribunal

27. On 14 October 2022, Dr. Heftberger filed an appeal of the impugned Decision with the Appeals Tribunal, to which the ICAO Secretary General responded on 13 December 2022.

¹² *Ibid.*

¹³ *Ibid.*, paras. 9.3.4 and 10.1.e.

¹⁴ *Ibid.*, paras. 10.1.c-10.1.d, 10.1.g, 10.1.i-10.1.l.

¹⁵ *Ibid.*, para. 10.1.h.

¹⁶ *Ibid.*, paras. 10.1.m and 10.1.n.

¹⁷ *Ibid.*, para. 11.2.

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”.

29. With respect to the impugned Decision, Dr. Heftberger submits that the Appeals Board is not a neutral first instance. She further argues that the Appeals Board committed several errors in procedure, such as to affect the impugned Decision. She also submits that the Appeals Board erred in fact and law in dismissing her application.

30. First, with regard to the independence and neutrality required of the Appeals Board, Dr. Heftberger argues that it is not a “neutral first instance” in accordance with Article 2(10) of the Appeals Tribunal Statute. She emphasizes in particular the fact that it is composed of two ICAO staff members who report to the ICAO Secretary General in their daily functions which make them vulnerable to retaliatory measures.

31. She also contends that ICAO Staff Rule 111.1(15) unlawfully limits the right of ICAO staff members to be represented, as it allows them to be represented before the Appeals Board only by “any other active or retired staff member serving or residing at the duty station where the hearing is conducted”.

32. Second, Dr. Heftberger argues that the Appeals Board committed several errors in procedure, such as to affect the impugned Decision.

33. With regard to the hearing, Dr. Heftberger submits that the Appeals Board failed to inform the ICAO staff members of the hearing, although Rules 27 and 33 of the ICAO Appeals Board Rules of Procedure (Appeals Board Rules) provide that hearings are held in public sessions. She also notes that pursuant to Rule 35 of the Appeals Board Rules, the recording of the hearing was prohibited, but that the Appeals Board recorded the hearing. Moreover, she observes that the impugned Decision was not signed by all the Appeals Board members, “resulting in a lack of transparent documentation of consent”.

34. With regard to the case management, Dr. Heftberger submits that she was significantly disadvantaged by the fact that the ICAO Secretary General failed to produce all the documentation required by Order No. 1 (2021) of December 2021 within the set deadline and that the Appeals Board failed to insist on the production of the documentation that she requested.¹⁸

35. Dr. Heftberger contends that the Appeals Board erred by allowing the ICAO Secretary General to produce additional evidence, more specifically a longlist of all the applications received for the Chief position appointment (longlist), after the hearing of 21 January 2021. She recalls that Rule 13 of the Appeals Board Rules specifically provides that “[n]o post-hearing comments or briefs shall be accepted”. She also notes that the impugned Decision is “highly inconclusive and unreasonable” as it dismisses her application but concludes that “it was apparent that [the] requests for the production of all documents, pursuant to the Order, had simply not been complied with” and that “the practice of not having full information makes the task of rebutting the presumption of regularity more difficult for any applicant”.¹⁹

36. Third, Dr. Heftberger submits that the Appeals Board committed several errors in fact and law in dismissing her application.

37. Dr. Heftberger submits that by allowing the ICAO Secretary General to produce a “highly incomplete and inadequate” longlist after the hearing, the Appeals Board put her “at significant disadvantage”. She notes that the longlist discloses several defects in the selection process that she was unable to contest prior to receiving the longlist (for example: the consideration of geographical representation in the selection process). Dr. Heftberger also draws attention to the fact that two candidates marked as not qualified on the longlist were added to the roster, while the shortlisted candidates were not.

38. Dr. Heftberger contends that the Appeals Board erred by failing to consider the fact that both the interview panel members and the APB neglected to review if the candidates possessed all the criteria outlined in the vacancy notice. She submits that this “absence of documented evidence on preponderant elements of the selection process” should have led the Appeals Board to conclude

¹⁸ For example, in her appeal, Dr. Heftberger mentions: the longlist, 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.

¹⁹ Impugned Decision, paras. 12.2-12.3.

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. 10.1.a and 11.2.

²¹ *Ibid.*, para. 10.1.b.

42. Dr. Heftberger also notes that the impugned Decision does not reflect the testimony of S.J., which she maintains was tainted by contradictions (for example: as to gender equality and geographical representation).

43. Therefore, Dr. Heftberger submits that the Appeals Board should have concluded that the lack of evidence on the verification of the candidates' skills was sufficient to rebut the presumption of regularity in the selection process.

44. Dr. Heftberger contends that the Appeals Board erred in fact and law in finding that she had been fairly considered for the Chief position.

45. Dr. Heftberger submits that the Appeals Board erred in concluding that the Organization ensured that the selection process was carried out in compliance with ICAO regulatory framework. She rather contends that the Appeals Board failed to consider the "numerous transparency issues" related to the "pre-arranged" selection process. She claims that the Appeals Board erred in finding that the evidence did not show any reasonable apprehension of bias against her while N.G., the Chair of the APB (and Director of the Air Navigation Bureau) clearly "targeted" her and "influenced" the selection process, resulting in a violation of her due process rights.

46. Dr. Heftberger observes that the Appeals Board erred in differentiating "collegial relations" and "close friendship" and in concluding that there was no conflict of interest between the members of the interview panel and the selected candidate.

47. Last, Dr. Heftberger submits that the Appeals Board erred in finding that even if the selected candidate had not been selected, she would not have been promoted. She contends that the fact that she was ranked as the number three candidate does not preclude irregularity in the selection process. She also recalls that the second-ranked candidate also did not meet the criteria.

