

Office of the Ombudsman

Case 11-000XX

In a matter of a Complaint by XY

Determination dated 16th November 2011

Introduction

This investigation stemmed from a complaint made by XY, resulting from the recent selection of candidates from the (AB) Regional At Large Organisation for the ICANN Nominating Committee (NOMCOM) by the At Large Advisory Committee (ALAC) established under Article XI of the ICANN Bylaws. XY was not selected although he expected to be, and a complaint was therefore made to the office of the Ombudsman that the process and result were unfair to him.

Facts

The complaint has been fully articulated by XY, and I cite the relevant part of his petition so that his position can be explained.

1. *RALO sent a mail in (date) seeking expression of interest to serve in the NOMCOM. As a serving member of NOMCOM for (year) elected by RALO in (year), I sent my expression of Interest. Thereupon RALO chair sent a mail announcing that my nomination as the unanimous choice as there were no contenders to ALAC. I also received the copy of the same.*
2. *After few weeks I came to know from the ALAC mailing list that CD had been elected in a contest along with my candidature and was recommended to NOM COM to serve as a member from RALO constituency.*
3. *I wrote to the RALO chair on the issue and the chair replied that I was the unanimous choice and this selection was entirely an ALAC affair and the RALO chair was not aware of such candidature till the selection was announced by ALAC.*
4. *I wrote a mail to the ALAC Chair and received a reply that it was done according to the byelaw and thereupon the ALAC Chair reiterated the position in the conference call with RALO.*

The facts are not greatly in dispute. There is no issue taken with the description.

Investigation

To undertake this investigation I sought comments from the parties named in the documents and in particular from the relevant ALAC officers, (the Chair and Vice-Chair at relevant times) and from the ICANN Director for the at large community. I was provided with documents and e-mails relating to this matter, as well as the submission from XY. In addition to this, I had a telephone conference during which we discussed the matters raised and the usual way in which ALAC reaches

out to select members of the Nom Com. I also had the advantage of meeting with them in person at (place) to discuss the issues in more detail. I have also reviewed the relevant bylaws so that I may place the issues in context. This report was also sent in draft to the parties for comment.

Issues

The issue which I am required to investigate is whether the selection of members for the Nom Com was conducted in a way which was unfair and therefore resulted in unfairness to the complainant. This was explained in the complaint as a failure to properly consult with the Regional at Large Organisation which is in this case, RALO. The complainant asserts that RALO was not consulted at all on the candidature of the successful candidate appointed by ALAC, who was CD. He comments that he was chosen by RALO on this occasion, and there had also been previous votes which he had clearly won.

The issue which also follows is whether ALAC acted correctly in the selection of the candidates, and the relevant consultation.

Jurisdiction

This is a matter where I clearly have jurisdiction to consider the complaint under the bylaws and in particular Section 3(2), and under the Ombudsman framework as approved by the Board of Directors¹, as this is a matter relating to decisions, actions, or inactions by constituent bodies of ICANN, and in particular ALAC and RALO, as part of the ICANN community.

After determining that I have jurisdiction, it is therefore necessary to look at the relevant bylaws in relation to the way that ALAC selects members for the Nom Com. It is also important to consider the role of the elections for RALO and the status of such elections, and where there has been a unanimous choice, as occurred here, the status of such a choice.

The Bylaws of ICANN provide in Article XI at Section 2 (4) (e) that:-

*“The ALAC shall, after consultation with each RALO, annually appoint five voting delegates (no two of whom shall be citizens of countries in the same Geographic Region, as defined according to Section 5 of Article VI) to the Nominating Committee.”*²

It was explained to me that while the Regional At Large Organisations are asked to submit names, it is always open for ALAC to reach out and select other persons. This is because they consciously try to avoid the regional organisation putting forward a slate of candidates.

Reasoning

The complainant’s issue is that because he was the preferred candidate as selected by RALO, then the consultation by ALAC should have resulted in his selection. The response to this assertion,

¹ <http://www.icann.org/en/ombudsman/framework.html>

² <http://www.icann.org/en/general/bylaws.htm#V>

which has already been made known to him by ALAC, is that any election process by RALO or any nomination of a person, is not binding on ALAC when they make a decision.

Another issue follows, as to whether there has been an expectation raised that a candidate elected by a Regional at Large Organisation should in some way be preferred when ALAC reach out to make the selection. Similarly, if a candidate is selected for that post as was the complainant in this case, is there an expectation that he would be appointed?

