



World Bank Administrative Tribunal

2009

No. 392

**AE,
Applicant**

v.

**International Bank for Reconstruction
and Development,
Respondent**

**World Bank Administrative Tribunal
Office of the Executive Secretary**

**AE,
Applicant**

v.

**International Bank for Reconstruction
and Development,
Respondent**

1. This judgment is rendered by a Panel of the Tribunal, established in accordance with Article V(2) of the Tribunal's Statute, and composed of Jan Paulsson, President, and Judges Francisco Orrego Vicuña, Sarah Christie, and Florentino P. Feliciano. The Application was received on 18 June 2008. The Applicant's request for anonymity was granted on 25 July 2008.

2. The Applicant joined the Bank in 2005 under a Term appointment as a Senior Institutional Integrity Officer, level G, in the Department of Institutional Integrity ("INT").

3. The Applicant challenges the Bank's decision to place him on paid administrative leave in response to his alleged unauthorized disclosure of confidential Bank documents relating to INT's investigation of Bank-financed projects in India.

4. According to the Bank, on 4 and 5 March 2008, the Applicant and few other INT staff members received the following two confidential e-mails:

- (i) An email from [the then Acting Director of INT] to the Applicant and four other INT staff members, dated March 4, 2008, forwarding an email from [Mr. X], Operations Director, in the South Asia Region, with a draft PowerPoint presentation entitled "SAR Action Plan" attached. The draft SAR Action Plan addressed highly sensitive issues presented by INT's investigation of health sector projects in India. ["Mr. X's e-mail."]
- (ii) An email from [an INT staff member] to the Applicant and five other INT staff members, dated March 5, 2008. [This] email attached emails from [the then Acting Director of INT] and [Ms. Y, an assistant to the President], dated March 5, 2008. [Ms. Y's] email described various discussions between Bank officials and the government of India regarding the results of the Bank's investigation of health sector projects in that country. ["Ms. Y's e-mail."]

5. A few days later, on 10 March 2008, a New York-based newspaper ("the Newspaper") published an editorial about the Bank's investigation into alleged fraud and corruption in health sector projects in India. On the same day, the Newspaper also posted

four confidential Bank documents on its website. Included among these were the SAR Action Plan and Ms. Y's e-mail.

6. On 12 March 2008, the Acting Director of INT spoke to one of the Bank's Managing Directors about the Newspaper's publication of the confidential Bank documents and the need to determine whether it was possible to identify the source of the leak in the Bank. He told the Managing Director that management at that point had neither any information indicating that any specific staff member was responsible, nor any basis to begin an investigation. Thus, the Acting Director of INT suggested approaching the Bank's Information Solutions Group ("ISG") to determine whether it was possible to track the electronic path taken by the two confidential e-mails, to see whether they had been forwarded by a staff member to someone outside the Bank. He also suggested that ISG check whether any e-mails had been sent to the Newspaper's Internet address.

7. On 13 March 2008, according to the Bank, the Managing Director, with the concurrence of the Acting Vice President and General Counsel, authorized ISG to conduct the search pursuant to the Bank's Information Security Policy for Information Users (Administrative Manual Statement (AMS) 6.20A, 2007) ("Information Security Policy").

8. ISG concluded its search on 18 March 2008. It reviewed the logs of the Bank's external e-mail gateway, which show all e-mails sent from the Bank's system to outside addresses. ISG found that the Applicant was the only Bank staff member who had received and forwarded the two confidential e-mails to an individual outside the Bank. The logs reviewed by ISG showed that the e-mails were forwarded by the Applicant respectively on 5 and 6 March 2008 to an e-mail address belonging to the former Director of INT who had left the Bank in January 2008.

9. ISG conveyed its findings to the Acting Director of INT. According to the Acting Director, the former Director of INT was not authorized to receive the e-mails, and the Acting Director was unaware of any business reason that could justify the Applicant sharing the documents with the former Director of INT. On 19 March 2008, the Acting Director of INT wrote a memorandum to the Vice President of Human Resources (“HRSVP”) requesting that the Applicant be placed on paid administrative leave under Staff Rule 8.01 (Disciplinary Proceedings), paragraph 4.07. In the memorandum, the Acting Director advised HRSVP about the e-mails in question, the results of the search conducted by ISG, and the need for the administrative leave.

