

**DECISION OF THE PANEL OF ADJUDICATORS OF THE OSCE WITH
REGARD TO THE EXTERNAL APPEAL BY [REDACTED]
(CASE No: OSCE PoA 1/2017)**

Proceedings

1. The Chairperson of the Panel of Adjudicators (PoA) of the OSCE received on 24 January 2017 a letter dated 18 January 2017 from the Chairperson of the Permanent Council the OSCE transmitting an external appeal by [REDACTED] (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 26 January 2017 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 24 February 2017. The Applicant filed a submission on 24 February 2017, including an addition on the relief sought as well as a request for an oral hearing. The Respondent forwarded his reply on 24 February 2017 which was transmitted to the Applicant, advising [REDACTED] that [REDACTED] has a right to file a rebuttal by 16 March 2017. The Applicant filed such rebuttal on 16 March 2017 which was transmitted to the Respondent for information. Without leave from the Panel, the Respondent submitted a surrebuttal on 20 March 2017. On the request of the Panel both parties submitted additional information. All documents were communicated to the parties.
3. In accordance with Article VI of the Terms of Reference of the Panel, the Chairperson of the Panel convened the Panel on 13-14 July 2017 at the Hofburg premises at Vienna to examine the appeal. The Panel was composed of its Chairperson, Mr. Thomas Laker, Ms. Anna Csorba and Ms. Jenny Schokkenbroek.
4. After examining all the documents submitted to it, the Panel noted that the Applicant's claims include the following:
 - a) to strike out Staff Regulations and Staff Rules, Regulation 4.01,
 - b) to strike out Staff instruction 17/1, Articles 7.1.2 and 7.3,
 - c) to invalidate the impugned decision,
 - d) to rule that all staff/mission members shall be treated equally in recruitment, promotion and transfer without discrimination on age, and /or status,
 - e) compensation for material damage.

5. The Panel took also note of the Applicant's request for an oral hearing in [REDACTED] message dated 5 April 2017. This request was rejected on 11 April 2017.

Summary of facts

6. The Applicant, [REDACTED], is [REDACTED] on secondment [REDACTED], serving since 1 June 2016 as [REDACTED] in the OSCE [REDACTED]. Prior to this assignment, the Applicant was employed between 13 June 2014 and 31 May 2016 as [REDACTED] secondment [REDACTED] and serving as [REDACTED] in the OSCE [REDACTED].
7. In February 2016 the Applicant submitted an application for the fixed term contracted position of [REDACTED] via the OSCE's online application system. On 30 June 2016, the recruitment process was closed. From that day on, in the online application system, the status of the Applicant's candidature changed from 'active Application' to "Rejected by Mission/Institution". On 1 July 2016, the selected candidate was appointed.
8. Sometime in August 2016, the Applicant who had not been formally notified about the outcome of the selection process, inquired with [REDACTED] via telephone about the status of [REDACTED] application. Pursuant to the Applicant's information [REDACTED] was told that [REDACTED] was not long-listed and that [REDACTED] had not received the Applicant's name from [REDACTED].
9. On 30 August 2016 the Applicant sent an email to the Department of Human Resources [REDACTED] about the status of [REDACTED] applications for other positions, including the position in the [REDACTED]. On 19 September 2016 Applicant received an answer from the Department of Human Resources including the following paragraph:

"[REDACTED]: Non-inclusion on the long list was linked to the provisions on age grounds in the recruitment policy whereby somebody must be able to fulfil 2 years should they be appointed- this essentially means being aged under 63 at the time of the appointment. In this case, the projected appointment date was July/Aug 2016."
10. On 18 October 2016 the Applicant submitted a request "to review a decision not to include me in the long list for the contract position of [REDACTED]". As date of receipt of the impugned decision, 19 September 2016 was indicated.

11. On 19 October 2016 the Respondent, *inter alia*, confirmed that the application of 18 October 2016 was “timely filed”. By letter dated 31 October 2016 the Secretary General informed the Applicant about [REDACTED] decision to waive the jurisdiction of the Internal Review Board and to authorize the appeal to proceed directly to the PoA.

Contentions of parties

12. The Applicant’s major contentions are:

- The impugned decision is based on a provision with a discriminative nature.
- Regulation 4.01 of Staff Regulation and Rules as well as Regulations 7.1.2. and 7.03 of Staff Instruction 17/1 include discrimination among seconded/contracted mission/staffmembers as well as discrimination based on age.
- [REDACTED] suffers material damage.

13. The Respondent’s major contentions are:

- The impugned decision is in compliance with OSCE Staff Regulations and Staff rules.
- The relevant provisions in Staff Instruction 17/1 are not contrary to the OSCE Staff Regulations and Staff Rules and therefore not invalid.
- The Applicant has failed to provide sufficient justification that Staff Instruction 17/1 and the OSCE Staff Regulation and Rules discriminate unfairly against different categories of Staff.
- The Applicant has failed to provide sufficient evidence to prove that Staff Instruction 17/1 and the OSCE Staff Regulation and Rules providing for a mandatory retirement age impose an arbitrary discrimination against contracted staff.