The ICAO Secretary General's answer

48. The ICAO Secretary General requests that the Appeals Tribunal dismiss the appeal in its entirety.

49. The ICAO Secretary General denies all the allegations made by Dr. Heftberger and "tenders the [Appeals] Board findings, set forth in its decision, as *res judicata* as to the facts determined".

50. First, with regard to the independence and neutrality required of the Appeals Board, the ICAO Secretary General submits that Dr. Heftberger's arguments are "vague" and have no basis in fact or law. He contends that the Appeals Board constitutes a neutral first instance body and satisfies the requirements set out in Article 2(1) of the Appeals Tribunal Statute.

51. Second, the ICAO Secretary General contends that the Appeals Board did not commit errors of procedure, such as to affect the impugned Decision. The ICAO Secretary General submits that Dr. Heftberger's argument regarding the restricted rights of ICAO staff members to be represented are misplaced. The ICAO Secretary General notes that pursuant to ICAO Staff Rule 111.1(15), ICAO staff members can freely engage a counsel of their choice, but that said counsel cannot appear before the Appeals Board where the hearings are conducted on an inquisitorial basis. He further observes that the Appeals Tribunal does not have the authority to amend any ICAO regulation or rule.

52. In any event, the ICAO Secretary General further notes that even if the Appeals Tribunal concluded that errors of procedures occurred before the Appeals Board, "none of them (either individually or collectively) would be grounds to reverse" the impugned Decision and that Dr. Heftberger failed to demonstrate how these alleged errors had affected her due process rights.

53. The ICAO Secretary General submits that Dr. Heftberger's argument that the Appeals Board erred in admitting additional documentary evidence during and after the hearing, when it should have been introduced earlier, is a new element that was not known and that was not put forward by her during the hearing. Therefore, relying on Article 2(5) of the Appeals Tribunal Statute and on *Shakir*,²² the ICAO Secretary General submits that it cannot be introduced for the first time on appeal and requests the Appeals Tribunal to find this aspect inadmissible.

54. The ICAO Secretary General notes that the Appeals Board is not a "dress rehearsal" and that Dr. Heftberger failed to raise any objection to the consideration of the additional documentary evidence or to ask for additional time to examine them during the proceedings before the Appeals Board. The ICAO Secretary General recalls the broad discretion of the

²² *Shakir v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-056.

Appeals Board in its case management, especially as Dr. Heftberger did not demonstrate to the Appeals Tribunal how these alleged errors would have affected the outcome of the case.

55. Third, the ICAO Secretary General argues that Dr. Heftberger failed to identify reversible errors in the impugned Decision. He contends that the Appeals Board did not err on a question of fact or as a matter of law in dismissing her application.

56. The ICAO Secretary General observes that Dr. Heftberger's arguments are essentially a repetition "point-by-point" of the ones that she made before the Appeals Board. The ICAO Secretary General recalls that it is not sufficient for Dr. Heftberger to indicate that she disagrees with the impugned Decision and that an appeal is not an opportunity for a party to merely repeat the arguments that failed before the Appeals Board.

57. The ICAO Secretary General submits that it is not the role of the Appeals Tribunal to "step into the shoes of the Administration and repeat the [...] procedure, or to assess the staff members' possibilities during the [selection process]".²³ In the present case, the ICAO Secretary General submits that the Appeals Board correctly concluded that Dr. Heftberger's application was given full and fair consideration.

58. Therefore, the ICAO Secretary General submits that Dr. Heftberger failed to establish "any procedural flaw, bias or other misfeasance" in the selection process by clear and convincing evidence.

Considerations

Preliminary matters

Whether the ICA Appeals Board is a neutral and independent first instance body

59. This is the second appeal by Dr. Heftberger with regard to her non-appointment to the Chief Position, this time from the impugned Decision of the Appeals Board issued on 21 July 2022.

60. In its Judgment No. 2020-UNAT-1012, the Appeals Tribunal found that while the AJAB's "opinion" was detailed and contained "reasons, facts and law", it could not be said to

²³ *Balinge v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-377, para. 18.

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 to effectively discharge its obligations in appeal cases, as required by Article 2(10) of the Appeals Tribunal Statute.

62. This Article states that a “special agreement may only be concluded if the agency, organization or entity utilizes a neutral first instance process that includes a written record and a written decision providing reasons, fact and law”. Based on the facts before us and after a thorough review of the applicable law, the Appeals Board appears to be that neutral first instance process.

63. In *Spinardi*,²⁷ we noted that a neutral first instance process must be established to decide disputes, and that the head of an agency or organization whose decision is under appeal cannot be part of that first instance process. Further, as restated in *Fogarty*,²⁸ for the UNAT to conduct its function as an appellate tribunal, the impugned decisions must emanate from a neutral first instance process.

64. In the present case, ICAO has made internal changes to satisfy the requirements of Article 2(10) of our Statute. Indeed, in response to our Judgments in *Heftberger*²⁹ and

²⁴ *RoseMarie Heftberger v. Secretary General of the International Civil Aviation Organisation*, Judgment No. 2020-UNAT-1012, para. 14.

²⁵ *Ibid.*

²⁶ *Ibid.*, para. 16.

²⁷ *Spinardi v. Secretary-General of the International Maritime Organization*, Judgment No. 2019-UNAT-957, para. 26.

²⁸ *Margaret Mary Fogarty, Robert Sheffer, Monia Spinardi, Astrid Dispert & Minglee Hoe v. Secretary-General of the International Maritime Organization*, Judgment No. 2021-UNAT-1148, paras. 7 and 10.

²⁹ *RoseMarie Heftberger v. Secretary General of the International Civil Aviation Organisation*, Judgment No. 2020-UNAT-1012.

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 United Nations Dispute Tribunal—UNDT) to conduct hearings and make decisions related to claims brought against it”.

