

**DECISION OF THE PANEL OF ADJUDICATORS OF THE OSCE WITH  
REGARD TO THE EXTERNAL APPEAL BY ██████████**

(CASE No: OSCE PoA 3/2018)

*Proceedings*

1. The Chairperson of the Panel of Adjudicators (PoA) of the OSCE received on 3 May 2018 a letter from the Chairperson of the Permanent Council the OSCE transmitting an external appeal by ██████████ (Applicant).
2. The Chairperson of the Panel, through the Executive Secretary of the Panel, informed the Secretary General of the OSCE (Respondent) and the Applicant on 14 May 2018 of the constitution of the Panel and asked them to forward any further communication to the Panel as per Article 5 of the Rules of Procedure of the Panel to reach the Panel no later than 13 June 2018. The Applicant filed an addendum on 12 June 2018, and the Respondent forwarded his reply on 13 June 2018. The addendum was transmitted to the Respondent on 13 June 2018, advising him that he has a right to file a further statement by 3 July 2018. The reply was sent to the Applicant on the same day, advising ██████ that ██████ has the right to respond by 3 July 2018. The Applicant did so on 2 July 2018, and the Respondent filed his response on 3 July 2018.
3. In accordance with Article VI of the Terms of Reference of the Panel, the Chairperson of the Panel convened the Panel on 13 and 14 September 2018 at the Hofburg premises at Vienna to examine the appeal. The Panel was composed of its Chairperson, Mr. Thomas Laker, its Deputy Chairperson, Mr. Gennady Kuzmin and its member, Ambassador Andrei Popkov.
4. After examining all the documents submitted to it, the Panel noted that the Applicant's claims include the following:
  - a) Immediate release of ██████ Provident Fund balance plus the statutory rate of interest since June 2017;
  - b) Compensation for material and moral damage;
  - c) Punitive damages against OSCE for willfull violation of Staff Rules and Regulations;
  - d) Costs associated with the adjudication.

*Summary of facts*

5. The Applicant, a former member of the ██████████ - ██████████ OSCE ██████████ who held various positions, finally as ██████████ ██████████ until 31 May 2017, contests the decision to withhold a portion of ██████████ Provident Fund benefits.
6. Pursuant to a report of OSCE's Office of Internal Oversight (OIO), from 2010 to 2016 an estimated loss of more than 250 000 EUR appeared at ██████████ in relation to fraud schemes, price overcharging and omissions of obligation involving fuel paid for ██████████. The report concluded that the Applicant omitted to fulfill some of ██████████ professional obligations, namely ██████████ supervisory obligations ██████████ ██████████ and ██████████ responsibility to ensure compliance with OSCE's Administrative Regulations, Rules and Instructions.
7. Based on the findings of the OIO report, by letter of 28 June 2017, ██████████ ██████████ informed the Applicant about the decision to freeze ██████████ Provident Fund disbursement until further procedures were completed and the extent of the Applicant's financial liability had been determined.
8. By email of 3 July 2017, the Applicant acknowledged receipt of the above letter; ██████████ argued that this freeze be illegal and requested the immediate release of ██████████ Provident Fund benefits.
9. On 10 July 2017, the ██████████ ██████████, in response to the Applicant's message of 3 July 2018, clarified that the withholding was merely a holding measure and would not represent neither a disciplinary measure nor pre-determine the outcome of a review. It was explicitly decided to limit the withholding to the amount of four months of net base salary.
10. By message of 10 August 2017, the Applicant was informed that disciplinary process and withholding of benefits were separate proceedings. In relation to the freeze the message reads: "However, should you feel that the decision to withhold a portion of your Provident Fund is one which you want to appeal, you are hereby advised of the appeal procedures set out in accordance with Article X of the OSCE Staff Regulations and Staff Rules."

