

**DECISION OF THE PANEL OF ADJUDICATORS OF THE OSCE WITH REGARD
TO THE EXTERNAL APPEALS BY [REDACTED]
AND [REDACTED]
(CASE Nos.: OSCE PoA 31/2019 and OSCE PoA 36/2019)**

Proceedings

1. The Chairperson of the Panel of Adjudicators (PoA) of the OSCE received on 11 June 2019 an external appeal by 18 current and former international mission members of the OSCE [REDACTED] (Applicants) which had been forwarded to the Chairperson of the OSCE Permanent Council on 27 May 2019.
2. Since [REDACTED] had agreed to act as representative of a group of Applicants in a similar matter (see decision of 16 July 2019, OSCE PoA 2/2019 – OSCE PoA 19/2019), it was suggested that he would act as representative in the present bundle of cases. No objections were made. Subsequently, individual case numbers were assigned to 18 applications. From then on, the 18 external appeals were consolidated.
3. The Chairperson of the Panel, through the Executive Secretary of the Panel, informed the Secretary General of the OSCE (Respondent) and the Applicants on 12 June 2019 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 12 July 2019. The Respondent forwarded his reply on 12 July 2019 which was transmitted to the Applicants, advising them that they have a right to file a rebuttal by 7 August 2019. No reaction from the Applicants was received.
4. It turned out that 16 out of 18 of the external appeals were not submitted within the time-lines as requested by the rules. The Panel dealt with these applications in its decision of 6 September 2019 (OSCE PoA 22/2019 – OSCE PoA 30/2019; OSCE PoA 32/2019 – OSCE PoA 35/2019; OSCE PoA 37/2019 – OSCE 39/2019).

5. For the remaining two applications, in accordance with Article VI of the Terms of Reference of the Panel, the Chairperson of the Panel convened the Panel on 21 and 22 November 2019 at the Hofburg premises at Vienna to examine the appeal. The Panel was composed of its Chairperson, Mr. Thomas Laker, and its members Ms. Anna Csorba and Ms. Jenny Schokkenbroek.
6. After examining all the documents submitted to it, the Panel noted that the Applicants contest the 'Board and Lodging Allowances' (BLA) methodology as announced by email of 23 February 2018. They ask for rescission of this decision; further they claim that rescission would entitle each of them to 1825 EUR. Should the contested decision not be rescinded, the Applicant request a further 1000 EUR.
7. The Respondent, pursuant to his reply, holds the view that the approval of the 2018 BLA rates were valid and that the impugned decision should be sustained.

Summary of facts

8. The Applicants contest the calculation of 'Boarding and Lodging Allowances' (BLA) as provided for in Staff Regulation 5.13. Based on the OSCE's Permanent Council PC Decision No. 1288 of 15 February 2018, these allowances were reduced for [REDACTED] except the non-family duty area in [REDACTED]. Pursuant to an email of 23 February 2018 the application of the new rates came into effect as from 1 March 2018.
9. On 23 March 2018, the Applicants requested an internal review of this decision. An Internal Review Board was established and submitted a final report on 25 January 2019, coming to the conclusion that the contested decision should be sustained.
10. By letter dated 25 February 2019, sent to each Applicant via email to the email addresses specified in the individual application, the Secretary General decided to sustain the impugned decision. The respective emails were sent on the same day.
11. On 26 April 2019 and on 25 April 2019 respectively, the Applicants submitted their requests for an external review.

Contentions of parties

12. The Applicants' major contentions are:

- The BLA calculation is flawed, and neither transparent nor participatory;
- The BLA reduction is a violation of mission members' contract rights, in particular it violates acquired rights;
- The BLA system implies a contravention against the principle of equal pay for equal work, since seconded mission members often rely solely on the BLA whereas other mission members receive salary and BLA;
- The BLA rates for 2018 were established in contravention of the specific provision of the Staff Rules.

13. The Respondent's major contentions are:

- The adoption of the BLA methodology and the approval of the BLA rates were valid;
- There is no contractual right to a specific amount of BLA or a particular BLA methodology;
- The Applicants' request to change the purpose of the BLA and the method of its calculation exceeds the authority of the Secretary General;
- Even assuming a procedural violation of the specific provision of the Staff Rules, the Applicants have not proved harm as they received an additional amount of BLA as a result of such violation.