67. The above established legal framework, which governs the composition of the Appeals Board and the discharge of its duties, provides ICAO staff members with both a neutral first instance and a neutral and final right of appeal as the United Nations staff members have to this Appeals Tribunal from the UNDT. Thus, it corresponds to and implements the intention of the provisions of Article 2(10) of the Appeals Tribunal Statute and of the Special Agreement entered into thereunder by ICAO, which was to provide ICAO staff members with an independent and professional avenue of appeal against decisions of the ICAO

³⁰ *Ahmed El Sehemawi v. Secretary General of the International Civil Aviation Organization*, Judgment No. 2020-UNAT-1034.

³¹ ICAO Staff Regulations 11.2, 11.3 and 11.5 of Article XI of ICAO Service Code.

Secretary General, albeit within the structure of the Organisation rather than, as in the case of the UNDT, external to it.³² At any rate, while it may have been open to ICAO to have considered 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.

68. In the same line of reasoning, we do not agree with Dr. Heftberger's rather vague and unsubstantiated averment that:

ICAO-internal Board comprises a Chair/President, an ICAO selected and paid consultant and two ICAO staff members. It is not assured that ICAO personnel remain independent when they report to the ICAO Secretary General, while performing duties on the Board which may make them susceptible to retaliatory actions rather than being part of a neutral entity and process.

69. Dr Heftberger's submission is also misconceived as to the nature of the Appeals Board as it may be seen from the following passages from the ICAO Staff Regulation 11.3:

The Appeals Board shall consist of three members: the Chair, who shall be a non-staff member with legal and judicial expertise and shall serve in the non-staff member's personal capacity and enjoy full independence, and two staff members who shall assist the Chair, one appointed by the Secretary General and one selected by the representative association or associations of staff members.

70. The decision of the Chair shall be on behalf of the Appeals Board and shall be final and binding on all of its members.

71. The two ICAO staff members to whose presence Dr. Heftberger objects are assistants to the Chair of the Appeals Board and not full members of the Appeals Board in the sense of being equals in a triumvirate. We infer that the role of the two ICAO staff members is to assist the Chair, whose expertise is legal and judicial but not in matters of aviation. Their role is an advisory one. The Appeals Board's decision is 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 may be beholden to ICAO is an illusory one not based in statutory fact. So analysed, the Appeals Board is a neutral first instance body.

³² Compared to *RoseMarie Heftberger v. Secretary General of the International Civil Aviation Organisation*, Judgment No. 2020-UNAT-1012, para. 14.

Whether ICAO Staff Rules ensure due process

72. ICAO Staff Rule 111.1(15) 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 that effectively implement Article 13 thus permitting Appellants to engage external legal assistance. Further, active staff members face the potential of retaliation without established policy and procedures to mitigate the risks. In addition, a significant percentage of retired staff members reside outside of Montreal.

74. This submission, addressing a direct challenge to ICAO Staff Rule 111.1(15), is misconceived because 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 as, in this case, the legal representation of ICAO staff members. The ICAO Secretary General correctly argues, in response to Dr. Heftberger's claim, that the applicability of ICAO Staff Rules and Regulations stems from them being part of Dr. Heftberger's contract of employment³³ and that the UNAT does not have the authority to amend or not to apply them.³⁴

³³ *Muwambi v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-780, para. 46; *Badawi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2012-UNAT-261, para. 28, citing *Abboud v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-100.

³⁴ *El Rush v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-627, para. 14; *Andrysek v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-070, para. 14; *Mebtouche v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-033, para. 11.

Merits of the appeal

75. The issue on appeal is whether the Appeals Board erred in law or fact resulting in a manifestly unreasonable decision when it concluded that the administrative decision not to select Dr. Heftberger for the Chief position was lawful.

Legal framework

76. ICAO Staff Rule 104.8, relating to appointments and promotions, in 2014, provided in relevant parts:

...

3. In accordance with Regulations 4.11 and 4.12, the Secretary General shall appoint the staff of the Organization and shall act with the advice and assistance of the following advisory bodies:

...

c) the Appointment and Promotion Board I (APB I) for P-1 to P-5 posts;

....

4. These advisory bodies shall provide advice to the Secretary General, or the Director to whom authority has been delegated, with regard to the appointment to the post. In carrying out their responsibilities for advising the Secretary General on appointments and promotions, the advisory bodies shall be guided by the recruitment provisions as laid down in The ICAO Service Code. These advisory bodies shall be constituted and shall function as described below.

...

7. The composition of APB I shall be as follows:

- All Directors of Bureau as voting members, or in their absence, Acting Directors of Bureau. The Senior Director of Bureau, or, if absent, the next most senior Director of Bureau shall serve as Chairman.

- The ICAO Regional Director (non-voting), to the extent his Regional Office is concerned, shall present the candidatures via telephone conference.

- Observer (non-voting): A gender advisor (from the Professional and higher categories) may be appointed by the Secretary General, when deemed necessary.

- Secretary (non-voting): DD/ADB/HR.

Quorum: Three voting members shall constitute a quorum.

...

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

a) the vacancy notice;

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 information concerning the candidate; and

e) in the case of a candidate who is a staff member of the Organization, a copy of the performance reports.

...

10. The advisory bodies may also, where deemed necessary and practicable, arrange for candidates to be tested using appropriate assessment methods.

11. On completion of the review of candidates for a particular position, the advisory body shall make a report to the Secretary General containing its recommendations and a ranking list of the candidates in order of the advisory body's assessment of their qualifications for the position.

12. The advisory bodies shall keep minutes which shall be confidential to themselves, the appointing authorities, the Secretary General, as well as the President of the Council, where applicable.

...

14. The decision to select a candidate shall be implemented upon its official communication to the individual concerned (...).