11. In [REDACTED] email of 20 August 2017, the Applicant again raised a number of legal questions and indicated them as “central topic of the pending application for a legal opinion by the Panel of Adjudicators, as a first immediate step”.
12. By email of 1 September 2017, the Applicant was “reminded of the measures available ... under OSCE Staff Regulations and Staff Rules, in particular those detailed under Article X pertaining to requests for internal review and appeal.”
13. In an email of 11 November 2017, addressed to [REDACTED], the Applicant mentioned that [REDACTED] had “now prepared a formal request to initiate the administrative review procedure, starting with the Internal Review Board”.
14. In [REDACTED] letter of 20 November 2017, [REDACTED] [REDACTED] informed the Applicant of the decision not to pursue disciplinary procedure. However, [REDACTED] decided to place a copy of the OIO Investigation Report in the Applicant’s personal file. Further, with respect to the financial losses suffered by OSCE, the Applicant was informed that “there is a need to assess the degree of responsibility (if any), and the corresponding level of financial liability, including the amount of reimbursement in relation to the liability that may be established.” The Applicant was advised, that this matter was referred to the Funds Materials Management Committee. A decision of this Committee, to the Panel’s best knowledge, has not yet been taken.
15. In [REDACTED] request for internal review, dated 11 December 2017, the Applicant considered as date of notification of the impugned decision “20-Nov-2017”. In [REDACTED] pleadings, the Applicant repeatedly criticized the withholding of [REDACTED] retirement funds, arguing that there was no legal basis for such course of action. In addition, [REDACTED] contested the decision to place a copy of the OIO Investigation Report in [REDACTED] personal file.
16. After establishment of an Internal Review Board (IRB), on 21 February 2018 the IRB informed the Secretary General of OSCE of its decision to declare the part of the appeal challenging the decision of 28 June 2017 to withhold the Applicant’s share of the OSCE Provident Fund as irreceivable since the Appellant did not have legitimate reasons for not having submitted [REDACTED] request within the prescribed time limit. The IRB added: “Members of the Internal Review Board would strongly recommend the Appellant to appeal against the impugned administrative decision of 28 June 2017 to

the second tier of the internal justice system, namely to the Panel of Adjudicators. Members of the Internal Review Board believe that the interim measure to withhold (fully or partly) ██████████ share of the OSCE Provident Fund upon ██████ separation from OSCE is not justified either by the decision of the Disciplinary Committee or Fund Material Management Committee.”

17. By letter of 6 March 2018, the Secretary General informed the Applicant about said IRB decision.

18. In ██████ present request for external review, dated 20 March 2018, the Applicant indicates as contested decisions (1) the decision to withhold ██████ retirement funds, as well as (2) a disciplinary measure of withholding of same funds. As date of notification of the impugned decision ██████ puts “28/June/2017, as amended through 20-Nov-2017”.

#### *Contentions of parties*

19. The Applicant’s major contentions are:

- Since the IRB recommended to file an external appeal, ██████ application for review is receivable;
- The final decision was only taken on 20 November 2017 which ██████ contested in a timely manner;
- There is no legal basis for seizure of personal retirement funds;
- Withholding Provident retirements is not in line with various internal provisions.

20. The Respondent's major contentions are:

- Since the Applicant failed to meet the deadlines of the internal appeals procedure ■■■ cannot be afforded access to the external appeals procedure on the merits of the case;
- Since the Provident Fund can be interpreted as an OSCE emolument, Staff Rule 5.06.1 provides for a sufficient legal basis for the withholding to cover financial liabilities.

*Considerations*

*Procedural issues*

*Scope of the application*

21. In ■■■ request for external appeal, the Applicant seems to understand the withholding of the retirement funds as both an administrative decision as well as a disciplinary measure. However, the withholding of financial means is not part of the disciplinary measures as listed in Staff Regulation 9.04. Therefore, the Panel will not address any disciplinary issues in this decision.

*Timeliness of the internal appeal*

22. Pursuant to Staff Regulation 10.01 (c), which deals with the OSCE's Internal Appeals Procedure, to be considered an appeal shall be lodged within thirty days from the date of the notification of the impugned decision.

23. The Panel notes that the Applicant filed ■■■ internal appeal on 11 December 2017, based on the assumption that the notification of the impugned decision took place only on 20 November 2017.

24. The Panel recalls that, pursuant to an established tradition in international administrative law and its own jurisprudence, an administrative decision may be

defined as a unilateral decision taken by the administration in a precise individual case which produces direct legal consequences to the legal order (see Panel's decision of 24 November 2017, OSCE PoA 1 /2017 para. 15; decision of 20 April 2018, OSCE PoA 4/2017, para. 21).

