



World Bank Administrative Tribunal

2009

No. 426

**BB,
Applicant**

v.

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

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

**BB,
Applicant**

v.

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

1. This judgment is rendered by the Tribunal in plenary session with the participation of Jan Paulsson, President, and Judges Florentino P. Feliciano, Stephen M. Schwebel, Francis M. Ssekandi and Ahmed El-Kosheri. The Application was received on 16 June 2009. The Applicant's request for anonymity was granted on 21 July 2009.
2. The Applicant contests the decision of the Vice President, Human Resources ("HRSVP"), to deny her request for compensation for a flawed and improper investigation of charges of misconduct by the Bank's Department of Institutional Integrity ("INT") which ultimately concluded that no misconduct had occurred.

FACTUAL BACKGROUND

3. The Applicant was appointed to the Legal Department ("CLEd") of the International Finance Corporation's ("IFC") on 1 May 1987 as an Attorney (Grade 23). She was promoted steadily, eventually attaining the position of General Counsel (Level I) in November 2002. She held that position until 31 July 2008 when she retired.
4. In 1996 and 1997, the Applicant was instrumental in establishing the "relationship counsel" program in CLED as one way to address the "seriously stretched" operations of the department. CLED thus gradually reduced the number of law firms that worked with IFC, with the aim of creating a smaller number of "relationship firms." The increased work flow to any single firm so designated permitted CLED to negotiate lower rates and

more advantageous fee arrangements for IFC and to obtain more responsive service on urgent matters. In conjunction with these efforts, CLED also established a Law Firm Associate Program, pursuant to which CLED contributed to the salaries of certain law firm associates in exchange for their secondment to IFC. During the period of secondment, the relevant law firm continued to pay the salary of the associate. CLED on occasion hired these former secondees as permanent CLED staff, whether directly after the end of their secondment or later.

5. In 2005 CLED underwent a major reorganization. In June of that year, one of the Chief Counsel of CLED [Mr. A], and Ms. Stephenie Goddard, Senior Human Resources Officer of the Human Resources Department of IFC (“IFC/HR” or “HR”), met with several Level E Legal Assistants who had complained about their inability to enter the counsel career stream. It was explained to them that CLED’s policy was to hire into the counsel career stream experienced lawyers from leading law firms and not staff from the IFC’s more junior legal analyst positions, due to CLED’s lack of facilities for training junior lawyers.

6. Beginning in June and continuing into August 2005, INT, the offices of the Bank Group’s Conflict Resolution System (“CRS”), the Staff Association and the President’s office received both identified and anonymous complaints concerning hiring and management practices within CLED. According to one anonymous allegation, hiring of CLED staff was limited to lawyers who had been seconded to the department from a “relationship firm,” even though the hired secondees did not have the qualifications required by CLED for internal staff applying for such positions. In addition, it was alleged that CLED managers failed to resolve conflicts of interest arising from sexual relationships

between senior attorneys and subordinate staff. These alleged conflicts had, it was claimed, created a hostile work environment through favoritism and discrimination in CLED recruitment and promotion practices.

7. Between 16 August 2005 and 11 January 2006, INT examined these complaints and referred them to IFC management, HR, and CRS offices (particularly Ombuds Services and the Office of Ethics and Business Conduct (“EBC”)) for resolution. At the request of IFC/HR, Maria Borrero, Ethics Officer and Manager of EBC, initiated an inquiry, notably to determine whether a conflict of interest existed in connection with the business relationship between CLED and its relationship firms. On 27 September 2005 Ms. Borrero sent an e-mail message to the Applicant with a number of questions regarding the selection process of relationship firms. One of these questions centered on personal and familial connections between CLED managers and the relationship law firms. On 12 October 2005 the Applicant forwarded to EBC an extensive response disclosing, among other things, personal and familial ties that CLED managers had with relationship firms. Following this initial response, Ms. Borrero asked the Applicant by e-mail on 8 November 2005:

It is alleged your former husband is at White & Case, if this is true, what is his title/position and when did you get divorced? If he is a partner when did he become a partner?

8. According to her testimony before INT, Ms. Borrero was trying to establish whether the Applicant and her former husband were on friendly terms because, since White & Case was a relationship firm, that would in her eyes constitute a conflict of interest. She also sought to know whether he played a role in the placing of the secondees in CLED or in the contracting process and whether he stood to benefit from those

arrangements. Ms. Borrero had copied an e-mail to this effect to CLED managers and IFC/HR staff. The Applicant responded that same day:

We will need to put together a response. But I wanted to go on record immediately with respect to item 7. I do not have a former husband at White & Case. I was divorced in the early 90's (I will get the date), but it is several years before the relationship counsel program was set up, from a Fulbright partner who worked in a department unrelated to our work (US Securities & Exchange Commission [SEC] enforcement actions). His department has since left Fulbright to go to another firm.

9. That same day, the Applicant sent an e-mail message to Esteban Altschul, Associate Director, HR Development, IFC, seeking advice on whether she should inform Ms. Borrero that she considered her question personal and inappropriate to circulate in writing. Mr. Altschul advised the Applicant to send an e-mail message to Ms. Borrero answering the question in "a very dry, matter of fact way" and not to mention anything about the question being inappropriate. The next day, the Applicant sent Ms. Borrero the following response:

I do not have a former husband at White & Case. Before I joined IFC I was married to a Fulbright partner, who was in a practice group unrelated to IFC's work (defending companies before the United States Securities & Exchange Commission). We split up before I joined IFC and the divorce was final (no financial payments or children) years before the law firm program was established. His practice group has left Fulbright and joined another firm that does no work for IFC.

10. Ms. Borrero testified that from this response she believed that the Applicant's ex-husband had performed no work for CLED and that the Applicant's response was truthful and complete. She also testified that it would have been pertinent to her inquiry to learn that, in fact, the Applicant's ex-husband had been perceived as the relationship partner of Fulbright with IFC, and that he had sent invoices billing IFC in excess of \$300,000 for services provided by Fulbright to CLED, including work performed by him. In her view, all this information would have been relevant because it gave rise to a perception of a

conflict of interest which put the Bank Group's reputation at risk in violation of the Bank's Principles of Staff Employment. Ms. Borrero also testified that she did not pursue allegations of misconduct regarding the Applicant's failure to resolve conflicts of interest concerning two sexual relationships involving CLED staff because she was not asked to do so. Nevertheless she responded positively to questions of the investigator about whether such relationships constituted a conflict of interest.

11. During the course of the inquiries by EBC and HR, grounds for additional allegations of misconduct emerged. Between 12 January and 16 October 2006, INT conducted a preliminary inquiry into the allegations of discriminatory hiring and conflicts of interest in CLED by reason of CLED's use of "relationship counsel," sexual relationships between CLED managers and staff, and alleged retaliation against staff for availing themselves of the CRS. The Applicant was one of the subjects of this preliminary inquiry, along with three of her managing attorneys. INT engaged outside counsel, namely Oliver Garcia, a partner and co-founder of the Aegis Law Group and an experienced litigator, to conduct the preliminary inquiry.

12. On 22 and 27 June 2006 INT interviewed four witnesses, namely an Office Administrator, who had separated from IFC in 2000, and three legal assistants. On 25 July 2006 INT interviewed Dorothy Berry, Vice President of IFC/HR, and Alan Siff, Lead Counsel in the Bank's Legal Department (LEG) which pursuant to contract provides legal advice to IFC regarding, among other things, interpretation of Staff Rules.

13. While INT resolved some allegations concerning the engagement of outside counsel in favor of the CLED managers, it also determined that there was sufficient basis to warrant further investigation of multiple allegations against four CLED managers

including the Applicant. On this basis, INT commenced formal investigations. The four investigations were linked and therefore conducted simultaneously.

14. On 20 October 2006 INT interviewed the Applicant. This interview was interrupted and resumed on 24 October 2006. During her interview of 20 October 2006 INT gave the Applicant a Notice of Alleged Misconduct dated 17 October 2006 which stated that INT was conducting an investigation into the following allegations:

(i) [t]hat, during the course of an inquiry conducted by the Office of Ethics and Business Conduct (EBC) into potential conflicts of interest in IFC's engagement of outside law firms, you willfully misrepresented facts and failed to disclose facts concerning your ex-husband, a partner at a law firm providing legal services to the IFC's Legal Department (CLED), with whom you had exercised responsibilities concerning the provision of those legal services;

(ii) [t]hat you failed to adequately and promptly resolve a conflict of interest arising out of the sexual relationship of a CLED manager/supervisor, [Mr. A], and a subordinate, [Ms. B]; and

(iii) [t]hat you failed to adequately and promptly resolve a conflict of interest arising out of the sexual relationship of a CLED manager/supervisor, [Mr. C], and a subordinate, [Ms. D].

15. A fourth allegation, concerning retaliation against a legal assistant by negatively modifying her performance evaluation after she had made a complaint to the Ombudsman, was directed at two of the managing lawyers in the Applicant's legal department, not the Applicant.

16. According to the Notice of Alleged Misconduct, the Staff Rules allegedly violated were:

- a. Staff Rule 8.01, paragraph 2.01(b) – Willful misrepresentation of facts intended to be relied upon;
- b. Staff Rule 8.01, paragraph 2.01 (b) – Failure to observe generally applicable norms of prudent professional conduct;

- c. Staff Rule 8.01, paragraph 2.01(a) – Failure to observe Principles of Staff Employment, Staff Rules, and other duties of employment, to wit:
 - (i) Staff Principle 3, paragraph 3.1, which states that staff members have a special responsibility to avoid situations and activities that might reflect adversely on the Organizations or lead to real or apparent conflicts of interest; and
 - (ii) Staff Principle 3, paragraph 3.1(c), which states that staff members must conduct themselves in a manner befitting their status as employees of an international organization, and shall avoid any action that would adversely or unfavorably reflect on their status or the integrity, independence and impartiality that are required by that status;
- d. Staff Rule 8.01, paragraph 2.01(c) – Acts or omissions in conflict with the general obligations of staff members set forth in Chapter Three of the Principles of Staff Employment and Rule 3.01, “Standards of Professional Conduct,” notably those listed above;
- e. Staff Rule 3.01, paragraph 4.01 (April, 1999) – Failure to promptly resolve conflicts of interest created by sexual relationships involving a manager/supervisor and his/her subordinate; and
- f. Staff Rule 3.01, paragraph 4.02 (December, 2004) – Failure to promptly resolve conflicts of interest created by sexual relationships involving a staff member and his/her direct report, or direct or indirect manager or supervisor.