77. As the Appeals Board noted in the impugned Decision:³⁵

... On 28 June 2012, a set of "Guidelines on evaluation of applications," were issued by the Secretary General of ICAO and were applicable in 2014. They provided for *'hiring managers* to be responsible for the pre-screening and evaluation of applications, with effect from 1 July 2012. SEA [The Staff Employment and Administration Section] will continue to provide guidance and support to both managers and members of the selection and APB panels, including monitoring the consistent and appropriate application of procedures'. The Guidelines specifically provided:

³⁵ Impugned Decision, para. 9.3.1.

a) Hiring managers are deemed to have in-depth knowledge of the work area and the requirements of the posts under their supervision, and are therefore better placed to assess the suitability of applicants.

...

c) Only candidates, who fully meet the required minimum specifications for the position

...

and are evaluated *as well qualified or qualified*, may be included in the long list and subsequent shortlist for the post. (emphasis in the original)

...

e) Hiring managers are equally responsible and accountable for ensuring that diversity targets of the Organization are duly considered when evaluating applications. In this regard, any suitably qualified female candidates must be given due consideration

...

f) The short list of candidates to be invited for further assessment, is to be submitted to the Employment Unit (EMP) in SEA. SEA/EMP will review the list to ensure that all procedures have been followed in the evaluation of the applications...

An Inter-Office Memorandum from the Secretary General provided that:

- ...effective 1 July 2012, the new format of the Candidate Assessment and Selection Report will become effective. The main features of the new report are:

- a cover page summarizing the entire candidate selection process in a comprehensive way;

- an evaluation chart, showing the rating of all candidates in order to improve objectivity and transparency of selection recommendations... Following [an] interview, the panel members should agree on the rating for each candidate;

- an interview report balancing technical skills evaluation and competency assessment. Managers need to clearly justify why the candidate is or is not recommended ... ; and

- the APB Summary of Decisions that will be submitted to the final approval authority

78. Before embarking on the consideration of the specific arguments made on appeal in this case, it is apposite to recap the jurisprudence of the Appeals Tribunal regarding the scope and exercise of judicial review in relation to matters of appointments and promotions.

79. The Appeals Tribunal has consistently held that the Secretary-General or the Administration has broad discretion in staff selections.³⁶

80. We have also stated that:³⁷

... The Dispute Tribunal possesses jurisdiction to rescind a selection or promotion process, but may do so only under extremely rare circumstances. Generally speaking, when candidates have received fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration, the Dispute Tribunal shall uphold the selection/promotion

... All candidates before an interview panel have the right to full and fair consideration. A candidate challenging the denial of promotion must prove through clear and convincing evidence that procedure was violated, the members of the panel exhibited bias, irrelevant material was considered or relevant material ignored. There may be other grounds as well. It would depend on the facts of each individual case.

... There is always a presumption that official acts have been regularly performed. This is called a presumption of regularity. But this presumption is a rebuttable one. 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. Thereafter the burden of proof shifts to the Appellant who must show through clear and convincing evidence that she was denied a fair chance of promotion.

81. We have gone through the record of the case, examined the grounds of appeal as well as the ICAO Secretary General's answer, and hold that the Appeals Board did not err in its approach to the disputed legal and factual issues of the case at bar. It is also the considered view of this Tribunal that, under the specific circumstances of the case at bar and the overall assessment of the record on file, the Appeals Board correctly determined, per the applicable law and our pertinent jurisprudence, that the available information established by a preponderance of evidence that Dr. Heftberger's candidacy for the Chief position had been given full and fair consideration and dismissed her application.

³⁶ *Marius Mihail Russo-Got v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1095, para. 29; *Kinyanjui v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-932, paras. 13-15.

³⁷ *Felix Ross v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1054, para. 26. See also *Verma v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-829, para. 14, citing *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122, paras. 20-21 and 26.

82. As we found in *Cherneva*:³⁸

... The Appeals Tribunal emphasizes that the appeals procedure is of a corrective nature and, thus, is not an opportunity for a dissatisfied party to reargue his or her case. A party cannot merely repeat on appeal arguments that did not succeed before the lower court. The function of the Appeals Tribunal is to determine if the [first instance tribunal] made errors of fact or law, exceeded its jurisdiction or competence, or failed to exercise its jurisdiction, as prescribed in Article 2(1) of the Statute. An appellant has the burden of satisfying the Appeals Tribunal that the judgment he or she seeks to challenge is defective. It follows that an appellant must identify the alleged defects in the impugned judgment and state the grounds relied upon in asserting that the judgment is defective.

83. Nevertheless, 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 that such factors played a role in the administrative decision.³⁹

84. As we stated in *Orabi*:⁴⁰

... When judging the validity of the Administration's exercise of discretion in administrative matters, as in the case of the above mentioned decision, the Dispute 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 the role of the [first instance tribunal] to substitute its own decision for that of the Administration. As we stated in *Sanwidi*, when the Dispute Tribunal (and the Appeals Tribunal) conducts a judicial review, it does not engage in a merit-based review:

(...) Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. This

³⁸ *Cherneva v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-870, para. 30. See also *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-849, para. 19.

³⁹ *Yolla Kamel Kanbar v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1082, para. 29; *Orabi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-884, para. 20, citing *Kule Kongba* Judgment, *op. cit.*, para. 26; *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-311, para. 32.

⁴⁰ *Orabi* Judgment, *op. cit.*, para. 21. See also *Kule Kongba* Judgment, *op. cit.*, para. 27.

process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

85. In the present case, the Appeals Board very thoroughly conducted a judicial review of the administrative decision under challenge. It carefully reviewed the legality of the contested administrative decision from every possible angle in accordance with the applicable law and established the critical facts of the case. The Appeals Board was cognizant of the Appeals Tribunal relevant jurisprudence governing the exercise of discretionary authority by the Administration and correctly applied the right test that the latter had to pass, without substituting its own assessment for that of the Administration.