Considerations

Procedural Issues

14. Pursuant to Staff Regulation 10.01, OSCE’s internal appeals procedure for staff/mission members relates to and is limited to “administrative decisions concerning alleged non-observance of their letter of appointment or terms of assignment, or of any provisions governing their working conditions”. Accordingly, Staff Regulation 10.02 provides for “a right of final appeal to a Panel of Adjudicators against an administrative decision directly affecting him/her”. These limits of jurisdiction are repeated in Article 1 paragraph 1 of the Terms of Reference of the Panel of Adjudicators, stating that the Panel shall be competent to decide on final appeals “against administrative decisions”.

15. Pursuant to an established tradition in international administrative law, 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.
16. The Panel notes that abstract norms like general principles, laws, staff regulations or staff instructions cannot be considered as administrative decisions since they are of general character and applicability, thus not taken in an individual case. It follows from the above that it is not within the jurisdiction of the Panel to strike out general provisions as requested by the Applicant. Therefore, the Applicant's claims to strike out Regulation 4.01 of the Staff Regulations and Staff Rules as well as Articles 7.1.2 and 7.3 of Staff Instruction 17/1, as mentioned above in paragraph 4 a) and b), cannot succeed. Such an approach would exceed the Panel's powers vested in it by the OSCE Staff Rules and Regulations. The same applies to [REDACTED] general request to rule that all staff/mission members shall be treated equally in recruitment, promotion and transfer without discrimination on age, and /or status (see above 4 d)).
17. Notwithstanding the above, the Panel is not prevented from reviewing provisions of OSCE's legal framework in the context of their application in an individual case. Insofar, an implicate examination of crucial general norms is possible.
18. Further, the Panel notes that the email of 19 September 2016 the Applicant received as an answer to [REDACTED] query of 30 August 2016 does not meet the criteria for an administrative decision either. In this respect, this email did not produce any direct legal effects. Indeed, it merely informed the Applicant about the reasons for an administrative decision which had been taken long before, i.e. the decision not to consider the Applicant for the position [REDACTED] had applied for. Therefore, the Applicant's claim to invalidate the impugned decision (see above 4 c)) must also fail.
19. With respect to the Applicant's aim to submit the selection procedure at stake to a review, in the Panel's view, the only administrative decision to be considered is the decision of not selecting the Applicant for the Position [REDACTED]. This decision was taken by the administration in an individual case that produced direct legal effects to the Applicant who, therefore, could and should have contested it.
20. Pursuant to Staff Regulation 10.01 (c), to be considered an appeal shall be lodged within thirty days from the date of the notification. It is obvious that the crucial administrative decision had been taken on or before 30 June 2016, since the selected candidate was appointed on 1 July 2016.
21. The Panel is aware of the fact that the Applicant had never been notified about the outcome of the selection process at stake in writing or by other specific individual message. Notwithstanding this absence of formal information, the Panel is satisfied that the Applicant had access to sufficient information about the outcome of the

selection procedure. Due to the participation in OSCE's online application system, the Applicant had the opportunity to learn about the status of [REDACTED] application on a day to day basis. In principle, it is appropriate for candidates who have submitted their candidature via the online application system only to be informed via the same venue. The Organization fulfilled her legal obligation to inform candidates about the outcome of the selection procedure (see Paragraph 8.10.8 of Staff Instruction No.17/Rev. 1 on Standard Recruitment Procedures of 22 July 2014) by updating the respective data.

22. It follows from the above that the Applicant was notified about [REDACTED] non-selection on 30 June 2016 when the online application system showed that [REDACTED] respective application had been rejected. From that date on, the time limit to request an internal review started.
23. In addition, the Panel notes that the Applicant was aware of [REDACTED] exclusion from the selection process at latest in August 2016: First, [REDACTED] had already – in [REDACTED] words – “sometime in August” 2016 been informed by [REDACTED] Human Resources that [REDACTED] was not long-listed, and second, in [REDACTED] written query of 30 August 2016 [REDACTED] wants to know “how it happened that my file did not make the long lists”, thus admitting positive knowledge of the failure of [REDACTED] candidatures.
24. Against this background, with respect to the only relevant administrative decision of 30 June 2016, the Panel cannot but determine that the Applicant's request for internal review of 18 October 2016 does not meet the 30 day time limit established in Staff Regulation 10.01 (c).
25. The unfortunate confirmation in the Respondent's email of 19 October 2017 that the “application is timely filed” does not remedy the non-observance of the time limit, as described above. According to the applicable law, the Respondent is not entitled to waive the time limits; pursuant to Staff Rule 10.02.2 (d) (iv) it is only for the Panel to waive time limits in conditions that are not relevant in the present case.

Merits

26. Since the appeal has not been lodged in time, Staff Regulation 10.01 (c) prevents the Panel from considering its substance and merits.
27. Having said this, the Panel takes note that, to the best of its knowledge, there are no overall accepted prohibitions for statutory rules on mandatory retirement at a reasonable age. Many international organizations, including the United Nations, as well as many of their member states have established such rules. Also, some of these rules provide for different limits of age for different groups of civil servants, including flexible approaches. Therefore, where different groups are treated differently, respective rules are not *per se* in conflict with the principle of equal treatment.

28. In view of the foregoing, all claims of this application (see above 4 a) to e)) are rejected.

Done in Vienna, on 14 July 2017



Thomas Laker
Chairperson of the Panel



Anna Csorba
Member of the Panel



Jenny Schokkenbroek
Member of the Panel