17. Staff Rule 3.01, paragraph 4.01 (April 1999) governs sexual relationships between supervisors and subordinates. As originally promulgated in April 1999, the Rule read as follows:

Sexual relationships involving a manager/supervisor and his/her subordinate are considered a *de facto* conflict of interest. The manager/supervisor shall be responsible for seeking a resolution of the conflict of interest, if need be in consultation with management, who will take measures to resolve the conflict of interest. Failure to promptly resolve the conflict of interest may result in a finding of misconduct and the imposition of disciplinary measures, up to and including termination.

18. A Bank Intranet Announcement that accompanied the rule at its initial promulgation in 1999 provided general guidance to staff as to what constituted a manager/supervisor and subordinate relationship:

Conflicts of interest are likely to arise in relationships where one party has the authority to make decisions about the other's conditions of employment (recruitment, salary, contract approval, performance evaluation, promotion, work program). When a supervisor and subordinate engage in a sexual relationship, the unequal institutional power heightens the vulnerability of the subordinate and the potential for coercion. Other negative effects include perceptions by others of unfair advantage enjoyed by the person involved in the relationship, and the potential for one or both parties to injure the other if the relationship does not end amicably. Experience of other organizations and of the Bank Group has shown that the costs of relationships between managers and subordinates, even when initially consensual, are high in terms of staff morale, perceptions of fairness, and in extreme cases, legal fees.

19. In December 2004 the first sentence of the rule was edited to read as follows in paragraph 4.02:

A sexual relationship between a staff member and his/her direct report, or direct or indirect manager or supervisor is considered a *de facto* conflict of interest.

20. On 21 November 2006 the Applicant submitted to INT a written response to the allegations of misconduct.

21. INT interviewed nine other witnesses in the course of several months. Between 23 November 2006 and 21 March 2007, it pursued fact-finding and completed four draft reports, including that relating to the Applicant. On 20 January 2007 the Director of INT, Suzanne Folsom, updated the Executive Vice President of IFC, Lars Thunell, and his advisor, Karl Jackson, on the status of the four investigations. She stated that her team was in the process of completing the last steps in each of these investigations and anticipated that the four separate final reports would be available for review and comment by the respective subject staff members by 20 February 2007, before the final report was

forwarded to HRSVP for decision. The next day, in a follow-up e-mail message to Mr. Jackson, Ms. Folsom stated that “a number of the allegations have been substantiated.”

22. In a declaration submitted to the Tribunal, Mr. Jackson stated that President Wolfowitz had authorized him to ask the Bank’s General Counsel, Ana Palacio, to review the INT investigation against the Applicant because the case against her seemed to be an instance of “prosecutorial excess.” Mr. Jackson had immediately briefed Ms. Palacio and provided her with copies of the written materials that the President had seen. He affirms that in February 2007, she met with Ms. Folsom; Wayne Nardolillo, Lead Investigation Officer INT; Scott White, the Bank Legal Department’s Deputy General Counsel; and others to discuss the INT investigation. Mr. Jackson says that at that meeting Ms. Palacio decided that there was no basis for continuing the investigation against the Applicant and instructed INT to close the case. Mr. Nardolillo denies Mr. Jackson’s account.

23. In September 2007, the report of the Independent Panel Review of The World Bank Group Department of Institutional Integrity (“Volcker Report”) was published. Among other things, it recommended that the World Bank Group reassign cases not involving fraud and corruption to a unit other than INT and that INT permit subjects of investigations to question witnesses.

24. Between 13 March and 15 November 2007, a period of 248 days, the INT Director reviewed the draft reports of the investigations. The reports were approved for distribution to the subjects of investigations on 15 November 2007. When the Applicant was notified in November 2007 that she should soon expect to receive the Draft Report of Investigation, and as she “anticipated the worst,” she engaged counsel on 12 December 2007. Between 16 November 2007 and 4 January 2008, the subjects of the investigations and their counsel

executed required Non-Disclosure Agreements in order to receive the draft reports for review.

25. On 4 January 2008 the Applicant received a lengthy Draft Report of Investigation (“First Draft Report”) which concluded that she had engaged in misconduct on all three counts.

26. Following an informal meeting of the Board of Executive Directors, a World Bank Working Group accepted on 23 January 2008 the Volcker Report’s recommendations and indicated that management would implement them. From late 2007 through the end of February 2008, the Applicant’s counsel corresponded with INT and senior World Bank officials arguing, among other things, that the Non-Disclosure Agreements were overly restrictive and violated the Volcker Report’s corrective recommendations regarding fair access to witnesses and INT’s jurisdiction. In addition, in February 2008 the Applicant’s counsel requested from President Zoellick and Mr. Nardolillo that the investigation be held in abeyance until the Volcker reforms were implemented. Juan Jose Daboub, Managing Director with administrative responsibility for INT, giving reasons, denied this request.

27. Between 5 January and 28 February 2008, the subjects under investigation reviewed and submitted comments on their respective draft reports. On 28 February 2008 the Applicant submitted her Written Comments to the First Draft Report. Between 29 February and 1 July 2008, INT reviewed the comments of all the subjects of the investigation, undertook further investigation, and determined that the allegation of retaliation for a complaint to the Ombudspersons did not warrant further investigation. This resulted in the investigation against one of the managing attorneys being closed at that

point. INT explains that it also revised three draft reports with substantive changes requiring resubmission of the draft reports to their subjects for comment.

28. On 1 July 2008 the Applicant received a voluminous Revised Draft Report of Investigation (“Revised Draft Report”). The Revised Draft Report reached the same conclusions and found that the Applicant had engaged in misconduct under all three charges.

29. The subjects of investigation reviewed and submitted comments on the revised draft reports between 2 July and 4 August 2008.

30. The Applicant retired from IFC on 31 July 2008. She explains that as a result of the long and aggressive investigation and the negative effects the attendant long-term stress was having on her health and emotional state, and at the urging of her doctor and family, she resigned from her position as General Counsel of IFC almost five years before her mandatory retirement date. The Applicant has provided certificates from her doctors.

31. On 4 August 2008 the Applicant submitted lengthy written comments to the Revised Draft Report.

32. In August and September 2008 INT finalized and submitted the final reports of the investigation to HRSVP for decision. On 30 October 2008 the Applicant received the Final Report of Investigation, in which INT reversed its position and concluded that there was no violation of the Staff Rules on any count.

33. On 8 January 2009 HRSVP informed the Applicant that after “carefully reviewing the Final Report, including your testimony and written comments, I have concluded that no misconduct occurred. There will be no record of this matter in your personnel file.”

34. In her letter to HRSVP of 20 February 2009, the Applicant stated that INT continually violated its mandated duties and the terms and conditions of her employment and requested that the World Bank Group compensate her for the cost and damage caused from INT's actions. In addition, the Applicant asked that HRSVP inform everyone who was interviewed by INT for her case that she had been found innocent of misconduct. The Applicant received no answer from HRSVP.

35. On 19 March 2009 the Bank agreed to the Applicant's request to proceed directly to the Tribunal to resolve her claims for compensation for damages and costs resulting from HRSVP's decision and the INT investigation underlying it. The Applicant filed her Application on 16 June 2009. The Bank raised a preliminary objection on 14 July 2009 on which the Applicant commented on 28 July 2009. By order dated 30 July 2009, the President of the Tribunal decided to join the Bank's preliminary objection to the merits.

36. The Applicant justifies her claims for damages as follows: (i) the Bank violated its obligation under Principles 2.1 and 9.1 of the Principles of Staff Employment to treat her fairly; (ii) INT harassed her, violated due process and exceeded its authority by unilaterally initiating and conducting a flawed preliminary inquiry followed by an abusive and unjustified investigation; and (iii) INT exceeded its authority by wrongly interpreting the Staff Rules. She explains that she announced her retirement in November 2007 after already having endured at that point two years of investigation. She asserts that but for the investigation, she would have continued her service to IFC as its General Counsel.

37. The Applicant requests the following relief: (i) a formal written apology from the Bank to the Applicant; (ii) a letter from the Bank to all staff in service in CLED from 2005 to the present, whether presently in service or not, and to any witness that was interviewed

or contacted by INT regarding the INT investigation at issue, informing the recipients of the letter that an investigation of the Applicant regarding allegations of misconduct has been concluded and that there was no finding of any misconduct; (iii) \$137,187.50 for legal fees and costs incurred by the Applicant during the investigation and while responding to two draft reports of investigation; (iv) \$1,037,457 representing no less than three years salary for the Applicant's moral injury and personal distress, as well as harm to her professional and personal life and reputation or a higher amount to be determined by the Tribunal; (v) \$1,959,926.68 representing lost salary as a result of the Applicant separating 4 years and 10 months prior to her mandatory retirement date due to the harassing and prolonged INT investigation, based on a conservative 3.1% annual increase; (vi) \$944,461.41 representing the lost pension benefits as a result of the Applicant separating 4 years and 10 months prior to her mandatory retirement date due to the harassing and prolonged INT investigation; (vii) any other relief deemed fair and appropriate by the Tribunal; and (viii) all actual legal fees and costs incurred as a result of this Application.

38. The Bank answers that INT's decision to conduct a preliminary inquiry and an investigation was justified. They were both conducted in accordance with the principles of due process and in an impartial and fair manner. The Bank states that the Applicant's claims for damages should be denied as there was no finding of misconduct and the Bank did not terminate the Applicant's employment, which might be the basis for a back wage or lost pension award. It maintains that she could have pursued numerous alternative avenues, including disability leave, a sabbatical, reassignment, or the like, that would have

allowed her to continue to receive some compensation, and perhaps remain eligible for pension benefits.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

THE PRELIMINARY OBJECTION

39. The Bank contends that the Application should be dismissed on two grounds: first, the Application is inadmissible for untimeliness, and second, the Applicant fails to state a claim that the Tribunal can address.

The timeliness of the Application

40. Two provisions are pertinent in this regard. The first is Article II, paragraph 2 of the Tribunal's Statute, which provides as follows:

No ... application shall be admissible, except under exceptional circumstances as decided by the Tribunal, unless:

(i) the applicant has exhausted all other remedies available within the Bank Group, except if the applicant and the respondent institution have agreed to submit the application directly to the Tribunal; *and*

(ii) the application is filed within one hundred and twenty days after the latest of the following:

(a) the occurrence of the event giving rise to the application;

(b) receipt of notice, after the applicant has exhausted all other remedies available within the Bank Group, that the relief asked for or recommended will not be granted; or

(c) receipt of notice that the relief asked for or recommended will be granted, if such relief shall not have been granted within thirty days after receipt of such notice. (Emphasis added).

41. The second is Rule 7(8) of the Tribunal's Rules, which provides as follows:

Where the President of the respondent institution and the applicant have agreed to submit the application directly to the Tribunal in accordance with the option given to them under Article II, paragraph 2(i), of the Statute, the filing shall take place within ninety days of the date on which the President of the respondent institution notifies the applicant of

agreement for direct submission. In all other cases, the filing shall take place within the time limits prescribed by Article II, paragraph 2(ii), of the Statute and by Rule 24.