86. In the first place, following its review of the formal legality of the challenged decision, the Appeals Board thereafter examined its rationality. It reached the conclusion that the ICAO Secretary General had been able more than minimally to demonstrate that full and fair consideration had been given to Dr. Heftberger's candidacy in the selection process for the Chief position and that the procedures set out had been followed. It was therefore left for Dr. Heftberger to show that the process was flawed in that "she did not receive full and fair consideration of (...) her candidacy, the applicable procedures were not followed, the members of the panel exhibited bias, or irrelevant material was considered or relevant material ignored".⁴¹

87. In this respect, the Appeals Board opined that:⁴²

... The procedural process was in compliance with the regulatory requirements:

a. An Interview Panel of 3 was formed, including the hiring manager. Two members of the Panel were subject experts, the third member was from outside the hiring department.

b. The Panel reviewed all of the applications as part of a long list, noting whether they met the criteria for the Post, as set out in the vacancy notice, establishing a shortlist of 9 candidates to be interviewed. This shortlist was reviewed by Human Resources.

⁴¹ Impugned Decision, paras. 9.3.4 and 11.1.

⁴² *Ibid.*, para. 9.3.4.a–9.3.4.g.

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 reviewed and considered by the APB for recommendation of the final candidates to the Secretary General. The APB was properly constituted, with all members being in attendance.

g. As part of the considerations of the APB, its members were provided with the applications for the Post of the three most highly ranked candidates. They undertook a separate verification process. The members of the APB were all directors and can be assumed to have knowledge of the experience and qualifications of the candidates from the information provided by the candidates in their application forms. The members of the APB had access, upon request, to the personnel files of the Organization in respect of each of the three candidates. It is apparent that verification of the qualifications and skills required for the Post was undertaken by the APB, as the Executive Summary of its deliberations in respect of the Post contains the following specific reference: 'The Board agreed with the ranking of the top three (3) candidates. The Board also noted that clarification was obtained regarding the experience of the 2nd ranked candidate and how he fully meets the requirements of the post'.

88. We find that the evidence on record supports these findings. This Tribunal is satisfied with the detailed analysis of the totality of the evidence by the Appeals Board and agrees with the well-reasoned conclusion it reached.

89. As we stated in *Aliko*:⁴³

... [I]t is not the function of the Dispute Tribunal [...] to take on the substantive role with which the interview panel was charged. Rather, the Dispute Tribunal reviews

⁴³ *Aliko v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-540, para. 30. See also *Cardwell v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-876, para. 26.

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, or irrelevant material was considered or relevant material ignored.

90. In the present case, we agree with the Appeals Board that there was no evidence forthcoming from Dr. Heftberger 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 and that some members of the interview panel were biased. These are very serious claims that have to be established by clear and convincing evidence in order to rebut the general presumption of regularity.⁴⁴ Hence, the burden of proof shifted to Dr. Heftberger to rebut the presumption of regularity of the selection process and prove her allegations and there is no evidence that she had done so.

91. Indeed, as the Appeals Board correctly found on the evidence on file and the witnesses' testimonies, both the interview panel and the APB had concluded that all of the top three ranked candidates met the requirements for the Chief position. They had done so on the basis of the material presented to them by the candidates and upon their verification of such. The APB had independently verified the skills and qualifications of the top three ranked candidates.

92. Further, the Appeals Board set out its analytical thoughts on the reliability and probative value of the testimonial evidence provided by Dr. Heftberger's witnesses at the hearing before it, i.e. that of C.R., C.E., K.N. and P.B. In this context, it noted that:⁴⁵

... The evidence of the witnesses called by the Applicant was directed to either support for the Applicant in respect of a belief by the witnesses that the Applicant was the best candidate for the post or to provide the views of the witnesses in respect of the selected candidate, and to a lesser extent, the second ranked candidate. This evidence was of little, if any, assistance to the Appeals Board, as it could not be directed to the

⁴⁴ *Lemonnier v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-762, paras. 34-36.

⁴⁵ Impugned Decision, para. 10.1.b.

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. S.J. further stated, in respect of the interview for this post, that the interview panel was made up of three people. Two were subject matter specialists and one was from a different department. The hiring manager arranged who was on the interview panel.⁴⁷ The witness then proceeded to testify about the next step, namely that of the preparation for the interview, saying that:⁴⁸

... The hiring manager submits to Human Resources a list of questions which are to be asked of all candidates. These are checked against the job vacancy to ensure that they relate to the competencies set out in the vacancy notice. They are not reviewed in respect of technical matters. The check is made to ensure that the interview panel is only asking questions which relate to the position and not additional matters which would take the candidates by surprise or would be irrelevant. The interview process involves each of the candidates being asked the same questions. Their answers are noted and ranked by the interview panel members. The ranking is then collated and, in this matter, the top three candidates were ascertained and put before the APB, which is made up of the Directors of the five departments of ICAO. (...) The APB is tasked with considering the three top-ranked candidates to ensure and verify that they possess the skills and qualifications in respect of the vacancy. They also consider issues of gender

⁴⁶ *Ibid.*, para. 8.2.11.

⁴⁷ *Ibid.*, para. 8.2.12.

⁴⁸ *Ibid.*, para. 8.2.13.

and geographical distribution of the candidates. Following its considerations, the APB makes a recommendation, recorded in an “Executive Summary”, which is provided to the Secretary General who makes the decision as to whom to appoint. The Secretary General has a discretion to adopt the recommendation or not.

