



40th ANNUAL MEETING – SEPTEMBER 2018

**Update by the Secretariat on the implementation of
PRP recommendations tasked to STACFAD**

The one remaining recommendation from the first PRP tasked to STACFAD not yet addressed suggests amending certain provisions of the NAFO Staff Rules pertaining to the rights and obligations of NAFO Secretariat Staff, particularly dismissal or termination of appointment. A review of this agenda item has been deferred in prior years until the conclusion of the wrongful dismissal legal case against NAFO.

PRP Recommendation #	Recommendation Text	Status
7.2.3	Taking into account the relevant existing best practices, there is a need to amend certain provisions of the NAFO Staff Rules pertaining to the rights and obligations of NAFO Secretariat Staff, particularly dismissal or termination of appointment. In so doing, and given the Organization's intergovernmental nature, special attention should be given the relevant provisions of the prevailing Canadian legislation as well as international law in terms of Secretariat staff employment rights, obligations and conditions.	The Secretariat will present proposed changes to the Staff Rules upon conclusion of the current legal case.

As agreed at the 2017 Annual Meeting of NAFO, the NAFO Secretariat requested its lawyers to review NAFO Staff Rules 9.1 and 9.2 in line with the above PRP Recommendation.

Here's the response received from Stewart McKelvey:

At the outset, I note that it is unclear, in light of NAFO's immunity, what the Performance Review Report means when it says – "special attention should be given the relevant provisions of the prevailing Canadian legislation as well as international law in terms of Secretariat staff employment rights, obligations and conditions."

The statement is unclear for the following reasons:

1. *NAFO is immune from Canadian labour and employment legislation and the common law (i.e. judge made law).*
2. *We are not aware of any international law with respect to Secretariat staff employment rights, obligations and conditions.*

<p>The following is my sentence by sentence analysis of NAFO Staff Rules 9.1 and 9.2. I will assess from a Canadian common law perspective, i.e. what a non-unionized employee would receive pursuant to the common law. The Rule appears in bold on the left side of the table with my commentary on the right side:</p>	
<i>NAFO Staff Rules</i>	<i>Stewart McKelvey Comments</i>
<p><i>Rule 9.1 - Staff members may separate from service by giving four (4) weeks' notice in writing to the Executive Secretary</i></p>	<ol style="list-style-type: none"> 1. <i>This is reasonable from both NAFO's and the employee's perspective.</i> 2. <i>For higher level positions, it may be that NAFO would prefer a longer notice period.</i>
<p><i>Rule 9.2</i></p>	<p><i>The Supreme Court of Canada made clear in Amaratunga that NAFO does not enjoy immunity from its Staff Rules. Rule 9.2 only contemplates termination for employment in the following circumstances:</i></p> <ol style="list-style-type: none"> 1. <i>Restructuring of NAFO or its constituent bodies or cessation of operations.</i> 2. <i>Performance based reasons.</i> <p><i>Significantly, the Staff Rules do not provide for termination if a staff member's performance deficiencies are not so serious as to amount to just cause, but as a result of such deficiencies they are "not working out". Terminating on this basis is usually not contemplated in unionized government positions, but it is the basis upon which employees in non-unionized positions are often terminated. Under Canadian law, in the absence of just cause, employees are entitled to pay in lieu of reasonable notice. NAFO may want to consider amending Rule 9.2 to provide for that type of termination.</i></p>
<p><i>The Executive Secretary may terminate the appointment of a staff member by giving three (3) months written notice, when that termination is due to restructuring of the Organization or of any of its constituent bodies, or if the Organization would decide to cease its functions.</i></p>	<ol style="list-style-type: none"> 1. <i>The following comments with respect to the notice provided in Rule 9.2 have to take into account Rule 9.5 which provides for 2 weeks' notice per year of service up to 40 weeks for employees hired before October 1, 2016 and 1 weeks' notice per year of service up to 40 weeks for employees after October 1, 2016. Rule 9.5 essentially provides a pay in lieu of notice period.</i>