10. HRSVP placed the Applicant on paid administrative leave effective 20 March 2008 under Staff Rule 6.06 (Leave), paragraph 9.09. In a memorandum dated 20 March, HRSVP advised the Applicant:

This is to inform you that in accordance with Staff Rule 6.06, paragraph 9.09 you are being placed on Administrative Leave with Pay effective today, March 20, 2008, until further notice, in relation to possible unauthorized disclosures outside the Bank of sensitive internal Bank e-mails, pending a decision whether to appoint an investigator under Staff Rule 8.01 You will be contacted shortly about the decision in this matter and about how the Bank will proceed.

11. Subsequently, on 21 April 2008, the Bank commenced a formal investigation to determine whether the Applicant had engaged in misconduct.

12. On 15 June 2008, the Applicant wrote to the Bank seeking its consent to file directly with the Tribunal an application challenging the Bank’s decision to place him on administrative leave. The Bank agreed. On 18 June 2008, the Applicant filed this Application challenging the decision to place him on administrative leave. The Applicant requests that the Tribunal set aside that decision and award him attorney’s costs.

PRINCIPAL CONTENTIONS OF THE PARTIES

The Applicant's contentions

13. The Applicant claims that the administrative leave decision was improper for the following reasons. First, HRSVP erroneously determined that his forwarding of the two confidential e-mails in question to the former Director of INT amounted to misconduct under Staff Rule 3.01 (Standards of Professional Conduct), paragraph 5.01, which prohibits disclosure of confidential information. The Bank placed the Applicant on administrative leave without determining whether other staff members might have leaked the documents to the press.

14. Second, the Applicant contends that the Bank did not follow proper procedures in reaching the decision to place him on administrative leave. Instead of conducting an investigation under Staff Rule 8.01, the Bank had improperly carried out a "special" investigation outside Staff Rule 8.01.

15. Third, the Applicant claims that the administrative leave decision was improperly based in part on privileged attorney-client communication to which the Bank obtained access by investigating the e-mails in the Applicant's work computer.

16. Fourth, the Applicant asserts that the Bank's search of electronic records leading to the administrative leave decision violated the Bank's Information Security Policy. In addition, the Bank had failed to obtain prior authorization from either a Managing Director or the General Counsel. Moreover, ISG had unilaterally expanded the scope of the electronic search in violation of the Information Security Policy.

17. Finally, the Applicant argues that the administrative leave decision was flawed because of a conflict of interest. The Applicant explains that the Bank acknowledges that there would have been a conflict of interest if the Acting Director of INT or INT had

conducted an investigation into the Applicant's conduct. Yet, the Acting Director of INT was involved in placing the Applicant on administrative leave.

The Bank's response

18. The Bank responds that the administrative leave decision was a proper exercise of managerial discretion. First, contrary to the Applicant's belief, HRSVP did not conclude that the Applicant had engaged in misconduct, but had only determined that the evidence before him warranted placing the Applicant on administrative leave.

19. Second, the Bank did not conduct a Staff Rule 8.01 investigation immediately after the confidential documents appeared in the Newspaper because, at that time, it had no information on who had leaked the documents to the press. The Bank initially conducted a limited search to determine whether any staff member had sent the e-mails in question to someone outside the Bank. This limited search was not unreasonable given the circumstances. The Bank later commenced a Staff Rule 8.01 investigation after it had acquired evidence apparently implicating the Applicant.

20. Third, the Bank claims that the Applicant's privileged attorney-client communication played no role in the making of the administrative leave decision.

21. Fourth, the Bank insists that the examination of electronic records was conducted in accordance with the Bank's Information Security Policy. The Bank had obtained approval from the proper Bank officials and the actual search did not go beyond the scope approved.