96. In terms of the verification of skills and qualifications of the candidates, S.J. gave his testimony that:⁴⁹

... [T]he self-declaration of an applicant is found in the application for a post. When a person first joins ICAO, the statements that they make in the application are verified with the employer of the candidate for a position. There is a request made by ICAO of the former employer which relates to the particular competencies required for the position applied for and generally. The reply from the former employer goes onto the personnel file of the staff member of ICAO. This applies to all staff.

... When verifying whether an internal candidate has the requisite experience for a position and that the claims made in their application are correct, verification is conducted by an examination of their performance reports, the last two of which are required to be provided when applying for a post. The whole of the personnel file may also be consulted. It is the role of the APB to undertake a final verification in respect of ensuring that the candidates being considered possess the required skills and qualifications as contained in the job vacancy. Members of the APB have access to the applications, and thus the last two years of performance reports, and can request to see other information from the personnel file of the candidates. In this case this was done. It is evident from the Executive Summary of the APB, dated 16 October 2014, that there was consideration given to the experience and qualifications of the three recommended candidates, as the APB recorded under ‘Considerations of the Board’ that, ‘The Board also noted that clarification was obtained regarding the experience of the 2nd ranked candidate and how he fully meets the requirements for the post’.

97. Finally, S.J. stated that “it is the interview panel who creates the short list of candidates to be interviewed and that they verify the qualifications for [the] post”. He also testified that “there was a document which set forth an analysis of the requisite qualifications for the job and how each candidate met such” and that such a document was part of the “‘long list of candidates’, where there [were] columns specifying the meeting, or otherwise of the qualifications by each of the applicants for the post”.⁵⁰

⁴⁹ *Ibid.*, paras. 8.2.15 and 8.2.16.

⁵⁰ *Ibid.*, paras. 8.2.19 and 8.2.20.

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 most part on the evidence the Administration reviewed in making the non-selection decision; not evidence outside the administrative record of which the Administration was not aware. And certainly not evidence outside the record relating to the qualifications of the selected candidate.

99. Hence, we agree with and uphold the Appeals Board's holding that:⁵²

The witnesses [C.R., C.E., K.N. and P.B.] were not involved at all in any part of the selection process. Insofar as they expressed an opinion in respect of the lack of formal managerial or financial experience of the successful applicant, then they did so 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. To the extent that the witnesses for the Applicant gave evidence concerning their views concerning the management experience of the selected candidate, they made an assumption as to what was required, what was verified or what was found by those involved in the selection process as to managerial experience of the selected candidate and the second ranked candidate.

100. Of course, this does not mean that a staff member cannot present evidence outside the administrative record to show bias or ill motive against him or her or in favour of the selected candidate. That is a different matter. In fact, Dr. Heftberger made an effort to present such witness testimonies and circumstantial evidence to the effect that irrelevant matters had been taken into account, or that relevant matters had not been considered by the Administration, during the selection process or when the decision was taken to appoint the first-ranked candidate. However, Dr. Heftberger has not been successful in convincing the Appeals Board or this Tribunal that the presented evidence was of sufficient weight to rebut the presumption of regularity and to shift the burden of proof back to the Administration. In other words, Dr. Heftberger did not meet her burden to show by clear and convincing evidence that such flaws existed which rendered the selection procedure not fair, transparent and non-discriminatory.

⁵¹ *Lemonnier* Judgment, *op. cit.*, para. 38.

⁵² Impugned Decision, para. 10.1.b.

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 appointment. In this respect, the Appeals Board rightly pointed out the fact that Dr. Heftberger had been considered as one of the top three ranked candidates, out of the 65 applicants who had applied for the Chief position. The review process of the APB also disclosed that it considered Dr. Heftberger, determining that she should be ranked as third in the reference of the appointment to the ICAO Secretary General. Further, there is no evidence that the ICAO Secretary General did not fully consider the recommendations of the APB. Dr. Heftberger had been treated in the same manner as the other candidates.

102. Consequently, we reject as without merit Dr. Heftberger's assertions that: i) there was no method in place to ensure consistency in the scoring for the same questions; and ii) there existed no documented evidence, such as minutes, on "a) agreement by all interview panel members with the hiring manager's final report, b) on the APB members review of advance submitted documentation, c) on the by [S.J.] mentioned presentation made by the hiring manager and the APB Chair's briefing, and d) on actual discussion of the requirements set out in the job description".

103. Next, the Appeals Tribunal finds no error in the Appeals Board's conclusion that Dr. Heftberger had failed to establish that the selection decision was tainted by improper motives, resulting from bias against her and favour of the selected candidate. Rather, the selection decision, as correctly determined by the Appeals Board, was a legitimate exercise of the Administration's discretion.

104. Concerning the allegations of bias, the Appeals Tribunal has held that:⁵³

... Bias is an element of natural justice which examines not only the mind of the decision-maker subjectively but also examines the manifestation of the process of decision-making objectively. Put another way, a decision is not only biased if made by a decision-maker deliberately intending to favour or disadvantage the subject of it for improper reasons. Bias can also occur unintentionally on the part of the decision-maker if, considered objectively, a neutral, reasonable and informed bystander would conclude

⁵³ *Hatim Mahmoud Sobier v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1208, paras. 29-31.

that it is likely to have been made to favour or disadvantage improperly the person affected by the decision. This is sometimes called ‘a reasonable apprehension of bias’. Its ascertainment is an objective exercise, and it arises and is entirely dependent on the circumstances of the case.

... Unconscious bias or unconscious prejudice, sometimes based on inaccurate stereotyping of persons or classes of people, is a now well-recognised phenomenon in many legal systems. Its application may, if detected objectively, cause a decision to have been made improperly and so be unsupportable. However difficult in practice it may be to make an accurate assessment of the subjective mind of the decision-maker to determine whether a decision was infected by bias, an objective consideration of all other relevant factors may nevertheless bring the tribunal to the decision that bias was established.