42. The Bank argues that the Applicant has not complied with the time limits required in Article II, paragraph 2, of the Statute. It points out that paragraph 2(i) and paragraph 2(ii) are separated by the word “and”, which means that the Applicant must comply with *both* the requirement that internal remedies be exhausted in paragraph 2(i) *and* the 120-day time limit in paragraph 2(ii). The Bank argues that the Applicant has failed to satisfy the requirements of paragraph 2(ii). HRSVP communicated his decision to the Applicant on 8 January 2009. The Applicant was required to file her Application within 120 days of that date, i.e. by 8 May 2009, but she failed to do so, filing her Application on 16 June 2009. She has provided no reasons or exceptional circumstances for her untimely filing.

43. The Applicant responds that Rule 7(8) controls. That Rule allows her 90 days from the date on which she was notified of the Bank’s agreement to direct submission of her Application to the Tribunal. The Bank notified her of its agreement on 19 March 2009. She could therefore file within 90 days of 19 March 2009, i.e. by 17 June 2009. She argues that she complied with this requirement by filing on 16 June 2009.

44. The Bank rejoins that Rule 7(8) was adopted pursuant to Article VII of the Statute, pursuant to which the Board of Governors empowered the Tribunal to adopt rules relating to its functioning; but that grant of authority must be exercised within the limits imposed by the Statute. The Tribunal cannot vary its own Statute, which can only be amended by the Board of Governors. Thus, regardless of Rule 7(8), the Applicant has failed to comply with the Statute and the Tribunal lacks authority to consider her Application.

45. At the outset, two preliminary determinations are required. First, the Tribunal recalls Article III of its Statute, which provides that: “In the event of a dispute as to whether the

Tribunal has competence, the matter shall be settled by the Tribunal.” Accordingly, the Applicant is correct when she argues that, unless and until Rule 7(8) were challenged and adjudged by the Tribunal to be *ultra vires*, the Applicant is entitled to rely on its terms, which were established by the Tribunal to govern the submission of applications for its adjudication. A decision regarding the Tribunal’s authority to hear a case is a decision for the Tribunal alone. Second, the Tribunal, pursuant to Article VII of the Statute, adopted and promulgated its Rules as governing the procedural issues dealt with in those Rules. Accordingly, all actual or potential parties are bound by, and are fully entitled to rely on, the provisions of the Rules in all cases before this Tribunal.

46. The Bank is correct in stating that applicants are required to comply with both paragraphs 2(i) and 2(ii) of Article II of its Statute. Paragraph 2(i) of the Statute requires exhaustion of internal remedies but also permits waiver of that requirement by agreement of the parties. The timing implications of an agreement to such a waiver, however, are not clearly spelled out in the Statute. Paragraph 2(i) imposes neither a time limit by which the potential applicant making a request for waiver of the requirement of internal remedies must comply, nor a time limit by which the Bank must give its assent to such a request. It is thus possible for the Bank to delay its agreement or disagreement to such a request in a manner that is prejudicial to a potential applicant. Conversely, it could be argued that a prudent potential applicant should not presume the Bank’s response and should proceed on the assumption that internal remedies must be exhausted. To address these matters, the Tribunal, within the first year of its existence and in its original Rules, adopted what is now Rule 7(8). The current version of the Rules retains verbatim the language used in the 1981 version. Rule 7(8) addresses these questions by establishing that, where the Bank

agrees to a waiver of the requirement to exhaust internal remedies, the period allowed for filing an application pursuant to that waiver begins to run from the date the Bank communicates its agreement to the waiver. By addressing issues on which the Statute remains silent, Rule 7(8) complements rather than contradicts Article II, paragraph (2)(i), of the Statute.

47. The Bank is under no obligation to agree to waive the requirement that internal remedies be exhausted. Yet when it does so agree, it must do so within certain constraints, notably acceptance that notification of the Bank's agreement to such a waiver constitutes the starting point of a 90-day period in which an applicant must file his or her application.

48. The Tribunal thus concludes that the Application is admissible as it complies with Article II, paragraph 2(i), and Rule 7(8).

Failure to state a valid claim

49. The Bank asserts that the Application fails to state a claim that the Tribunal may address. It argues that the Applicant does not contest INT's decision that no wrongdoing was committed, and that the only harm she has arguably suffered, i.e. loss of employment, was a result of her decision to retire early, which was a matter of her own volition. "[T]he Tribunal is not being asked to reverse that decision." The Bank alleges that the Applicant's demand for compensation for the intangible harm allegedly inflicted upon her by the INT investigation is essentially a claim of "professional damage" which the Tribunal has refused to consider in its jurisprudence. Furthermore, the Applicant has no contractual right to reimbursement of legal fees, and there is no duty or obligation for the Tribunal to enforce in her favor.

50. In response, the Applicant contends that her claim challenges HRSVP's failure to accept her demand for compensation as well as the underlying INT investigation upon which it was based, in violation of Principles 2.1 and 9.1 of the Principles of Staff Employment, due process and other staff rights. Her claim thus arises under the terms and conditions of the contract of employment. Therefore, the claim is within the subject-matter jurisdiction of the Tribunal.

51. The Tribunal recalls that Article II, paragraph 1, of its Statute prescribes that

[t]he Tribunal shall hear and pass judgment upon any application by which a member of the staff of the Bank Group alleges non-observance of the contract of employment or terms of appointment of such staff member. The words "contract of employment" and "terms of appointment" include all pertinent regulations and rules in force at the time of alleged non-observance...

52. In the Tribunal's jurisprudence, the Principles of Staff Employment have been viewed as forming part of the "contract of employment or terms of appointment" of staff members. One such principle is Principle 2.1 which states that "[t]he Organizations shall at all times act with fairness and impartiality and shall follow a proper process in their relations with staff members." Principle 9.1 states that "[s]taff members have the right to fair treatment in matters relating to their employment."

53. Furthermore, the Tribunal held in *N*, Decision No. 356 [2006], para. 20, that

[t]he discussion whether there has been a breach of fairness and impartiality in this case pertains to the merits. For jurisdictional purposes, as the Tribunal held in *McKinney*, Decision No. 183 [1997], paras. 13, 16-17, it is enough that the Applicant has "alleged" a plausible claim of contract violation and that it is tenable that "there are circumstances that warrant an examination of the merits of his allegations." It was there held by the Tribunal that "[i]t would be premature and improper for the Tribunal, by declaring this application inadmissible on the ground of jurisdiction *ratione materiae*, to deprive the Applicant of an opportunity to make his case."

54. The Tribunal has consistently assumed jurisdiction over claims concerning allegations of unfairness, abuse, or even carelessness in decisions taken during the conduct of a preliminary inquiry and an investigation, even when such investigative processes did not result in findings of misconduct. (*See G*, Decision No. 340 [2005], para. 2; *I*, Decision No. 343 [2005], paras. 17-19; *N*, Decision No. 356 [2006], paras. 18-23 and 32.)

55. As a former staff member of the Bank Group, the Applicant has standing to present an application to the Tribunal and has made a claim based on an alleged violation of her contract of employment and terms of appointment. She claims that HRSVP's decision and the underlying INT investigation violated Principles of Staff Employment 2.1 and 9.1, due process and other staff rights. The Tribunal finds that, on the basis of Article II of its Statute and its well-established jurisprudence recalled above, it has jurisdiction to examine the Applicant's claim on the merits.

MERITS

56. The Tribunal has held that in disciplinary matters its review is not limited to determining whether there has been an abuse of discretion but encompasses a fuller examination of the issues and circumstances of the case. (*See e.g. Cissé*, Decision No. 242 [2001], para. 26.) Concerning its review of the investigative process, the Tribunal found in *K*, Decision No. 352 [2006], para. 20:

[The Tribunal's] assessment of the Bank's conduct at the prior stage, i.e., the investigative process, is limited to verifying that the requirements of due process have been met.

57. With regard to the review of investigations which lead to a finding that misconduct has not been established, the Tribunal held in *G*, Decision No. 340 [2005], para. 73, that although not every inquiry must be "a model of efficiency," it is necessary that INT

operate “in good faith without infringing individual rights.” The Applicant’s contentions will be examined in accordance with these standards.

Initiation of the investigative process and the preliminary inquiry

58. The Tribunal will first examine whether INT, as required under the applicable Staff Rules, its Staff Guide and its Standards and Procedures for Inquiries and Investigations (“INT Standards”), properly initiated the investigative process and launched a preliminary inquiry. It is evident from the interviews of witnesses before INT and from the documentary record that, following a reorganization in CLED in the summer of 2005, INT, along with other offices in the Bank Group such as the IFC/HR and the President’s office, as well as the Staff Association, received complaints and anonymous letters from staff working in CLED claiming mainly that CLED senior managers had engaged in long-standing discriminatory hiring practices and conflicts of interest through CLED’s hiring of outside counsel through its “relationship counsel” program with law firms. There were also allegations of staff that CLED managers failed to resolve conflicts of interest arising from sexual relationships between senior attorneys and subordinate staff. The Applicant’s contention in this respect is that the complaints brought to INT were not about misconduct, but about discretionary administrative decisions and work environment, and that INT should have never initiated the investigative process on such basis. In her view, INT failed to take into account the motivations of the complainants, who sought to upset the hiring practices of CLED which confined its career stream to seasoned attorneys who had years of experience in private practice.

59. The applicable version of Staff Rule 8.01, paragraph 4.01, prescribes:

The investigative process may be initiated by the Bank Group whenever conduct for which disciplinary measures may be imposed is reported to

INT or the Vice President, Human Resources for the Bank, or the Vice President, Human Resources for IFC.

60. The Staff Guide to INT as in effect in 2005 stated that INT “first evaluates whether the alleged behavior, if it occurred, would constitute misconduct.” If the INT determination is negative, it refers the matter to the appropriate manager(s) or the Human Resources team, or both, for follow-up and resolution in a non-disciplinary context. However, if the allegation or complaint could constitute misconduct, INT is required to evaluate

the totality of the allegation to determine whether the matter could be better addressed through less formal means of intervention by management or Human Resources or within the framework of the CRS. INT makes these determinations following consultations with the Office of EBC, Human Resources, and the Legal Department.

61. The record demonstrates that when the complaints were first raised they were in fact motivated by the frustration of a number of legal assistants in CLED who had law degrees and who wanted to enter the career path of counsel in CLED. Other staff members had complaints about the extent of their salary increases and the positions assigned to them after the 2005 reorganization in CLED. It is clear that these decisions affecting staff members in CLED constituted discretionary administrative decisions which might have been challenged through the internal grievance system in the Bank; they were hardly the proper concern of INT.