22. Finally, the Bank stresses that the record is clear that the Acting Director of INT did not conduct an investigation into the Applicant's actions. The Applicant's contention that the administrative leave decision resulted from an improper investigation by INT or the Acting Director of INT is unfounded.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

Whether the Bank had a proper basis for the administrative leave decision

23. Under Staff Rule 6.06, paragraphs 9.08 and 9.09, HRSVP has authority to place a staff member on paid administrative leave in the following circumstances:

Administrative Leave under Rule 8.01, “Disciplinary Measures”

9.08 The Vice President, Human Resources may place a staff member on administrative leave in accordance with the provisions of Rule 8.01, “Disciplinary Proceedings.”

Administrative Leave at the Direction of the Vice President, Human Resources

9.09 The Vice President, Human Resources may place a staff member on administrative leave for up to 6 months for reasons which he or she determines are sufficient after consulting with the staff member’s manager.

24. In the present case, HRSVP placed the Applicant on paid administrative leave under paragraph 9.09. A decision to place a staff member on administrative leave under paragraph 9.08 or 9.09 is always a matter of managerial discretion. Thus, when an administrative leave decision is challenged, the Tribunal will not exercise its broader review power as it does in cases of disciplinary measures, but will undertake a more limited review of whether the Bank has abused its discretion in placing the staff member on administrative leave. In *G*, Decision No. 340 [2005], the Tribunal stated at para. 67:

The jurisprudence of the Tribunal is clear to the effect that the scope of its review in connection with disciplinary cases is broader than with respect to decisions of a purely managerial or organizational nature. (*Kwakwa*, Decision No. 300 [2003], para. 20.) But *the Tribunal has also stated that placing a staff member on administrative leave ... is, in itself, not a disciplinary measure.* If a decision to impose administrative leave is challenged, *the Tribunal will consider whether the decision was an abuse of discretion – while still acknowledging that it is indeed a matter of discretion.* (*Ismail*, Decision No. 305 [2003], para. 54.) (Emphasis added.)

25. With respect to reviewing discretionary managerial decisions, such as HRSVP's decision to place the Applicant on administrative leave, the Tribunal has consistently held that: "The Tribunal's general approach to decisions involving the exercise of discretion is that it will not interfere or substitute its own judgment unless the decision constitutes an abuse of discretion." *Nunberg*, Decision No. 245 [2001], para. 40 (citing *de Merode*, Decision No. 1 [1981], and *Bertrand*, Decision No. 81 [1989]). Here, HRSVP's decision would be an abuse of discretion if it lacked a reasonable basis, or was arbitrary or carried out in violation of a fair and reasonable procedure. *Desthuis-Francis*, Decision No. 315 [2004], paras. 19, 23.

26. The Tribunal has on record a signed declaration dated 14 August 2008 by HRSVP explaining the basis for placing the Applicant on paid administrative leave as follows:

On March 18 or 19, 2008, I was advised by ... the Acting Director, Department of Institutional Integrity ("INT") that [the Applicant], a Senior Institutional Integrity Officer in INT, may have engaged in an unauthorized disclosure of confidential information in violation of the institution's policies. [The Acting Director of INT] stated that the Information Solutions Group ("ISG") informed INT that it obtained some electronic evidence, which suggested that [the Applicant] may have sent two highly confidential emails outside the Bank.

[The Acting Director of INT] reported that the electronic records obtained by ISG showed that the emails in question were forwarded by [the Applicant] on March 5 and 6, 2008 to an outside email address that appeared to belong to ... former Director of INT.

[The Acting Director of INT] indicated that to the best of his knowledge that [the former Director of INT] was not authorized to receive the emails. She left the Bank on January 18, 2008 and was prohibited access to confidential information under the Bank's policies. [The Acting Director of INT] was also unaware of any business reason that could justify [the Applicant] sharing the documents with [the former Director of INT].

According to the [Acting Director of INT] [the Applicant's] position as INT investigator provided him with wide access to highly sensitive and confidential information. Intentional or inadvertent disclosure of such information outside the Bank by someone in his position could present

significant risks to the institution. He said that it could cause irreparable harm to individuals under investigation, witnesses, Bank projects, and member governments; could result in damage to the reputation of the Bank; and could undermine the institution's efforts to fight fraud and corruption.