... An ill-motivated decision includes not only one in which the decision-maker is deliberately motivated to maliciously deprive the staff member of what would otherwise have been the staff member’s entitlement: an ill-motivated decision can also include one where the decision-maker’s reasons are simply wrong in law, for example by taking into account irrelevant, or failing to take into account relevant, considerations. While the word ‘ill’ in the phrase ‘ill-motivated’ can include moral wrongfulness, it can also include what might be called innocent or mistaken or negligent wrongfulness. The important element is wrongfulness, not the subjective attribution to the decision-maker’s motive for its occurrence.

105. Dr. Heftberger submits that the Appeals Board “erred when it failed to effectively assess the evidence of prejudice and improper motivation intended to manipulate the selection process, including but not limited to [N.G.]’s tainted transfer initiatives prior to the publication of the [vacancy notice]”. In this regard, Dr. Heftberger, *inter alia*, points to the witness testimonies of: i) C.E. who provided character evidence from his own experience and described the then ICAO Secretary General as “involved in politics related to staffing arrangements” which allegedly supports her claim of his preference to recruit several French nationals during his tenure regardless of qualification, consideration of geographical representation and/or gender; ii) C.R. who testified that N.G., in her function as Director, “made the utmost to ensure that all her proteges received Chief posts prior to her departure, which included both” the first and second ranked candidates, and that she wanted to get rid of Dr. Heftberger; and iii) P.B. who described N.G.’s initiatives to transfer Dr. Heftberger as well as the amicable relationship which existed in his opinion between some members of the interview panel and the selected candidate.

106. We do not accept Dr. Heftberger's assertions. First of all, the Appeals Board addressed in detail each of the parameters of the alleged ulterior motives and found them unsound. It examined all of the critical facts and assessed all of the witnesses' testimonies, as well as Dr. Heftberger's allegations and testimony before it and came to the conclusion that she failed to meet the burden of proof that the decision was based on ulterior motives.

107. Notably, in this context, the Appeals Board found that there was no evidence that the interview panel was incorrectly formed in respect of its membership so as to support any bias, or that it, in any event, functioned in a biased manner.⁵⁴ The Appeals Board made specific reference to the alleged close friendship between members of the interview panel and the selected candidate by holding that:⁵⁵

... There is evidence that most people within ICAO know each other, in some manner or another. There was evidence that the selected candidate was known to at least two members of the Interview Panel. There was no clear and convincing evidence which could lead to a finding that there was a close friendship which would have been such as to require a recusal of any member of the Interview Panel. (...) The issue of knowledge of candidates applying for positions, especially when they are internal candidates is a matter which frequently occurs, to varying degrees. (...) Where an organization, or a unit within an Organization is small, then there must be a presumption that those sitting on interview panels will act properly, professionally and independently and in conformity with any Code of Conduct when undertaking their assigned task. If this is not the case, then from a practical point of view it may not be possible to make any selection in an informed and properly assessed manner. Such presumption is clearly rebuttable. In this case there is not the evidence to support such rebuttal.

108. These findings of the Appeals Board go along with its similar holdings, per the evidence on file, that Dr. Heftberger has not made out that there existed any form of bias against her by N.G. in terms of alleged suggestions that she move to a different post in Paris and/or to be "in a front office". She did not establish any kind of immediately apparent causal link between these suggestions and any form of bias. Moreover, it correctly concluded that "it [was] unable to find on a clear and convincing basis that the evidence [led], in respect of either of the first two ranked candidates, to a conclusion that there has been favouritism or nepotism in the selection and appointment process for the Post in breach of the Anti-Fraud and

⁵⁴ Impugned Decision, para. 10.1.e.

⁵⁵ *Ibid.*, para. 10.1.g.

Anti-Corruption Policy”, and that “[t]here [was] no evidence whatsoever of the Chair [of the APB] acting improperly or having undue influence on the other members of the APB. The only witness who was present at the meeting of the APB, [S.J.], gave no support for such contention”.⁵⁶

109. These are accurate conclusions drawn from the evidence on record and common knowledge. We find no reason to differ from them. As already noted, the comprehensive record demonstrates that the selection decision was lawful.

110. Dr. Heftberger’s candidacy was given full and fair consideration. Undoubtedly, she was well qualified for the Chief position. However, as the Appeals Board correctly held, from the rankings and the final decision of those directly involved in the decision-making process, it was determined that there were others who better match the requirements for the position.

111. Furthermore, it was not the task of the Appeals Board, or for that matter, the role of this Tribunal, to step into the shoes of the Administration and repeat the selection procedure or to assess the candidates’ qualifications and technical expertise, namely whether they met or lacked, at the material time, the required skills and experiences for appointment to the Chief position, as Dr. Heftberger requests us to do. These are technical matters which have been properly determined by the decision-maker, as already noted.

112. As the Appeals Board rightly observed when it made its final determination on the legality of the selection exercise:⁵⁷

... It may well be that the qualifications and experience of the Applicant are better than those of the selected candidate, a view shared by the Applicant and her witnesses. The process of review undertaken by the Appeals Board is not to revisit the conclusions reached by the decision maker and the decisions along the way and come to a different final decision. The Appeals Board must examine the selection processes and look for error, supported by clear and convincing evidence, which would be such as to rebut the presumption of regularity or otherwise amount to an error which would render the decision to appoint the selected candidate to have been unsupportable and thus to be rescinded. The reversal of the onus of proof based upon the presumption of regularity where minimal compliance is shown by the respondent, as in this case, is such that an applicant must produce clear and convincing evidence to support the contentions of

⁵⁶ *Ibid.*, paras. 10.1.i-10.1.l.