62. The Tribunal nevertheless finds that INT complied with its internal policy and guidelines as they then were when it advised that, as a first step, IFC management, HR, Ombuds Services and EBC should seek to address and resolve the alleged conflicts and improprieties through coordinated interventions. The Ethics Officer, Ms. Borrero, initiated

an inquiry at the request of INT and IFC/HR into the allegation of a conflict of interest in connection with the business relationship between CLED and its relationship law firms.

63. In addition, it appears that during the examination by these offices in the Bank of the complaints of abuse of discretion, discrimination and unfairness in managerial decisions regarding hiring and promotions in CLED, grounds for related allegations of other possible misconduct emerged. Upon conclusion of their interventions, which were not deemed successful, EBC, Ombuds Services and the Vice President of IFC/HR requested INT to investigate the allegations under the Bank's disciplinary proceedings.

64. The Applicant claims that even though INT had first passed the matter to IFC/HR, it later succumbed to pressures to "distort its findings in order to justify its decision to conduct a full investigation." The Tribunal does not accept this claim. It considers that INT's decision to undertake the preliminary inquiry at that time was consistent with Staff Rule 8.01, paragraph 4.02, which stated:

Where an incident of possible misconduct is reported, a preliminary inquiry may be undertaken if necessary to determine whether there is sufficient evidence to warrant further proceedings.

65. INT also complied with its Staff Guide which prescribes that

[i]f INT determines that less formal means of intervention are not appropriate, it initiates a preliminary inquiry to determine if the allegation is sufficiently credible to merit a formal investigation.

66. Furthermore the Tribunal notes that the referrals of these complaints were not received from doubtful sources as in *Koudogbo*, Decision No. 246 [2003], para. 43, where the Tribunal found:

The initiation of investigations, preliminary or otherwise, on the basis of rumors and allegations by questionable sources, clearly does not comport with the basic elements of due process.

67. In the Applicant's case, the initial complaints were reviewed by authorized sources in the World Bank Group: the Ethics Officer, the Ombudspersons and the IFC/HR Vice President and were referred to INT only after examination. Whether those sources took account of the apparent motivations of the complainants is unclear. The Tribunal finds that INT's initiation of a preliminary inquiry into these matters under the circumstances was not inconsistent with applicable rules and proper procedure then in force. At the same time, the Tribunal takes note of the Volcker Report and the Report of the Working Group on Implementing the Recommendations of the Volcker Report favoring reassignment of primary responsibility for the investigation of staff misconduct cases not involving allegations of significant fraud or corruption to an administrative unit or units other than INT. The handling by INT of this case illustrates the force of that recommendation.

Conduct and outcome of the preliminary inquiry

68. The Applicant makes a number of claims in this regard. She alleges that while INT examined six witnesses in total, including three "disgruntled" legal assistants, a former Office Administrator, and Mr. Siff and Ms. Berry, it gave weight only to the interviews of the three legal assistants from whom it elicited testimony not about misconduct but about their dissatisfaction with the CLED hiring/promotion policy for the counsel career stream. The Applicant also states that INT improperly gave weight to the testimony of a former Office Administrator, who said she remembered the role that the Applicant's ex-husband played in the Fulbright & Jaworski relationship with IFC but whose testimony was factually incorrect, hearsay and not credible. The Applicant claims that INT discounted evidence favorable to her case given by senior Bank staff such as Ms. Berry and Mr. Siff and simply postulated that their opinions were less valid because they were not fully

informed. Furthermore, the Applicant states that during the preliminary inquiry INT failed to contact known, available and important witnesses, such as IFC/HR representatives Ms. Goddard and Ms. Helen Frick, IFC/HR Manager, who had first-hand knowledge of the issues in CLED during the time in question, as well as Fulbright & Jaworski partners who could have verified her ex-husband's status and relationship to IFC. All of these witnesses, the Applicant asserts, would have offered exculpatory evidence.

69. Most importantly, the Applicant complains that INT failed to notify her about the preliminary inquiry after interviewing six witnesses, while gossip and rumors were spread in the hallways of CLED. The Applicant says that had INT informed her of the preliminary inquiry, and allowed her to provide her own comments, she would have contributed to focusing, expediting or concluding the preliminary inquiry. She claims that INT unjustifiably launched an investigation even though the preliminary inquiry did not reveal any credible information that misconduct had occurred. INT thus violated the applicable Staff Rules, its own Standards, her right to due process and the Tribunal's jurisprudence.

70. The Bank, for its part, asserts, among other things, that INT gathered, reviewed and considered all exculpatory evidence and gave it the weight it believed was appropriate. It points out that there is no reason to second-guess INT for its exercise of investigatory discretion and that while some of the facts reported may not have supported a conclusion of misconduct it was not wrong for INT to follow up. It also states that there is no rule, policy or practice that gives the Applicant the right to be notified of the fact that a preliminary inquiry was taking place in her case.

71. The relevant provisions governing the conduct of a preliminary inquiry are as follows. Staff Rule 8.01 provides:

4.02 Where an incident of possible misconduct is reported, a preliminary inquiry may be undertaken if necessary to determine whether there is sufficient evidence to warrant further proceedings...

Where it is determined there is a sufficient basis to merit further proceedings, an investigation will be undertaken to determine the substance and circumstances of the matter.

The Staff Guide to INT states:

If INT determines that less formal means of intervention are not appropriate, it initiates a *preliminary inquiry to determine if the allegation is sufficiently credible to merit a formal investigation....* If the information gathered during a preliminary inquiry supports the misconduct allegation, INT normally initiates a formal Staff Rule 8.01 investigation to gather all relevant facts and circumstances. (Emphasis added.)

Finally, INT's Standards state:

4.2 In accordance with Staff Rule 8.01, investigators conduct preliminary inquiries to determine whether there is *credible information (some prima facie-valid-evidence to support the allegation) to merit an investigation.* The outcome of a preliminary inquiry is a determination of whether further investigation is warranted, not whether an investigation is substantiated. (Emphasis added.)

Regarding the evaluation of the credibility of witnesses INT's Standards state:

The initial fact-finding also includes a careful analysis of the credibility of the allegation(s), i.e., the complainant's good faith, honesty and sincerity with regard to the complaint information

In evaluating the testimony of witnesses, account shall be taken of their interest, bias, prejudice, integrity, reputation, and the manner in which they gained the information.

72. In reviewing the preliminary inquiry in *Sjamsubahri*, Decision No. 145 [1995], para. 11, the Tribunal found a serious irregularity in the Bank's failure to take into account exculpatory evidence in favor of the Applicant. In *N*, Decision No. 362 [2007], para. 27, the Tribunal also found serious irregularities during the preliminary inquiry:

In sum, due process was compromised by the handling of this case. The allegations were based on insufficient information and a negligent failure to verify essential data. Moreover, as the Applicant convincingly argues, the burden of proof was effectively shifted from the Bank to him.

73. In reviewing the Applicant's claims in the context of its precedents and the applicable rules, the Tribunal notes that the threshold that INT must cross during the preliminary inquiry in order to justify the initiation of a formal investigation is low. All that it needs to find is that the allegation is sufficiently credible to merit a formal investigation.

74. Through its interviews of witnesses, and particularly those of Mr. Siff and Ms. Berry, INT was able to establish – regarding two allegations of misconduct against the Applicant – that although there existed in her department romantic relationships between two managers and two lower level staff, the staff in question were not in a direct reporting relationship. A question arose as to whether a conflict would be created even in the absence of direct reporting if the managers were in a position to influence personnel decisions in respect of the lower level staff members with whom the managers were romantically involved. Both managers were in fact members of an HR Committee in CLED which reviewed the performance evaluations, salary increases and promotions and other HR actions for the staff of the unit. According to the testimony of witnesses, at least one of the managers recused himself as an extra precaution when discussions regarding his partner would take place. The other apparently would also recuse himself once his relationship became known. A related question of principle was whether Mr. A and Mr. C, as indirect rather than direct managers of their lower level staff, were *per se* in a situation of conflict of interest, especially under Staff Rule 3.01, paragraph 4.02, as amended (quoted above). The most important question was the scope of the Applicant's duty, if

any, under this Staff Rule to take measures to resolve any conflict of interest promptly upon becoming apprised of the facts and the consequences of any failure in this regard.

75. During the preliminary inquiry, INT also had to establish whether there was *prima facie* evidence or credible information to support a third allegation, namely whether the Applicant had willfully misrepresented facts to EBC concerning her ex-husband's interactions with IFC.

76. The outcome of a preliminary inquiry is a determination whether further investigation is warranted, not whether an investigation is substantiated. INT considered that through the interviews of six witnesses it was able to establish a *prima facie* case that the alleged instances of misconduct had occurred and that further investigation would be necessary to assess whether the charges were substantiated. But the reason it arrived at this conclusion may turn on its selection of the particular witnesses during the preliminary inquiry and to the manner it chose to interpret their testimony. With regard to two of the allegations, it turned also on its interpretation of Staff Rule 3.01, paragraph 4.01, as well as its revision of December 2004. In these respects, the Tribunal finds that (a) INT's selection of witnesses manifested questionable judgment; and (b) INT's presuming to interpret the rules was *ultra vires* and the interpretation that it assumed to be governing was questionable.

77. First, the Tribunal finds that INT should not have given substantial weight to the testimony of the three legal assistants. It was obvious that their references to the matters that formed the basis of the allegations of the Applicant's misconduct were incidental. The great bulk of their testimony consisted of complaints against a hiring policy that they perceived as unfair to them; they were naturally motivated against the Applicant and her

colleagues. Furthermore, they were misinformed regarding the employment status of one of the lower level staff members and in particular regarding the allegation that she was making more money than other staff because of her relationship with the manager. As the record shows and as Ms. Goddard testified, the staff member had first worked as a consultant in another department and was later hired as Counsel in CLED and was making less money than other staff members at her level.

78. Further, a review of the interview given by the former Office Administrator shows that her testimony was not credible. She wrongly stated that the staff member in question had started in CLED as a legal assistant, while in fact she was hired as Counsel. Her testimony was mainly hearsay, mostly obtained during informal visits to IFC. She had not worked in CLED since 2000. She also referred to past disagreement with the Applicant resulting from a previous investigation, which may raise questions about her objectivity. Her testimony could not have been reasonably considered as the basis on which to initiate an investigation. In contrast, the testimony of Mr. Siff and Ms. Berry was fully credible. Mr. Siff in fact had been contracted by IFC to give advice on conflict of interest issues. His testimony and that of Ms. Berry supported the Applicant's understanding that the romantic relationships in question did not give rise to conflicts of interest because there was not a reporting relationship. The Applicant had sought Mr. Siff's advice and reasonably relied upon it. As Mr. Siff confirmed, the Applicant wanted to make sure "that the rule was being followed or that ... there wasn't any perceived violation of the policy."