25. Contrary to the Applicant's view, the communication of 20 November 2017 does not amount to a final decision regarding the issue of withholding the Provident Fund benefits. According to this message, the matter "of reimbursement in relation to the liability" had been referred to the Funds Material Management Committee for further consideration.
26. By contrast, with respect to the contested partial withholding of the Applicant's retirement funds, the Panel takes note that in the letter of 10 July 2017, the Administration clearly took the unilateral decision to withhold four months of net salary from the Applicant's Provident Fund holdings, thus specifying the decision communicated in the letter of 28 June 2017. There is no doubt that the decision of 10 July 2017 fulfils all criteria of an administrative decision. It was sent by [REDACTED] [REDACTED] by email which is a proper way of notification (see Panel's decision of 20 April 2018, OSCE PoA 4/2017, para. 22 and 23). Therefore, the time-line to lodge an internal appeal against this decision started to run from the day following its notification. Further, it follows that the Applicant's internal appeal of 11 December 2018 was not submitted within the prescribed time-limit.
27. In the interest of justice and equal treatment, time limits are to be enforced strictly. Compliance with time-limits is among each party's responsibilities (see Panel's decision of 24 November 2017, OSCE PoA 2/2017, para. 23; decision of 20 April 2018, OSCE PoA 4/2017, para. 25). No legitimate reasons for not having submitted the request within the prescribed time-limit (cf. Art. III para. 3 of the Internal Appeals Procedure, Appendix 12 to the Staff Regulations and Staff Rules) have been asserted. Pursuant to the exchange between the Administration and the Applicant, the latter was quite aware of the intention to withhold [REDACTED] retirement funds as early as 28 June 2017. The Applicant commented on these plans as from 3 July 2017, and continued to do so on 20 August, without formally contesting the crucial decision of 10 July 2017. Although this option was explicitly emphasized in the messages of 10 August 2017

and 1 September 2017, the Applicant did not take formal action before 11 December 2017.

28. As the Panel has held, the waiving of legally prescribed time-limits may in general only be appropriate where the delay was caused by exceptional circumstances beyond an applicant's control (see decision of 20 April 2018, OSCE PoA 5/2017, para. 15). No such circumstances can be found. It is also a general principle of law that ignorance of legal provisions – including time-lines etc. – is no excuse.
29. It follows from the above that the Applicant's request for internal review was delayed and, accordingly, was rightfully rejected as irreceivable.

#### *Merits*

30. Pursuant to Staff Regulation 10.02., the right of final appeal to the PoA is granted "further to the procedure established in Regulation 10.01.", i.e the internal appeals procedure. Further, Staff Rule 10.02.2 (d) states that an application to the PoA shall not be admissible unless it complies with the requirements of the internal appeals procedure. Read together, it follows that access to the PoA can only be granted where the formal requirements of the Internal Appeals Procedure have been met.
31. Since, in the present case, the initial appeal has not been lodged within the time-limit as established in Staff Regulation 10.01 (c), the Panel is prevented from considering its substance and merits (see decision of 2 November 2017, PoA OSCE 2/2017, para. 26).
32. The Panel notes with regret that the IRB, in its decision of 21 February 2018 recommended the Appellant to appeal against the impugned decision "to the second tier of the internal justice system, namely to the Panel of Adjudicators". This recommendation is not in line with the Panel's jurisprudence on the effects of a delayed request for internal review, as indicated above. Of course, it also has no binding effect for the Panel.
33. In view of the foregoing, all claims of this application are rejected.

34. This being said, the Panel recalls the IRB's doubts regarding the substantial legality of the Organization's approach in this case. The OSCE Staff Regulations and Staff Rules presumably contain some *lacunae* with regard to the procedures of taking and enforcing provisional measures to partially withhold financial assets of OSCE officials with the intention to compensate financial losses. The OSCE is called upon to address these open questions in the interest of clarity and justice.

Done in Vienna, on 14 September 2018



Thomas Laker  
Chairperson of the Panel



Gennady Kuzmin  
Deputy Chairperson of the Panel



Andrei Popkov  
Member of the Panel