There are I consider two levels of fairness which need to be taken into account. If the bylaws provided for the Regional at Large Organisations to either appoint or elect candidates for the Nom Com, then such a process would have to be carried out in an open and transparent fashion, or in other words be a fair election or selection. In this case RALO has taken certain steps such as canvassing expressions of interest to serve on the Nom Com, receiving the nomination from the complainant and then selecting him as the nominee. Obviously he cannot complain about this part of the process. It should be noted that the RALO does have procedures for selecting members to serve on ALAC. This is related to the need to have regional representation evenly spread across ALAC. It does operate under a document called Operating Principles, but this does not assist in the issue of selection/election of candidates for Nom Com as this is not mentioned.

I would observe that the concept of selection/election of candidates for NOM COM by the Regional at Large Organisations does not appear to have any foundation in either the ICANN bylaws, the Operating Principles or ALAC. This may cause fundamental problems in that if expectations are raised by this process, then it is difficult to see how fairness can affect a process for which there is no foundation. I do not believe it can be said logically that principles of fairness can apply to a process which is voluntarily adopted without any basis in the underlying documents which create both ALAC and RALO. So the problem arises from a fundamental misconception as to this process.

The other level of fairness relates to the way in which ALAC must undertake the selection process. The bylaws do not have much detail as to how the selection process works. However, ALAC chose to select a candidate of their own rather than the nominated person. The issue can therefore be refined as to whether this selection, bypassing the nomination of the complainant, was unfair. There is considerable emphasis throughout ICANN and the supporting organisations on the bottom up model and stakeholder driven policy-making. The concept of open and transparent decision-making is fundamental to this process.

It is worth quoting from the minutes of the ALAC meeting where this is discussed³:-

“ALAC to select someone from each region, to send over to the NONCOM, ALAC makes selection and consult the region, which candidates they would like to put forward but they are not bound to 100% choose those candidates. Ability to go against the wishes of the region, if they have done an internal selection process, ALAC can choose someone else.

³ Minutes from (date) RALO meeting

A vote was done and selected CD for the RALO region and some might not have known her, but the process that the ALAC did was transparent. It was a very close vote and he has to thank XY on his work on the NONCOM and work in joint working groups and be active.”

And further in the minutes:-

“ Question is it is not bound, whole thing has been structured to go back to the RALO and then make a final decision, word shall bound, bottom up approach and then the people are contacted or informed and then final decision should be made.

Oliver said, of the RALO need to be informed, there is a wiki page. That had all of the candidates all the time, when they were added and both the candidates were added by the ALAC and supported by the ALAC ExCom.

Not sure if the ALAC has to email the RALO list if a candidate gets added, maybe it was something to do in the future and it will confuse everyone. It could be something we can discuss in the future.”

So the issue can be further refined by analysing whether there was in fact consultation as required by the ALAC bylaw, and whether this consultation was undertaken fairly. It seems clear that ALAC has a wide discretion as to the actual appointment, and the only limiting factor is the requirement to consult. It is also accepted that the process of appointment must be open and transparent. In this context, it should also be noted that there is nothing specifically stated about how the consultation is to take place. The process of placing the candidates on a wiki page is the method adopted by ALAC in this instance, and indeed in other selections. This certainly answers any suggestion that the process was not open and transparent. And, the advantage of a wiki is the ability to comment on the candidates, an opportunity not taken up in this case. The candidates who are chosen are then voted on by ALAC, which is what occurred. To take this to the next stage of saying that the process was unfair would require an argument that somehow the use of the wiki page to consult with the community is unfair. There is not this level of analysis in the complaint. Rather, the complaint is that the views of RALO were not taken into account. But this is to make an error in the way in which consultation takes place and relies upon the expectation based on a procedure used by APRALO, which does not have any proper basis.

Article XI of the Bylaws relating to the ALAC's selection of 5 Nom Com voting delegates must be read in conjunction with Article VII section 2 of the Bylaws,, that is,

"6. Subject to the provisions of the Transition Article of these Bylaws, five voting delegates selected by the At-Large Advisory Committee established by Article XI of these Bylaws; " ;

This is the pivotal point in understanding this issue, that makes it clear it is the ALAC that is charged with the task of making the selection of the delegates from each of the different Geographic Regions defined by ICANN⁴.

Result

⁴ Article VI, Section 5 “International Representation” ICANN Bylaws

I have carefully considered these issues. Because the selection process has passed, I did not consider that mediation would be appropriate. I thought it better to analyse the complaint and background material. My conclusion is that the process was fair, but the way in which Regional at Large Organisations appear to be adopting a voting process, creates an expectation not justified by the founding documents of the supporting organisations or ICANN. This is unfortunate, but if the supporting organisations want to change the method of selection of members of NON COM so as to include a voting process, then this would need to be expressly provided in the documents which they operate under, and may even need an alteration to the ICANN bylaws. It is beyond the scope of my investigation to make any suggestions or recommendations about this and I do not do so. That is a matter which would need to come from the community.

I regret I cannot provide any solace for XY, but do not uphold his complaint.

Chris LaHatte

Ombudsman