

Office of the Ombudsman  
Report to the Board of Directors File 08 - 62

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Internet Corporation for Assigned Names and Numbers

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From the ICANN Ombudsman Framework:

## **Confidentiality**

All matters brought before the Ombudsman shall be treated as confidential. The Ombudsman shall only make enquiries or advise staff and Board members at ICANN of the existence and identity of a complainant in order to further the resolution of the complaint. ICANN staff and Board members are to hold the existence of a complaint and the identity of a complaint as confidential, except to further the resolution of a complaint.

This report shall not be further released by any party receiving the report without the consent of the Office of the Ombudsman.

## Introduction

ICANN Bylaw V, Article 2 states:

“The Ombudsman shall serve as an objective advocate for fairness and shall seek to evaluate and where possible resolve complaints about unfair or inappropriate treatment by ICANN staff, the Board, or ICANN constituent bodies, clarifying the issues and using conflict resolution tools such a negotiation, facilitation, and “shuttle diplomacy” to achieve these results.”

Article 4 of the Bylaw further states:

The Ombudsman shall be specifically authorized to make such reports to the Board as he or she deems appropriate with respect to any particular matter and its resolution or the inability to resolve it. Absent a determination by the Ombudsman, in his or her sole discretion, that it would be inappropriate, such reports shall be posted on the Website.

The Ombudsman Framework contains the following provisions:

The Ombudsman shall have the power to make recommendations to the Board of Directors with respect to matters arising from complaints reviewed by the Ombudsman. Where a recommendation has been made to the Board of Directors, the Board of Directors shall respond to the Ombudsman within 60 days following their next Board meeting following a recommendation with a response.

In this case, I have determined that while ICANN has acted in an administratively fair manner, that my review indicates there are recommendations to be made, pursuant to Bylaw V, Article 4, with respect to ICANN’s administration. I have further determined that it is appropriate to post this report, as directed in the same Bylaw article.

### Scenario

A member of the ICANN community was appointed to membership of the governing council of one of ICANN's supporting organizations. The member attended an ICANN Meeting as a member of that council and as an officer of the supporting organization. The member's airfare, as I understand it, was paid for by the member's corporate entity, and the member's hotel costs were paid by a direct billing by ICANN following the conference. The member has requested a reimbursement of out of pocket expenses related to the ICANN Meeting.

Some three months following the ICANN meeting, the member submitted an expense claim in the amount of \$242.62 USD for meals and incidental expenses. ICANN determined that the member had been present at the meeting location but had not either attended nor cast a ballot at any supporting organization council meetings. This fact is supported by a review of the transcripts and voting records of the several council meetings undertaken by ICANN Staff. There is no evidence before me that the member was incapacitated due to illness during the time of the meeting.

The senior ICANN staff officer responsible for the supporting organization refused payment of the expenses. The staff officer stated, "ICANN reimburses...for reasonable and appropriate expenses...while fulfilling duties as council members. Our records indicate that you did not participate...Therefore, your expenses are not eligible for reimbursement.

### Systemic Issues

In general, a decision maker owes a duty of natural justice and administrative fairness to a person or entity over whose affairs they may make a decision. In general terms, for a decision maker to fairly decide a matter they must diligently accumulate the full set of facts, and weigh all of these. In this case, while the decision maker has done a thorough review of documentary evidence I would have felt it appropriate for the

member to have been asked for an explanation of the absences and failure to discharge duties. However, I am satisfied that sufficient anecdotal evidence exists to determine that the member was in good health, and was able to attend various meeting related social events, and other meetings.

I note that while the ICANN Board of Directors recently instituted a Code of Conduct (<http://www.icann.org/en/committees/board-governance/bod-proposed-code-of-conduct-15jul08.pdf>) that a similar code of conduct or responsibility does not exist for the councilors, directors, officers, or governing committees of the various supporting organizations. I also note that ICANN does not have a policy with respect to the timely submission of expense claims for community members traveling on ICANN business, such as ICANN meetings.

#### General Comments

In this investigation I have taken the further step of requesting a legal opinion from independent counsel. My request for an independent legal opinion was to determine if there is a generally accepted theory or practice in commercial or business law which imposes a duty on the directors to attend meetings for which they seek reimbursement. I concur with the legal opinion provided by independent counsel, which states:

The directors and officers of an organization are under an obligation to be diligent, to act in good faith, to act honestly, loyally, and to avoid conflicts.

This is not a situation where a member has made or sought a profit while being a director or officer of an organization. Therefore the subject of a conflict is not applicable.

This is not a situation where a member incurs a liability while carrying out their duties and is seeking an indemnity of expenses for acts committed within the scope of being a Member.

Office of the Ombudsman  
Report to the Board of Directors File 08 - 62

Here the question is failure to carry out specific duties as a Member. It has been stated by one authority:

“The directors and officers owe a duty of diligence to the corporation. They should attend meetings and be prepared for the business at hand. Attendance and preparation are particularly important because most of the decisions that affect charitable and not-for-profit organizations must be undertaken at meetings, and the responsibility for making decisions rests with the directors, more so than in business corporations. In business corporations, much of the decision making is left to management of the corporation, and implemented by employees; boards of charitable and not-for-profit organizations are usually substantially more involved with the operations of the organization.”

“The duty of diligence involves participating in decision making.”

In the realm of ordinary commercial law reimbursement for expenses is recognized provided that such expenses are “...for money properly advanced or expenses necessarily incurred on behalf of the corporation” or such expenses “...were reasonable and redounded to the benefit of the corporation.”

Such attendance by directors or officers is widely recognized as a crucial aspect in a not-for-profit corporation.

I have reviewed the transcripts and voting records for the supporting organization at the ICANN meeting and can find no evidence that the member attended or participated. I have no evidence before me that the member’s absence from duty was related to illness, and in fact recall seeing the member in good health at social events.

### Conclusion

I conclude that ICANN was not administratively unfair by rejecting the expense claim. The member should be advised that further review of the ICANN staff member’s

BUSINESS PROPRIETARY

Office of the Ombudsman  
Report to the Board of Directors File 08 - 62

decision to reject the expense claim may be made to the Board Reconsideration Committee (<http://www.icann.org/en/committees/reconsideration/>).

Recommendations

I make the following recommendations:

- 1) That the Chief Financial Officer develop a policy for the timely submission of expenses by members of the ICANN community seeking reimbursement for expenses incurred on behalf of ICANN, or while discharging duties as an officer of the organization or supporting organizations.
- 2) As ICANN is a not for profit organization whose members act in consideration of the public good, I recommend that ICANN develop a consistent code of expectation of conduct, duty or responsibility for officers of the supporting organizations, and generally for members of the community whose expenses are reimbursed by ICANN for the benefit of the member or the organization. I recommend that all officers be informed of this code upon appointment and at least annually thereafter. I further recommend that other ICANN reimbursed members be informed of the code upon the approval of travel.
- 3) I recommend that ICANN inform internal decision makers that to be administratively fair they should be diligent in accessing all pertinent facts before making a decision. Decision makers should also be sure to offer those persons who are affected by the decision the opportunity to provide facts or information which may not have been taken account when making the decision.