In order to protect the highly sensitive and confidential information readily available to [the Applicant] within INT, [the Acting Director of INT] believed it would be prudent to suspend his access to the department's electronic and paper files and place him on administrative leave until the matter was investigated and resolved.

I concluded that the facts and the rationale articulated by [the Acting Director of INT] were sufficient to justify placing the Applicant on administrative leave, with immediate effect. [The Applicant] was advised [of] my decision in writing on March 21, 2008.

27. The Applicant claims that the administrative leave decision was improper for the following reasons. First, HRSVP had erroneously determined that his forwarding of the two e-mails in question to the former Director of INT amounted to misconduct under Staff Rule 3.01, paragraph 5.01, which prohibits disclosure of confidential information. At the time HRSVP made the administrative leave decision, the Bank had no indication that the e-mails had been provided to the former Director of INT for any improper reason. The mere fact that he had forwarded the two e-mails to the former Director of INT, without more, cannot make the administrative leave decision justified. Second, the Bank assumed that since the Applicant had forwarded the e-mails, he must have also disclosed confidential information to the Newspaper. The Bank did not determine whether other staff members had leaked the same information to the press; it had simply assumed the Applicant's guilt.

28. The Tribunal is not convinced by the Applicant's arguments. The decision to place him on administrative leave was an interim measure. There is no requirement that HRSVP must have conclusive evidence of misconduct before placing a staff member on administrative leave. The Applicant was placed on administrative leave under Staff Rule

6.06, paragraph 9.09, not paragraph 9.08. Paragraph 9.09 gives substantial discretion to HRSVP. The Applicant has adduced no evidence of abusive or arbitrary exercises of discretion.

29. In his declaration, HRSVP explained that electronic evidence suggested that the Applicant had sent two highly confidential e-mails to the former Director of INT. The Applicant was not authorized to send those confidential e-mails to the former Director of INT, and the Applicant had no business reason to do so. A former official of the Bank is not authorized to receive confidential information kept by the Bank, in the absence of special authorization given by an authorized official of the Bank. Highly sensitive and confidential information was readily available to the Applicant within INT. Prudence dictated that he be placed on administrative leave until the matter was investigated and resolved. The Tribunal considers that, under the circumstances, HRSVP had sufficient reason to place the Applicant on administrative leave.

30. Whether the Applicant has engaged in misconduct under Staff Rule 3.01, paragraph 5.01 is another question that is still the subject of an investigation, which the Bank formally launched on 21 April 2008. A finding of misconduct is not a precondition for administrative leave.

Whether the Bank followed proper procedures

31. *Alleged “special” investigation.* The Applicant argues that the Bank did not follow proper procedures in reaching the decision to place him on administrative leave. The Applicant claims that instead of conducting an investigation under Staff Rule 8.01, the Bank engaged in a “special” investigation outside Staff Rule 8.01. The Applicant explains that Staff Rule 8.01 establishes the procedure in cases of possible misconduct, including

placing staff on administrative leave; but instead of pursuing an investigation under Staff Rule 8.01, the Bank conducted a “special” investigation outside the Staff Rules.

32. The Tribunal is unpersuaded by this. As already established, the Bank did not act on the basis of Staff Rule 8.01, which governs investigations of possible misconduct of a staff member. The Bank rather acted on the basis of Staff Rule 6.06, paragraph 9.09, governing administrative leave at the discretion of HRSVP. The Tribunal has not found the exercise of discretion in the instant case to be illegitimate or unreasonable. After 18 March 2008, upon the discovery of evidence showing that the Applicant had forwarded the two confidential e-mails to a person not authorized to receive those e-mails, the Bank proceeded under Staff Rule 8.01 to begin a misconduct investigation. This new investigation for misconduct was ongoing at the time the Applicant came to the Tribunal. The imposition of administrative leave on the Applicant accordingly found a new and clearly adequate basis.