79. The Tribunal notes that INT also failed to examine in a timely fashion other witnesses with first-hand and in-depth knowledge of the matters who could have helped develop a better understanding of the circumstances at this preliminary stage. One such

witness was Ms. Goddard who advised the Applicant and her colleagues on the matters of the 2005 CLED reorganization (paragraph 5 above), liaised with the legal assistants, and was involved in resolving the conflict with respect to relationships among CLED staff. She also worked with Mr. Siff, Ms. Berry and her own supervisor, Ms. Frick, who recognized her competence on these matters. Ms. Frick also had been involved in the resolution of such conflicts of interest and could have provided insights in this respect. Their testimony was largely exculpatory to the Applicant and gave proper context to the complaints of the legal assistants. INT, however, did not interview them until the very end of the investigative process. Similarly it was only at a later stage in the process that INT interviewed Ms. Borrero who had referred the matter to INT and therefore had a relevant perception of the Applicant's alleged misrepresentation regarding her ex-husband.

80. The Tribunal finds that the preliminary inquiry was additionally flawed by INT's failure to inform the Applicant of that inquiry and provide her with the opportunity to present explanations regarding her behavior. The Tribunal's jurisprudence requires early notification of the subject of the preliminary inquiry. In *D*, Decision No. 304 [2003], para. 65, the Tribunal held that

a staff member who is the subject of a preliminary inquiry should be informed of that fact *at the earliest reasonable moment, taking into account when justified the aforementioned concerns regarding tampering, collusion, and the like*. Early notice – short of a formal Notification of Misconduct – can provide an opportunity to the subject to respond to the charges, to explain his suspect behavior, to inform the investigators, and so better to focus and expedite (and perhaps conclude) the preliminary inquiry.

81. Similarly, INT Standard 5.3 encourages early notification if certain factors are existent:

1. If you learn that the subject has already been made aware of the inquiry or investigation, it may be prudent to formally notify the subject of the allegations to stem misinformation through rumors.
2. If one or more witnesses have already been interviewed and as a result there is a risk of the spread of rumors or gossip concerning the allegations, it may be prudent to formally notify the subject of the allegations.

...

On balance, the following two factors should also be considered on whether notification should be held in abeyance until the mandated threshold has been reached:

1. If there is a reasonable risk that material witnesses may be intimidated by the subject.
2. If there is a reasonable risk that physical or documentary evidence may be tampered with or destroyed by the subject.

82. In the present case, the INT Standards and the Tribunal's jurisprudence required that the Applicant be informed of the preliminary inquiry. The allegations of misconduct on the part of the Applicant had already been widely discussed following the complaints of the legal assistants in the summer of 2005, a whole year before the preliminary inquiry interviews were conducted. Since late 2005, matters had been referred to INT by EBC after its inquiry of the Applicant. Furthermore, as corroborated by the declaration of witnesses, the legal assistants were openly discussing INT's investigation of the Applicant. In addition, according to the statement of Mr. Nardolillo, relevant documentation had already been collected by INT in March 2006 as part of the preliminary inquiry and before the interviews of witnesses in June and July of 2006. As requested by EBC, the Applicant herself had already provided a number of documents in the context of the inquiry in the fall of 2005. There could have been no concern that the evidence would have been more

exposed to the possibility of tampering by the Applicant, if she had been officially informed of the preliminary inquiry.

83. Not only was the Applicant not invited to testify during the preliminary inquiry, but she was given notice of the allegations only in October 2006, three months after the conclusion of the preliminary inquiry, contrary to the requirement of early notification established in *D*. The Bank argues that not informing the subject can protect her from unnecessary stress, but this justification was not extant in this case as the Applicant had already been informed of the preliminary inquiry through the “grapevine” and her stress levels according to the declarations of witnesses were already elevated. Under the circumstances, the Tribunal finds that not informing the Applicant of the preliminary inquiry transgressed due process because she was not offered the opportunity to defend herself in a timely fashion against damaging allegations. It resulted in unfair treatment as it unnecessarily prolonged her anxiety and obviously compromised her effectiveness. The Tribunal concludes that INT failed to act in accordance with the applicable rules and standards and violated the Applicant’s due process rights by its flawed handling of the preliminary inquiry.

84. Moreover, the Tribunal finds that INT’s launching of its preliminary inquiry took for granted its interpretation of Staff Rule 3.01, paragraph 4.01 (which became paragraph 4.02 after amendment), as applying not only to the sexual relationship between a manager/supervisor and his/her subordinate but to their superior, in this case, the Applicant. INT’s interpretation of the rule was highly problematic. It is arguable that Staff Rule 3.01 imposes a duty to resolve a conflict of interest upon the immediate manager/supervisor, not upon superior management. INT had no warrant for pursuing a

charge of misconduct against the Applicant on this ground; its duty is to find facts and not to resolve legal controversies.

Conduct of the investigation

85. The Applicant's main claim is that INT, for more than two years, ignored or discounted her truthful and reasonable explanations, offered at the beginning of the investigation in October-November 2006, and in doing so violated due process. Instead, she states, INT produced two draft reports concluding that she had engaged in misconduct. It was not until after the Applicant had engaged counsel and submitted lengthy and detailed responses to each of the draft reports of the investigation, incurred more than \$137,000 in legal fees and costs, suffered nearly three years of harassment and accepted her physician's advice to retire early, that INT reversed its conclusion and, apparently, finally accepted the very explanations the Applicant had given in November 2006. Those explanations were corroborated by Mr. Siff and Ms. Berry during the preliminary inquiry in the summer of 2006, and by numerous other witnesses by March 2007. In addition, the Applicant maintains, INT had exceeded its terms of reference in the draft reports by taking a position as to the legal meaning of willful misrepresentation and as to the legal meaning of Staff Rule 3.01.

86. The Applicant also alleges that INT ignored or discounted exculpatory evidence for more than two years during the investigation and therefore failed to conduct its investigation in a fair and impartial manner. The Applicant points out that INT finally concluded that there was no conflict of interest involving the Applicant and her long-ago husband, who was not, in fact, a relationship partner at Fulbright & Jaworski. Yet without basis, and ignoring this exculpatory information, INT maintained unreasonably and

unfairly that she had willfully misrepresented facts relating to a conflict of interest that did not exist.

87. The Bank contends that the existence of a number of factual lacunae and ambiguities justified further investigation even if they did not necessarily point to misconduct. For example, the Bank points out, INT was entitled to consider all surrounding circumstances in its decision to continue investigating, including the facts that no formal memoranda exist reflecting the advice by HR and Mr. Siff to the Applicant regarding the conflicts, and that apparently it was not the Applicant who sought and received that advice, but Mr. A. Furthermore, the Bank states, the incomplete answer provided by the Applicant to Ms. Borrero concerning matters uniquely within her knowledge, justified INT's further investigation to determine whether this incomplete response was willful.

88. In deciding whether there is basis to the Applicant's main argument, it is useful to compare her initial response to the accusations of misconduct as well as to the first two Draft Reports with the findings of the Final Report of Investigation. The Tribunal will also examine the Applicant's allegations of INT's failures during the investigation.

89. The Staff Guide to INT in conformity with Staff Rule 8.01 states in pertinent part:

INT works closely with the Legal Department to ensure that its activities adhere to the Bank's rules and policies and are consistent with the Bank's rights and obligations under its governing documents....

90. The 2007 version of the Staff Guide to INT states:

The principal objective in these investigations is to establish whether there is sufficient evidence to either: (i) substantiate an allegation of misconduct which in turn provides the institution the means with which to hold the wrongdoer accountable; or (ii) refute (i.e., disprove) the allegation and clear the accused staff member of any wrongdoing. If the evidence is inconclusive or if the allegation lacks specificity an allegation is qualified

as unsubstantiated in which case the benefit of the doubt goes to the accused.

91. *The alleged willful misrepresentation of facts to the Ethics Officer.* The Tribunal finds that the Applicant's explanations, as first offered to INT in November 2006, were plausible then and fully corroborated in the Final Report of Investigation. The Applicant explained that in her initial response to the Ethics Officer she had focused on the fact that in the past she herself (and not her husband) had been an associate at White & Case and that she had not thought to list her ex-husband as a family member as, indeed, she had been divorced from him 15 years before the inquiry and had no financial continuing connection or family ties with him. The Tribunal finds this plainly credible. As the record indicates, it was her 9 November 2005 answer to the later inquiry as to whether her ex-husband had been a partner in White & Case that created the basis for the first allegation. It is obvious, as the Applicant explained, that in giving her response she focused on clarifying the error regarding the name of the law firm where her husband had been a partner, and to record that they had no financial connection stemming from their divorce and that the relationship program was established years after their divorce. Indeed these facts were corroborated during the investigation. It is also true, as she explained, that it was she who volunteered the information that her husband had been a partner in a relationship law firm. She then stated that his practice group left Fulbright, and joined another firm which did no work for IFC. It is this statement that seems to be at the core of the problem. She explained to INT, however, that the team of lawyers in Fulbright that worked with IFC was in the project finance/banking group, and not her ex-husband's practice group (which dealt with SEC investigations). This statement is also plausible and is undisputed.

92. INT had managed to produce and show to the Applicant during her interview bills to IFC that her ex-husband had sent to her for each year between 1996 and 2000 for professional services rendered and expenses and services incurred totaling a few hundred thousand dollars, as well as a document showing that he was a billing partner. This documentation also showed that her ex-husband had billed for work performed by him for IFC transactions representing some four hours of work. In its Final Report, INT attached documents that showed that other invoices had been sent during that time period by her ex-husband or at his direction totaling over \$400,000. According to INT's Final Report, the Applicant's ex-husband had also executed agreements concerning the discounted secondment fees of Fulbright lawyers.

93. The Applicant acknowledged in her response to INT that she had forgotten most of these matters, as they had happened long ago, until she was shown the documents in her interview. She also explained to INT that, in hindsight, if she had thought about it, she would have mentioned to the Ethics Officer that several years ago there was a small number of matters in which her ex-husband was involved that were outside the normal project work. In any event she believed that virtually all of the work (perhaps 99% or more) at Fulbright was done by others, mainly by the dedicated IFC team. She did not believe that there had been any violation of a staff rule or any real or apparent conflict of interest. Her memory still was that the amount of work he was actually involved in was "very, very small" in relation to the overall work done by Fulbright. She also identified to INT another partner in Fulbright's project finance/banking group who was in fact the contact partner for IFC and was formally designated as the "relationship partner" for IFC.