⁵⁷ *Ibid.*, para. 11.2.

error set forth the application. The evidence in this case has simply not been sufficient to rebut the presumption of regularity, to support contentions of bias or other error, with a number of matters alleged in the application as errors in the application having no evidence proffered to support them. The Applicant admitted in the papers filed at an early stage of the case that many of her allegations were not supported by any apparent evidence. It may well be that she had hoped that during the course of the matter such evidence would be disclosed. It was not, and thus the final order in the matter is made.

113. Finally, as already alluded above, Dr. Heftberger has not made out her case about the improper motives. The mere allegations of bias against her, as well as the impact and causal link of the alleged facts, which constituted the basis of her allegations about bias, do not amount to proof of such motives.

114. On appeal, Dr. Heftberger, while pointing out the alleged “organizational objectives, policy, and continuous encouragement by ICAO Council for women to apply for vacant posts”, claims further that the Appeals Board erred in finding that the contested administrative decision was lawful from the perspective of gender equality and geographical representation as she was the only shortlisted female and ranked last among the three finalists. She argues that “[n]either the sparse longlist nor any APB minutes provide details on how gender and geographical distribution were considered”.

115. Dr. Heftberger had put in an allegation before the Appeals Board asserting that “contrary to Assembly Resolution commitments and slogans, the ICAO policy on promoting female competent candidates was totally ignored”.⁵⁸ The Appeals Board dismissed her allegation reasoning that:⁵⁹

... [T]he Staff Regulation directs the appointment of staff members on a competitive basis. No distinction is made as to gender. The Service Code provides no exception in this regard, nor does it mandate the appointment of female candidates irrespective of qualification. It is clear from the Executive Summary of the APB that the matter of gender was considered, with a decision being that no change to the ranking was made on this basis. The applicant disputes the legality of the decision. The Appeals Board finds that there is no evidence of any error in the making of the decision and it has been made in a manner in conformity with the administrative and regulatory requirements.

⁵⁸ *Ibid.*, para. 10.1.m.

⁵⁹ *Ibid.*

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 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. We recall that "priority consideration" cannot be interpreted as a promise or guarantee to be appointed.⁶⁰

Due process issues

118. Dr. Heftberger raises a variety of challenges to the correctness of the Appeals Board's conclusions and additionally criticizes the fairness of the Appeals Board's general approach and management of her case.

119. In this respect, Dr. Heftberger submits, *inter alia*, that the Appeals Board erred in its assessment of the witnesses' testimonies as well as when it uncritically accepted the diverging statements of S.J., "whose testimony reveals further deficiencies, including accepting an applicant's self-declaration without independent verification". Dr. Heftberger argues further that the "absence of documentary evidence on an accurately conducted cross-check of

⁶⁰ *Tiwathia v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-616, para. 19.

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" and that the Appeals Board erred in concluding that the ICAO Secretary General has ensured that the selection was carried out in compliance with "applicable requirements and procedures, including documented evaluation of candidates' qualifications".

120. It is our settled case law that the first instance Tribunal has broad discretion to determine the admissibility of any evidence and the weight to be attached to it. As we recalled in *Abdeljalil*:⁶¹

... Our jurisprudence has consistently held that 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. We will intervene only in clear cases of denial of due process of law affecting a party's right to produce evidence.

121. In the present case, we do not accept Dr. Heftberger's argument that this threshold has been met. An objective review of the impugned Decision reveals that the Appeals Board meticulously and carefully examined the existing evidentiary material and weighed its credibility and reliability in a proper way. Notably, in terms of the witnesses' testimonies, where it was deemed appropriate, the Appeals Board challenged the witnesses about certain aspects of their statements taken during the hearing. Hence, it is not accurate that the Appeals Board misevaluated or ignored any kind of evidence. As evident on the face of the impugned Decision, read as a whole, the Appeals Board took stock of the totality of the evidence, including the testimonies of Dr. Heftberger's witnesses. Upon exercising its discretion to determine the admissibility of any evidence and the weight to be attached to it, it

⁶¹ *Abdeljalil v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-960, para. 43. See also *Uwais v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-675, para. 27, citing *Wu v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-597, paras. 34 and 35; *Lemonnier* Judgment, *op. cit.*, para. 37, citing *Ljungdell v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-265, para. 26.

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 failed, however, to demonstrate any error in the Appeals Board's finding that the Administration's decision not to select her for the Chief position was not a valid exercise of its discretionary power. She similarly has failed to show that the administrative decision was tainted by improper motives or was otherwise unlawful. She has not met the burden of proof in demonstrating an error in the impugned Decision such as to warrant its reversal. She merely voices her disagreement with the Appeals Board's findings and resubmits her arguments to this Tribunal.

124. Finally, we have considered the remaining grounds of Dr. Heftberger's appeal with regard to her due process rights and found nothing convincing us to interfere with the impugned Decision.

125. For all these reasons, the Appeals Tribunal finds that the Appeals Board did not make errors of law and fact when it concluded that the decision not to select Dr. Heftberger for the Chief position was lawful.

Request for damages

126. Dr. Heftberger's claim for compensation for the damage to her reputation, career prospects and health is rejected. Since no illegality was found, there is no justification for the award of any compensation. As this Tribunal has stated before, "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".⁶²

⁶² *Kule Kongba* Judgment, *op. cit.*, para. 34, citing *Kucherov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-669, para. 33, in turn citing *Wishah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-537, para. 40 and citations therein. See also *Nwuke v. Secretary-General of the United*

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 Raikos, Presiding

(Signed)

Judge Colgan

(Signed)

Judge Knierim

Judgment published and entered into the Register on this 4th day of August 2023 in New York, United States.

(Signed)

Juliet Johnson, Registrar

Nations, Judgment No. 2015-UNAT-508, para. 27; *Oummih v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-420, para. 20; *Antaki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-095, para. 23.

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.