33. *Alleged breach of attorney-client privilege.* The Applicant claims that the “decision made by [HRSVP] to place the Applicant on administrative leave is further flawed because it was based in part on a review by INT, [the Acting Director of INT], and [HRSVP] of communications between the Applicant and his attorney, which communications were clearly privileged and confidential, and had no relation whatsoever to the matter being investigated.” According to the Applicant, the privileged communication consisted of an e-mail from his attorney.

34. This argument is also unpersuasive. Both the Acting Director of INT and HRSVP in their signed declarations made it clear that they had no knowledge of the e-mail from the Applicant’s attorney and stated that the Applicant’s purportedly privileged communication did not play any role in the making of the administrative leave decision. The Applicant

himself stated that his privileged communication “had no relation whatsoever to the matter being investigated.” The Applicant has not explained how such an admittedly irrelevant communication could have played a role in the legal characterization of the administrative leave.

35. *Alleged violation of the Bank’s Information Security Policy.* The Applicant contends that the Bank’s search of the electronic records leading to the administrative leave was conducted in violation of the Bank’s Information Security Policy. First, the search should have been conducted under paragraph 14 of the Information Security Policy. Second, the Bank failed to obtain prior authorization from either a Managing Director or the General Counsel. Third, ISG expanded the scope of the electronic search in violation of the Information Security Policy.

36. The Tribunal is unable to accept the Applicant’s arguments. It is useful to recite here the relevant paragraphs (paragraphs 11-14) of the Information Security Policy.

[Paragraph] 11. The World Bank Group reserves the right to, but will not screen, monitor or examine the content of computer files, electronic mail messages, voice mail messages, telephone records, or similar stored electronic activities, or the record of usage of such electronic activities of Information Users with access to such facilities *unless there is a genuine business justification or there is a reasonable basis to suspect a violation of World Bank Group policy, a criminal act, or other misconduct.*

[Paragraph] 12. *In the event that there is a genuine business justification for monitoring of an Information User, approval for this activity will be authorized and pre-approved by the staff member’s Vice President. If the staff member is a Director or a Vice President, then permission shall be obtained from a Managing Director. If the individual is a Bank Group contractor, then permission shall be obtained from the Vice President or Managing Director responsible for the hiring unit.*

[Paragraph] 13. *A genuine business justification means that there is a legitimate reason connected to the work program of the Bank Group for a review of electronic activities and that such review is not done for personal reasons.* Access might, for example, be required to obtain necessary information when an Information User is away on vacation.

Likewise, access might be required to eradicate a virus or to protect the Bank Group's computer network from malicious software. The Information User involved shall be notified of such access as soon as practical.

[Paragraph] 14. Misconduct Investigations: *In the event that there is a reasonable basis to suspect a violation of Bank Group policy, a criminal act, or other misconduct*, then all instances of staff activity screening or monitoring must be pre-approved by (1) the senior manager responsible for the investigation, (2) a Managing Director, and (3) the Vice President and General Counsel. Such staff activity screening or monitoring must be stopped as soon as the investigation is complete. The senior manager responsible for the investigation must ensure that screening or monitoring facilities are not abused and that only necessary information has been captured. (Emphasis added.)

37. Under the above paragraphs of the Information Security Policy, the Bank has the right to review the electronic records of staff members if there is a "genuine business justification" or "a reasonable basis to suspect a violation of World Bank Group policy, a criminal act, or other misconduct." Paragraphs 12 and 13 govern reviews conducted for business reasons and paragraph 14 governs reviews conducted in connection with misconduct investigations.

38. The Applicant claims that when the Acting Director of INT discussed the search with the Managing Director, the Acting Director already suspected a violation of the Bank's disclosure policy. The search of the electronic record should therefore have been conducted under paragraph 14 of the Information Security Policy, which imposes stricter requirements.