	<ol style="list-style-type: none"> 2. <i>3 months' written notice for all employees, regardless of length of service or other factors, is likely unreasonable from a Canadian law standard. For short service employees (0-5 years' service) 3 months is likely reasonable. However, for longer service employees, 3 months would likely be viewed as too short.</i> 3. <i>Providing 2-3 weeks' notice per year of service would be more in line with Canadian law. Notice is generally determined by reference to a specific employee's character of employment, length of service, age, and availability of similar employment. Therefore, for example, an older employee in a more senior role with a longer period of service will receive more notice (pay in lieu) than a younger employee in a less senior role with a shorter period of service. Such a change will increase the cost of terminations.</i> 4. <i>The Rule does not explicitly provide for 3 months' pay in lieu. It would be preferable to provide for a pay in lieu option.</i>
<p>If at any time the Executive Secretary considers that a staff member does not give satisfactory service or fails to comply with the duties and obligations set out in these Rules, the staff member will receive a formal written warning.</p>	<ol style="list-style-type: none"> 1. <i>This is a reasonable first step in the progressive discipline process.</i> 2. <i>The phrase "satisfactory service" is vague, but, given the numerous types of performance issues that NAFO may have to address, this is reasonable.</i> 3. <i>This formal written warning should outline in detail the unsatisfactory service or the specific duties and obligations that the employee has failed to comply with.</i>
<p>If the performance does not improve or the employee continues to fail to comply with the duties and obligations set out in these Rules, the staff member will receive a second formal written warning and if necessary, other disciplinary action (e.g., suspension, demotion) may follow.</p>	<ol style="list-style-type: none"> 1. <i>This is a reasonable second step in the progressive discipline process.</i> 2. <i>It is important from a Canadian legal perspective that the Staff Rules explicitly provide NAFO with the right to suspend or demote as Canadian courts are reluctant to imply such a right into a Canadian employment agreement.</i> 3. <i>Again, the second formal written warning should outline in detail the unsatisfactory service or the specific duties and obligations that the employee has failed to comply with.</i>

<p>If after the second formal written warning the staff member's performance does not improve to a satisfactory standard, the appointment of the staff member may be terminated upon written notice of one (1) month in advance subject to the prior notification of the Chair of the Commission.</p>	<ol style="list-style-type: none"> 1. <i>This sentence should make reference to a continuation of a breach of the Staff Rules, e.g. "employee continues to fail to comply with the duties and obligations set out in these Rules..."</i> 2. <i>If the first and second warnings are appropriately worded, then under Canadian law, NAFO should be in a good position to establish just cause. Under Canadian law if an employer has just cause, there is no obligation to provide any notice or pay in lieu of notice. Therefore, if NAFO has just cause for termination, 1 month's notice in such circumstances is more generous than Canadian law.</i> 3. <i>Presumably, if NAFO has provided two warnings and the employee's performance continues to be deficient, NAFO would not want to have to wait a month to terminate. NAFO should explicitly provide that it has the power to terminate by providing 1 month's pay in lieu of notice.</i>
<p>In the case of serious misconduct by a staff member that threatens the organization's operations or the organization's staff members (for example, criminal offence, theft, intentional breach of confidentiality), appointment of the staff member may be terminated without prior warning.</p>	<ol style="list-style-type: none"> 1. <i>This principle is consistent with Canadian law and practice. Most disciplinary policies provide that in the event of serious misconduct, progressive discipline (e.g. the two written warnings and possible suspension and demotion) is not required.</i> 2. <i>The phrase "threatens the organization's operations or the organization's staff members" does substantially limit the circumstances in which NAFO could terminate an appointment without prior warning. NAFO should consider deleting this phrase.</i>

After reviewing Stewart McKelvey Comments, the NAFO Secretariat does not believe any substantive amendment to the NAFO Staff Rules 9.1 and 9.2 Staff Rules is required, at this time.