94. Disregarding the Applicant's explanations INT concluded in its First Draft Report:

The investigation disclosed reasonably sufficient evidence that [the Applicant], in response to a conflict-of-interest inquiry by EBC, willfully failed to disclose material facts concerning the provision of legal services to CLED by her ex-husband, his status as one of his law firm's "billing partners" for IFC, and his management of his firm's participation in CLED's law firm secondee program. By misrepresenting that her ex-husband did not perform work for IFC, [the Applicant] affected EBC's determination of whether her connection to a law firm providing services to IFC constituted a conflict of interest.

95. The Tribunal notes that the Applicant's counsel attached to her first Response to the First Draft Report two letters by the other Fulbright partner which corroborate the Applicant's statements to INT and offer exculpatory evidence in this respect. This partner confirmed that he, and not the Applicant's ex-husband, was the relationship partner responsible for managing the secondment of Fulbright associates to IFC. He clarified that the Applicant's ex-husband's group focused on SEC investigations and similar issues not related to IFC's day-to-day work, and provided advice requiring but a few hours' attention on discrete issues where special expertise might have been needed. Only on a few occasions and because this partner himself had been unavailable, the Applicant's ex-husband had signed requests for retainers which would be applied to IFC business needs during the following year. He pointed out that "the retainers themselves [by the Applicant's ex-husband and his team] represent[ed] a very small part of our overall business with IFC (probably less than 1%)." He added that "[t]he work done under the retainers was primarily (probably about 99%) done by others than [the Applicant's ex-husband]."

96. The Tribunal notes that the Applicant's counsel provided a comprehensive response to the First Draft Report maintaining, among other things, that the Report had not established that the Applicant's relationship with her ex-husband constituted a conflict of interest. He also pointed out that all that the Report charged was that the Applicant should

have remembered the minimal contact her former husband had with IFC years ago and that not affirmatively volunteering this detail in addition to her truthful response was a willful misrepresentation in violation of the Staff Rules. Counsel also questioned whether any manager could be expected to anticipate what an ethics officer might want to know and have perfect recall of trivial facts arising out of long past and insignificant events.

97. The Tribunal finds that even if INT had not considered sufficient the Applicant's explanation at the time she offered it, there was every reason to do so at the latest after the Applicant submitted her response to the First Draft Report in February 2008. But INT produced a Revised Draft Report reiterating its conclusion, upholding this charge and noting as the First Draft Report had noted that

[t]he investigative record contains reasonably sufficient evidence to support a finding that [the Applicant] violated Staff Rule 8.01, paragraph 2.01(b) by willfully misrepresenting and failing to disclose to EBC facts concerning her ex-husband's business interaction with CLED/IFC. These misrepresentations and failures to disclose also support a finding that [the Applicant] violated Staff Rule 8.01, paragraph 2.01(b) for failure to observe generally applicable norms of prudent professional conduct.

98. In her response to the Revised Draft Report, submitted in August 2008, the Applicant contended that a willful misrepresentation charge under the Rules could not be substantiated for the following reasons: (a) the standard for willfulness is extremely high; (b) the Applicant had no motive to make a willful misrepresentation as there was no conflict of interest and allegations of willful misrepresentation without any motive to misrepresent are intrinsically without merit; (c) INT did not construct a complete evidentiary record regarding the position of Fulbright's relationship partner which, contrary to what INT alleged, went exactly to the critical point of the Applicant not remembering her ex-husband's minimal contacts with IFC; (d) INT admits that a less forthcoming answer would not have been a willful misrepresentation; and (e) INT had

acknowledged the Applicant's memory lapses when INT noted in the First Draft Report that if she had not remembered, she could, to refresh her recollection, have checked her files or asked EBC to do so, or that she could have contacted her ex-husband.

99. It was only after the submission of these comments on 4 August 2008 and the Applicant's resignation a few days earlier that INT reversed its finding in the Final Report.

It noted in pertinent part:

The evidence suggests that [the Applicant's] misrepresentation may have been unintentional. [The Applicant's] testimony reflects the possibility that [the Applicant] misremembered her interactions with her former husband. In addition, [the Applicant's] communications with Mr. Altschul, obtaining advice on how to respond to the EBC inquiry, suggests that [the Applicant's] omission of her former husband's involvement with the IFC may not have been intended to interfere with the EBC inquiry. Mr. Altschul advised [the Applicant] to reply to the EBC inquiry in an email "to clarify, in a very dry, matter of fact way, the answer to that question." [The Applicant] may have been following Mr. Altschul's advice in providing the EBC with a "dry, matter of fact" response.

100. The Report concluded:

Because [the Applicant] was uniquely in a position to provide information relevant to a conflicts inquiry to Ms. Borrero and other units of the Bank Group, her statement that her ex-husband worked in a department unrelated to IFC/CLED's work combined with her failure to disclose her ex-husband's actual business interactions with IFC/CLED supports a finding that she misrepresented facts, by way of omission, to EBC. The issue remained whether the misrepresentation was indeed willful. The record shows that [the Applicant] considered her response in consultation with HR which supports a conclusion that the omission (which was material) was deliberate. However, based on the totality of the investigative record, and after a careful reconsideration of the facts and evidence related to this issue, INT has concluded that, while there is some circumstantial evidence to support the allegation of a willful misrepresentation, the evidence overall, does not appear reasonably sufficient to substantiate the allegation. Under INT's Standards and Procedures for Inquiries and Investigations, a case that is "unsubstantiated" is defined as "[t]he investigation, due to a lack of evidence, did not establish a reasonable belief to substantiate that misconduct was committed despite the presence of some credible information that, which if corroborated, would have established a reasonable belief, but as it stands does not rise above the suspicion level."

In other words, there was insufficient evidence to prove or disprove that the misrepresentation was willful. Accordingly, fairness in the investigative process dictates that the benefit of the doubt as to what actually occurred must go to [the Applicant].

101. The Tribunal fails to understand why INT did not arrive at the foregoing conclusions, if not as early as at the preliminary inquiry stage (had it interviewed the Applicant as the Tribunal finds that it ought to have done), then at least soon after the Applicant had provided her explanations in her first written response, or, at the very latest, after receiving the Applicant's comments on its First Draft Report. INT had at its disposal, first, Ms. Borrero whom it could have easily interviewed in the beginning and not at the end of the investigation about the pertinent questions to be asked. Second, it possessed information from HR as to the advice given to the Applicant by Mr. Altschul regarding her initial response to EBC. Third and most importantly, INT was informed that the relationship partner of Fulbright with IFC was not the Applicant's ex-husband. INT could easily have contacted him or the firm as early as the preliminary inquiry stage and he could have readily corroborated the Applicant's explanations even before he provided documentary evidence to that effect attached to the Applicant's Response to the First Draft Report.

102. The Tribunal notes that there was no conflict of interest involving the Applicant and her ex-husband who was not, in fact, the relationship partner with IFC at Fulbright & Jaworski. It also notes that even if the amounts billed by the Applicant's ex-husband or at his direction represented a few hundred thousand dollars and facially could not be classified as "minor and forgettable," the Applicant's explanation, as offered to INT, was plausible in view of the true relationship partner's explanation.

103. Furthermore, since there is no allegation, still less indication, of lack of justification of the billing, the Applicant's error of recollection, without having had the opportunity to refresh her memory by seeing the bills at issue before she spoke, scarcely justified a charge of willful misstatement on which the Bank relied. Indeed, even if INT was convinced that the Applicant had misrepresented facts, the Staff Rule that she was accused of violating required that such misrepresentation be willful. This was a high standard of proof to be met, particularly considering that the evidence available or easily accessible and verifiable by INT since the beginning of the inquiry was sufficient to create what INT acknowledged only in its Final Report: the presence of doubt. INT failed to take into account in a timely manner exculpatory evidence and placed undue weight on inculpatory evidence. It failed for too long to apply the Staff Rules properly and to observe the standards to which it refers in the Final Report to justify its ultimate conclusion that the Applicant had not engaged in misconduct on this count. It exercised questionable judgment from the beginning regarding this allegation and persisted in the exercise of such judgment unreasonably and unnecessarily. INT protracted the investigation for years. The prejudice caused to the Applicant's employment status and professional reputation is obvious, as is the high likelihood of severe personal distress.

104. *Failure adequately and promptly to resolve a conflict of interest arising out of the sexual relationship between Mr. A and Ms. B.* As to the second allegation of misconduct, the Applicant explained that the authoritative source of legal guidance on conflict of interest issues arising out of sexual relationships for IFC was the Bank's Legal Department and its attorney, Mr. Siff. Mr. Siff had been consulted about the relationship between Mr. A and Ms. B. The authoritative sources for IFC/HR, Ms. Frick and Ms. Goddard, had also

been consulted on this issue. The Applicant explained that the advice received was that, since there was no reporting line between Mr. A and Ms. B, this was a permitted relationship under the Staff Rules.

105. The Applicant's explanations also related to the measures she undertook to resolve the conflict of interest once she became aware of it in 2003 and in compliance with the advice she was given. She stated that Mr. A, in addition to not directly supervising Ms. B, physically left the room when CLED management discussed the latter's performance; he never weighed in with respect to her performance or salary increases. Ms. B did not leave CLED because according to the advice given there were no grounds requiring her to do so. There was no indirect reporting line and although Mr. A assisted the Applicant with some day-to-day matters this was in addition to his regular work program as Chief Counsel. None of the day-to-day matters involved supervision of Ms. B. When his promotion to Deputy General Counsel seemed definite and as a result there would be an indirect reporting line between him and Ms. B, the Applicant arranged, working closely with HR, to have Ms. B transferred to another department on 3 August 2005. While there was a possibility to have Ms. B continue to do some legal work while in the other department by having a secondary reporting line to the Applicant, the Applicant ultimately decided that the option was not feasible and that Ms. B needed to perform a non-legal job. As the record indicates, Ms. B was transferred again to the East Asia Department in January 2006, after the intervention of Eva Mennel, IFC/HR Manager, and her title changed from Senior Counsel to Senior Projects Officer.

106. Notwithstanding INT's examination of witnesses and collection of documents that offered significant exculpatory evidence during both the preliminary inquiry and the

investigation regarding this allegation, the First and Revised Draft Reports concluded (in almost identical terms in both reports):

The investigation disclosed reasonably sufficient evidence that [the Applicant] failed to resolve promptly a conflict of interest created by the sexual relationship of [Mr. A] and [Ms. B]. Although [Mr. A] appears to have disclosed this relationship to [the Applicant] and other Bank Group personnel in mid-2003, [the Applicant] failed to take adequate measures to resolve this conflict of interest, despite knowing that [he] was a member of the department's senior management group and otherwise held effective department-wide managerial authority.