39. The Tribunal is satisfied by the record that before the search, management did not have any information suggesting that a specific individual was responsible for improper disclosure of confidential information, or any other basis to begin an investigation. Thus, the Bank legitimately concluded that paragraph 14 of the Information Security Policy was not applicable. The Bank had a genuine business reason to find the source of the leak to

the press, in order to safeguard its confidential information, and to protect the Bank from future breaches. Accordingly, management authorized ISG to conduct a search to track the electronic path taken by the two e-mails when they left the Bank's electronic system. The Bank states that the search was limited and did not involve a review of the *content* of the Lotus Notes messages. ISG reviewed the logs of the Bank's external e-mail gateway to track the outward path taken by the two e-mails to determine whether they had been sent by anyone inside the Bank to someone outside the Bank. The Tribunal cannot find that this limited search was improper in the circumstances.

40. The Applicant next complains that the Managing Director did not approve the search formally (on a hard copy bearing his actual signature). In addition, it was not clear that the office of the General Counsel had agreed to the search. The record shows that the approval of the Managing Director was obtained through e-mail exchanges. The Tribunal is satisfied that the search had been approved by the authorized officials. Paragraph 12 of the Information Security Policy requires the approval of a Vice President for a search. Here, the Managing Director, rather than a Vice President, had approved the search because the search did not focus on any individual staff member under the supervision of a particular Vice President. Instead, the search focused on the electronic path taken by the two e-mails. The staff members who had received those two e-mails did not report to a particular Vice President. The Managing Director is senior to a Vice President, and was the appropriate official to approve the search. The Tribunal is thus satisfied that the search was conducted with proper prior authorization.

41. Finally, the Applicant contends that the request to search the Bank's information system was "limited to a review of the Bank's Lotus Notes email System." But ISG expanded the search and looked at the "internet gateway reporting system," which records

e-mails sent outside the Bank. In the Applicant's view, ISG was "strictly limited" to reviewing the Lotus Notes System and was not authorized to look at the "internet gateway records" linked to the Lotus Notes System.

42. The Tribunal is also unconvinced by this argument. The approved request to ISG stated:

I am requesting that ISG conduct a limited query of the Bank's Lotus Notes system. Specifically, I am requesting that ISG conduct three queries in an effort to *identify any Lotus Notes User Account from which these documents were sent to a domain outside the World Bank Group.* (Emphasis added.)

The approved request also asked ISG to track "any electronic or other action taken by the sender or any of the recipients with respect to any of the contents" [of the two e-mails in question].

43. Thus the approved request to ISG encompassed electronic actions taken to transmit these documents outside the Bank and allowed a review of the "internet gateway" which tracks outgoing e-mails. The Tribunal concludes that the record does not sustain the allegation that ISG had improperly expanded the ambit of its authorized search.

44. *Alleged conflict of interest.* The Applicant argues that the administrative leave decision was flawed because of a conflict of interest. He explains that the Bank acknowledges that it would have been a conflict of interest for the Acting Director of INT or INT to conduct the investigation; nevertheless the Acting Director of INT was significantly involved in the investigation, confronting each of the five INT staff members who had received Mr. X's e-mail, requesting the search of the electronic records and recommending administrative leave for the Applicant.

45. The Tribunal finds that the involvement of the Acting Director of INT in obtaining the permission for the ISG search and in recommending that the Applicant be placed on

administrative leave was not improper. When the Acting Director of INT requested a limited search of the Bank's electronic records, he made it clear to the Managing Director that (as stated in his signed declaration filed with the Tribunal) "management at that point did not have any information to indicate that any specific individual was responsible, [nor] any basis to begin an investigation." There was no conflict at that point. When the search was completed, and evidence implicating the Applicant had emerged, the Acting Director of INT asked HRSVP to place the Applicant on administrative leave. As the Acting Director of INT, he was the proper person to make the request for the search and the administrative leave. As manager of INT at the time, he was in the best position to explain why preventive leave of an INT staff member was warranted. Neither the ISG search nor the administrative leave matters were ultimately decided by the Acting Director of INT; he was involved only in making the requests. The Applicant has not established that such involvement was impermissible under the conflict of interest rules.

DECISION

For the reasons given above, the Tribunal dismisses all of the Applicant's claims.

/S/ Jan Paulsson
Jan Paulsson
President

/S/ Olufemi Elias
Olufemi Elias
Executive Secretary

At Washington, DC, 25 March 2009