Considerations

Procedural issues

Timeliness of the external appeal

14. Pursuant to Staff Rule 10.02.2 (d) (ii), an application for external appeal must have been filed within sixty days from the date of notification to the applicant of the decision rejecting his/her request for internal review.
15. The Panel notes that the Applicants were notified on 25 February 2019. Further, the Panel notes that the Applicants filed their present applications via email on 26 April 2019 and on 25 April 2019, respectively.
16. OSCE's internal rules are silent on the calculation of time-limits. Based on various national and international legal systems, it is the Panel's established jurisprudence that the day of receipt of the notification is disregarded for such calculation (see decision of 24 November 2017, OSCE PoA 2/2017, para. 21f).
17. It follows from the above that the 60 day-time-line for the Applicants started to run on 26 February 2019, and accordingly ended on 26 April 2019. Therefore, both applications were filed within the statutory time frame.

Merits

18. At the outset, the Panel reiterates that the OSCE's internal justice system does not grant an appeals procedure against each type of measures taken. With respect to the limits of its jurisdiction, the Panel has held in its decision of 14 July 2017, OSCE PoA 1/2017:

“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. ...Such an approach would exceed the Panel’s powers vested in it by the OSCE Staff Rules and Regulations. ...

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 implicit examination of crucial general norms is possible.”

19. For the case at stake, it follows that it is not for the Panel to “formally urge the Secretary General to align the OSCE remuneration system with that of the UN”, as requested by the Applicants. The same applies to the Applicants’ request “that the Secretary General be required to calculate BLA at a level that accounts for mission members’ different levels of effort and responsibility without regard to their salary, and that this be done with retroactive effect”. These requests are related to policy and other general issues which are excluded from the Panel’s jurisdiction.
20. In this context, also the possible difference between contracted and seconded international staff members regarding their overall income cannot be addressed by the Panel. Whether or not seconded staff members receive salaries from their seconding member states needs to be clarified by the competent bodies of the OSCE and is not part of the Secretary General’s legal obligations as laid down in the Staff Regulations and Staff Rules. OSCE’s responsibility for salaries is limited to contracted staff members (see Staff Regulation 5.02 (a) and (b)). In the same vein, the Panel has no jurisdiction to urge member states to pay salaries to seconded staff.
21. Further, the concept of BLA as a daily allowance “intended to cover at least partially the living expenses” (see Staff Rule 5.13.1 (a)) distinguishes BLA from salary. The former is related to “the costs of accommodation, food and miscellaneous expenses in the mission

area” which may (and do) vary over the years; consequently, they are established only for a period of one year (see Staff Rule 5.13.1 (b)). Being connected to variable living costs, BLA necessarily needs to be flexible. Therefore, unlike the Applicants believe, there is no room for any application of the concept of ‘acquired rights’.

22. In addition, the OSCE enjoys broad discretion in calculating BLA as long as the above factors – accommodation, food and miscellaneous expenses – are taken into account. Neither the Staff Regulations and Staff Rules nor any principle of international administrative law ask for a specific methodology of calculating BLA. It follows from the Respondent’s undisputed description of the respective methodology (and the respective change) that the newly applied Retail Price Index Details comprises of 12 cost indicators with a wide range of subjects including, but not restricted to the above factors. There is no reason to believe that the BLA as calculated in 2018 does not fulfill its legal purpose to cover at least partially the living expenses in [REDACTED]
23. However, it is a general principle of law and established jurisprudence of the Panel that every international organization has to adhere to its own rules (see, e.g., decision of 6 July 2018, OSCE PoA 2/2018, para. 25), or, as the Applicants put it, *tu patere legem quam ipse fecisti*. In this respect, the Panel takes note that pursuant to Staff Rule 5.13.1 (b), BLA rates – with no exception – “shall be established ... in December each year, and shall remain valid for the following year”. The Panel further notes that the BLA rate for [REDACTED] was established and notified only by email of 23 February 2018, with a view to take effect as of 1 March 2018.
24. The Panel does not share the Respondent’s view that the delay in establishing the BLA rate for 2018 was justified as the Unified Budget was only approved on 15 February 2018. It is for the OSCE to either adhere to the deadlines established by its own rules or to adjust the rules accordingly.
25. As a consequence of the delay - and since the BLA rate for 2018 was not established in December 2017, as required - the BLA rate for 2017 remained valid for the following year, i.e. for 2018, as provided for in Staff Rule 5.13.1 (b). The decision of 23 February 2018 could become effective only as from January 2019.

Remedies

26. It follows from the above that the BLA rate for 2017 has to be applied for the whole year of 2018. Therefore, the Applicants are entitled to additional payment which amounts to 306 days of the difference between the – applicable – rate for 2017 and the – inapplicable – rate for 2018, i.e. 5 (five) Euros per day. Therefore, both Applicants should receive an additional payment of 1530 Euros each.

27. All other pleas are rejected.

Done in Vienna, on 22 November 2019



Thomas Laker
Chairperson



Anna Csorba
Member



Jenny Schokkenbroek
Member