107. In its response to the First Draft Report, the Applicant's counsel identified evidence which supported the Applicant's explanations to INT. First, he attached Agreements of Understanding between IFC/HR and LEG showing that the latter undertook to provide legal support services to IFC for several years, including, among other things, advice on conflict of interest issues arising under Staff Rule 3.01, as well as on obligations under Staff Rules, Bank Group practice, and on individual human resource management issues. Second, according to the interviews of all HR representatives as well as that of Mr. Siff, the Applicant sought advice in order to resolve the conflict of interest arising out of the personal relationship in question. As early as 2003, when she became aware of the relationship, she requested a meeting (per Ms. Mennel's testimony) because she wanted advice on how best to handle the situation. At that meeting the Applicant was told that "the way the Legal Department was organized, the fact that there was this relationship was not an issue because [Mr. A] was not a supervisor in [Ms. B's] group." Ms. Frick and Ms. Goddard, and even Ms. Berry, confirmed their understanding that, as there was no reporting line between the two, there was no conflict of interest. Ms. Goddard also confirmed that Mr. A had no input in Ms. B's performance evaluation; and added that he recused himself from management discussions about her. Third, the record also shows that

Mr. Siff knew the details of Mr. A's responsibilities. Both Ms. Goddard and Ms. Mennel testified that they had discussed the issue and the Staff Rules with Mr. Siff, and they all agreed that Ms. B would remain in CLED unless Mr. A was promoted to become Deputy General Counsel. Even his undertaking acting assignments on a routine basis was acceptable as long as he was not a Deputy General Counsel. Additionally, as Mr. Siff had testified, his understanding was that before the 2005 reorganization, Mr. A was technically not in the supervisory chain. In the conversations with Mr. Siff, Mr. A understood that, as a matter of precaution only, he was required to recuse himself from discussions of Ms. B when it was necessary.

108. The Tribunal notes that the Applicant also pointed out in her response to the First Draft Report that it was entirely unclear from INT's interpretation of Staff Rule 3.01 what else she should have done, or when she should have done it, even though she took steps to obtain expert advice and relied and acted upon that advice as prudent managerial practice dictated. As her counsel correctly pointed out, "[t]he *post hoc* determination that the advice was flawed, or that under some unarticulated standard she should have done more than she was advised was appropriate under the circumstances, makes it impossible for her, ... , to navigate the path between acceptable discharge of [her] duties and sanctionable conduct." The Applicant's cogent defense, however, did not convince INT, which issued a Revised Draft Report arriving at the same conclusions. During her second response the Applicant argued, among other things, that INT could not be allowed to interpret the Staff Rules in order to fit its theory of prosecution when its interpretation was in direct conflict with World Bank Group experts on whom the Applicant was entitled to rely.

109. Apparently finally taking into account the Applicant's responses to the previous drafts, INT's Final Report noted:

INT's investigation disclosed that [the Applicant] sought to address the conflict posed by [the relationship of Mr. A with Ms. B]. In particular, [the Applicant] called a meeting with Eva Mennel, IFC HR manager, in October 2003, to inform HR of [the relationship of Mr. A] and to obtain "advice on how best to handle the situation." After Ms. Mennel consulted with Mr. Siff of [Legal Administration] LEGAD, [the Applicant] was informed that there would be no conflict of interest as long as [Ms. B] did not report to [Mr. A], and [he] recused himself whenever a decision related to [Ms. B] was made in the management team. [Mr. A] also met separately with Mr. Siff to discuss the matter and [Mr. A] in turn briefed [the Applicant]. In reliance on LEGAD and HR's advice, [the Applicant] took no further action to resolve the apparent conflict of interest until a CLED department reorganization occurred in 2005. CLED management transferred [Ms. B] out of the department in August 2005, when [Mr. A] was officially appointed CLED's Deputy General Counsel.

110. The Report concluded regarding this count of misconduct:

In light of the record, INT finds reasonably sufficient evidence that [the position of Mr. A] on the HR Committee and his duties as the *de facto* Deputy General Counsel created an indirect line of management and/or supervision over [Ms. B] while the two were involved in a sexual relationship. This in turn resulted in a *de facto* conflict of interest. As [his] supervisor, [the Applicant] had a duty to take measures to resolve the conflict once she became aware of the relationship. INT determined that [the Applicant] promptly sought advice to resolve the conflict and relied on that advice. Although [the Applicant] took measures to resolve the conflict by seeking advice from HR, the advice provided by HR (in consultation with Legal) may not have been sufficient to fully address all aspects of an apparent conflict of interest, because the advice appeared to have been based on an incomplete set of facts regarding the full extent of [Mr. A's] indirect managerial and/or supervisory role of all CLED staff, including [Ms. B]. In addition, while consultations concerning the ... relationship extended into the summer of 2005, there is no indication that the advice provided by IFC HR staff or Mr. Siff prior to December 2004 was reconsidered by the Applicant (or IFC HR or Mr. Siff) following the revised language of the rule in December 2004 (i.e., the explicit applicability of the rule to indirect reporting relationships). Nevertheless, [the Applicant] sought and was provided advice by HR (in consultation with Legal) and her subsequent actions adhered to this advice. Based on the totality of the evidence, INT believes that [the Applicant's] handling of the matter, in light of the advice provided by IFC HR and Mr. Siff (even if

based on an incomplete set of facts), appears not to have been in contravention with the requirements of a manager under Staff Rule 3.01.

111. A review of the findings in the Final Report shows that INT then accepted the Applicant's explanations as she had presented them in her interview and her first written response to INT. As with the previous allegation, the Tribunal can find no reasonable basis for INT to have arrived at a conclusion absolving the Applicant of misconduct with such extended delay and in the teeth of Reports reaching the opposite conclusion. All the interviews of the relevant witnesses on which INT based the findings in its Final Report had been conducted before the issuance of its First Draft Report, which nevertheless concluded that the Applicant had failed to resolve the conflict of interest from the romantic relationship adequately and promptly, and had thus engaged in misconduct. Throughout the investigation INT failed to give proper weight to the exculpatory testimony offered by HR representatives and Mr. Siff, and attempted to discount their advice to the Applicant on which she had relied, stating that it was based on incomplete facts. INT's First and Revised Draft Reports show that INT disregarded the absence of any actual conflict under the Staff Rule in effect then and insisted, in order to support its view that a conflict did exist, that [Mr. A] functioned as a *de facto* Deputy General Counsel, even though such a position did not exist at the time and witness testimony showed that he was part of a collective management structure with a number of co-equal Chief Counsels who did not view him as superior to them.

112. While the Applicant understandably relied on the advice of Mr. Siff, and on that of HR, and made good faith efforts to resolve the conflict on the basis of their advice, INT failed to recognize this fact early in the process and unjustifiably insisted, until its Final Report, on its own interpretation of the Staff Rule, on the existence of a conflict and on the

failure of the Applicant to resolve it. It thus penalized the Applicant on the basis of a questionable interpretation of Staff Rule 3.01. This point was made by the Applicant's attorney in the Applicant's response to the First Draft Report, but INT did not give it proper weight at that time. The Tribunal concludes that INT exceeded its authority as a fact finder by its interpretation of Staff Rule 3.01. Moreover, on the facts, it exercised inadequate judgment and unjustifiably persisted in the exercise of that judgment to the Applicant's prejudice.

113. *Failure to resolve adequately and promptly a conflict of interest arising out of the sexual relationship between Mr. C and Ms. D.* The Tribunal notes that the Applicant offered explanations with regard to this allegation, in her interview and her first response, that were plausible and corroborated. She stated that this matter had been handled by Mr. A, working with HR and Mr. Siff, and conveyed her recollection that this was a permitted relationship as there was no reporting line and that therefore neither party would be requested to leave. When she first learned of the relationship she instructed that both parties be advised not to spend any time at the office together and spoke to Mr. C. She mentioned that as part of the reorganization that took place in 2005 she removed him from his managerial position to a "technical track" position. She also explained that in October 2005 Ms. D had decided that she wanted to leave the department to take a developmental assignment and that the details of such developmental assignment were worked out by Mr. A and HR, and that the Applicant was informed of key developments. She stated that, given the complexities and sensitivity of the issues involved, the issue was resolved as expeditiously as possible.

114. INT refused to accept the Applicant's explanations. Despite her testimony, and that of a number of witnesses, the First Draft Report concluded, in terms similar to the Revised Draft Report, regarding this allegation:

The investigation disclosed reasonably sufficient evidence that [the Applicant] failed to resolve a conflict of interest created by the sexual relationship of [Mr. C], and [Ms. D]. Although [he] failed to disclose this relationship to [the Applicant] until 2004, once notified, [the Applicant] failed to take adequate measures to resolve the conflict of interest. Despite knowing that [he] was a member of the department's senior management group, [the Applicant] advised [him] at that time to "exercise better discretion" and to keep the relationship "below the radar screen."

115. The Applicant presented her response to the First and Revised Draft Reports pointing out, among other things, that the First Draft Report had erroneously stated that the Applicant had learnt of the relationship in October 2004. In fact, the Applicant had learnt of the relationship in early 2005. The Applicant stated that according to the record the only evidence of potential supervision of Ms. D by Mr. C occurred in 2002 and 2003, well before the Applicant was aware of the relationship. The First Draft Report had concluded that Mr. C had supervised Ms. D on occasion and found the Applicant guilty of misconduct without taking into account that at the time the Applicant had no knowledge of the relationship. Furthermore, the First and Revised Draft Reports placed significant emphasis upon, and took out of proper context, an alleged statement by the Applicant to Mr. C "to keep the relationship below the radar screen" as her main response to the conflict of interest although this was not the case. HR witnesses testified before INT that they did not view the relationship as creating a conflict of interest as there was no reporting relationship, but as a work environment issue. The Applicant sought advice upon learning of the relationship. Ms. Goddard, having consulted with her predecessors and HR management, told the Applicant that she needed to ensure that Ms. D was not reporting to

Mr. C and that he should not have any input in her Overall Performance Evaluation and Salary Review Increase discussions. The Applicant complied with this advice and moreover advised Mr. C not to meet with Ms. D in the office.

116. The Tribunal notes that, as the Final Report concludes, the advice that the Applicant received did not reflect that the Staff Rules had changed when the Applicant received advice relating to that relationship from Ms. Goddard. As the Applicant correctly pointed out in her response to the First Draft Report, the only relevant time frame for the purposes of the inquiry was between early 2005 when the Applicant became aware of the relationship and August 2005 when Mr. C was removed from management. Not only did Mr. C not supervise Ms. D during that period, on the contrary he did not participate in any discussions regarding her assignments, promotion, pay or employment. The Tribunal also notes that despite the Applicant's convincing comments on the First and Revised Draft Reports of the investigation, INT continued to hold that Mr. C was a *de facto* supervisor of Ms. D simply because he was a member of the HR CLED Committee. The Tribunal finds convincing the Applicant's argument in her response to the Revised Draft Report that if he was the indirect supervisor as a result of this Committee assignment, which was simply part of his responsibilities as a Chief Counsel, then he would have been the indirect supervisor of the entire department. Furthermore, applying INT's reasoning, every Chief Counsel in the department would have been the indirect supervisor of every other person in the department.

117. Nevertheless, INT found in its Final Report regarding the Applicant's alleged failure to resolve this conflict of interest involving the personal relationship in question that Mr. C supervised Ms. D, thus creating a *de facto* conflict of interest under the Staff

Rule. In examining the Applicant's obligation to take measures to resolve the conflict and to do so promptly, INT found:

At the time [the Applicant] became aware of [the relationship of Mr. C with Ms. D], she instructed him to exercise discretion....

[The Applicant] asserts that she took all the necessary steps to resolve the conflict and that she did so in reliance on advice from IFC/HR and LEGAD attorney Alan Siff. However, during INT's interviews with IFC/HR officers and with Mr. Siff, they testified that they did not learn of the relationship from [the Applicant] and there is no evidence that [the Applicant] promptly sought their advice upon learning of the relationship. Only Stephenie Goddard, former IFC Senior HR Officer responsible for CLED, thought she may have had initial discussions on [the relationship of Mr. C with Ms. D] with [the Applicant]....

[The Applicant] also asserts that she relied on the prior advice given to her by HR/Legal regarding [the relationship between Mr. A and Ms. B] given that it was consistent with Ms. Goddard's advice. However, more than a year had passed since she was given the advice and, in the meantime, the Staff Rule had been clarified in December 2004 (in proximity to the time [the Applicant] was informed of [the relationship of Mr. C and Ms. D] to emphasize the applicability of the Staff Rule to indirect managerial/supervisory relationships with subordinates.

Nevertheless, there is also evidence that CLED management, [Mr. A] in particular, interpreted indirect supervision narrowly (e.g., indirect supervision would arise only if [Mr. C] had direct authority over [Ms. D's] direct manager/supervisor...). While this interpretation appears inconsistent with the objective of the rule, the advice [the Applicant] received in respect to the [relationship between Mr. A and Ms. B] may not have been sufficient to fully address all aspects of an apparent conflict of interest and could reasonably have influenced [the Applicant's] perception of the apparent conflict of interest vis-à-vis not only [the relationship of Mr. A with Ms. B], but also the apparent conflict of interest in [the relationship between Mr. C and Ms. D]. In this context, [the Applicant] may have believed that there was no conflict to resolve because, under CLED management's interpretation of the Staff Rule, [Mr. C] was not [Ms. D's] indirect manager/supervisor since he was not her supervisor's supervisor. Therefore, [the Applicant's] comments to [Mr. C] may have been intended to address [a Principal Counsel's] specific complaint (lack of access to [Mr. C]). Furthermore, there is also evidence that [Mr. C] was asked to recuse himself, by stepping out of the room during discussions of [Ms. D's] performance in May 2005, consistent with the steps taken to address the [relationship between Mr. A and Ms. B]. In any event, in August 2005, as part of CLED reorganization, [the Applicant] moved [Mr. C] from a

managerial position to “technical track,” thus resolving the conflict. From that point, [Mr. C] was no longer on the CLED HR Committee.

118. INT concluded regarding this allegation

In INT’s view, under the totality of circumstances, and providing [the Applicant] with the benefit of the doubt, there is no reasonably sufficient evidence to conclude that [the Applicant’s] handling of [this] relationship was in contravention of the Staff Rule.

119. The Tribunal finds that in view of this analysis INT should have reached this conclusion shortly after the Applicant’s first explanations in her interview and written response and, at any rate, no later than the receipt of the Applicant’s comments on the First Draft Report. Moreover, INT’s case against the Applicant was based on a questionable interpretation of the Staff Rule as applying not only to the manager/supervisor conducting the sexual relationship but to his superior as well. As seen above, INT’s duty is to find facts and not to interpret the rules in a manner that would justify charging applicants with misconduct. INT exercised questionable judgment from the outset regarding this allegation, and inflexibly persisted until it had caused the Applicant substantial injury.

The Applicant’s claims of malice and abuse in the investigative process

120. The Applicant has made claims of malice on the part of the investigators and harassment as well as of abuse of investigatory initiatives and bias on the part of the investigator and on the part of certain witnesses. The Tribunal finds that the evidence in the record does not support an allegation of malice or bad faith on the part of INT.

121. It is however evident that INT, after its initial interviews, reached a premature conclusion that allegations against the Applicant had been substantiated. The Tribunal finds disquieting evidence provided through the e-mail message of Ms. Folsom to the Advisor to the Executive Vice President of IFC on 21 January 2007 that “a number of the allegations have been substantiated” at a time when INT had not completed its

investigation and was expected to interview more key witnesses in the investigation, two at least of whom in the event offered significant exculpatory evidence supportive of the Applicant. In this respect the Tribunal finds that INT did not act in accord with its mandate as presented in the 2006 version of its Staff Guide that “[i]n keeping with INT’s role as a neutral fact-finder, INT investigators collect evidence that is both inculpatory and exculpatory,” as recognized in the Tribunal’s jurisprudence. (*See e.g. Rendall-Speranza*, Decision No. 197 [1998], para. 57; *Z*, Decision No. 380 [2008], para. 27.)

122. The evidence does not support the allegation of bias on the part of Ms. Borrero although both she and the Applicant acknowledged the existence of a dispute that had arisen earlier regarding jurisdiction of EBC on conflict-of-interest matters. In keeping with its duty under Staff Rule 8.01, paragraph 4.05(c) to “[c]onsult persons believed to have, or materials believed to contain, information of probative value to the investigation,” INT properly interviewed Ms. Borrero who had been asked to initiate an inquiry into the Applicant’s actions with regard to the “relationship program,” and could provide testimony of probative value in this respect. A review of her responses to the investigator does no more than reflect her views of the matter.

123. The Applicant also claims that INT violated due process by unreasonably protracting the investigation for more than two years; she maintains that the length of the investigation was not reasonably proportionate to the complexity of the facts of the case. The Applicant points out in particular that the Bank has not offered any plausible explanation to the Tribunal why Ms. Folsom informed Mr. Thunell that the investigation was nearly complete in January 2007, but INT waited until 15 November 2007, to make the First Draft Report available for review. The Applicant has suggested that the reason

for this delay was the fact that the President of the Bank had asked for this investigation to be stopped. The Bank rejects that suggestion and maintains that the delays in the approvals of reports for distribution resulted from significant demands placed on INT due to leadership issues in the Bank and the Volcker Panel review of INT. It also invokes the Applicant's delays in signing the Non-Disclosure Agreements for the release of the draft reports and her requests for a stay of the investigation until the Volcker Report had been accepted by the Bank.

124. While the Tribunal accepts that the time taken by the Applicant to respond may have contributed to the length of the proceedings, it finds it reasonable that she would need time to review the voluminous reports of the investigations. In view of the complexity of the allegations, the number of witnesses to be interviewed and the volume of documentation to be collected, both during the preliminary and formal investigation stage, while at the same time INT was expected to balance the need to investigate allegations thoroughly and the need to minimize disruptions to the Bank Group's business operations as its Staff Guide requires, INT's timeline up to the moment that the interviewing was completed in March 2007 was justifiable. On the other hand, INT's delay in distributing the draft reports to the Applicant and her colleagues after that point, for 248 days, was unjustifiable. Even if as the Bank asserts that this delay was attributable to the demands placed on INT due to leadership issues in the Bank and the Volcker Panel review of INT, the Tribunal is not persuaded that INT could not allocate some time earlier in these 248 days to review the reports before distribution, especially given the ease with which important conclusions could have been properly verified and corrected. So protracted a process suggests disregard for the trauma that the conduct of an investigation entails. As

the declarations of several witnesses confirm, the investigation had a seriously adverse effect on the Applicant's life and ability to carry out her work. That this unreasonable delay had prejudicial consequences for the Applicant is also indicated by the fact that, subjected to stress from the prolonged investigation as confirmed by her doctors and, at their suggestion, she announced her intention to retire in the late fall of 2007.

125. The Applicant also claims that INT should have given her the benefit of the Volcker Report's recommendations when they became available and were accepted by the World Bank, particularly the recommendation that subjects of the investigation be given access to witnesses so as to be afforded a fair opportunity to form a defense. The Tribunal agrees that it would have been desirable to have afforded the Applicant the benefits advocated by the Volcker Report's recommendations, particularly as the Bank proposed to apply those recommendations on a case by case basis through 2008 even before their formal implementation. The Applicant argues that her right to due process was violated as she was denied an opportunity to contact witnesses, particularly her managing attorneys, to prove her claim. The question to be asked, in this respect, is whether the Applicant was afforded full opportunity to make her case. As the Tribunal found in *Ismail*, Decision No. 305 [2003], para. 58:

The Tribunal takes the view that denying a party the opportunity to be present when witnesses are interviewed does not necessarily amount to a denial of due process, provided that the party has a proper opportunity to be made aware of what is alleged and to put forward evidence and arguments in response. (*Rendall-Speranza*, Decision No. 197 [1998], paras. 61-62.)

126. The Tribunal finds that the Applicant was able to submit evidence and arguments in response to the allegations against her, on her own and with the assistance of competent counsel. As a result of these comments on the First Draft Report, INT attached the

transcripts of the testimony of the two managing attorneys to its Revised Draft Report. Furthermore it was through the competent defense of her case that she in the end convinced INT to reconsider its questionable interpretation of the Rules, albeit with a significant and prejudicial delay, and arrive at the conclusion that the Applicant had not engaged in misconduct.

Overall conclusion

127. The Tribunal concludes that the Applicant's treatment in this case by INT fell short of the standards of due process and fairness required by the Principles of Staff Employment and the Staff Rules. That treatment resulted in serious adverse consequences to the Applicant's career, professional and personal reputation, and apparently health, as well as financial damage.

Remedies

128. The Tribunal will now turn to assess the appropriate remedies to be granted to the Applicant. In so doing, the Tribunal will seek to award relief that is reasonable and proportionate to the circumstances of the case.

129. The Tribunal takes into account its conclusion above that, with regard to all three counts of misconduct, INT should have reversed its findings at the latest after the receipt of the Applicant's comments on the First Draft Report in late February 2008 and before the Applicant had retired. The Applicant asserts that she would not have retired but for the prolonged and damaging investigation. She therefore requests not only lost salary as a result of her leaving the Bank prior to her mandatory retirement date but also lost pension benefits she could have built up. As evidenced by her doctors' certificates and declarations of other witnesses, the prolonged and flawed investigation apparently had adverse

consequences for the Applicant's health. It was at their suggestion, among that of others, that she decided to retire. While the Tribunal notes that the ultimate decision to retire was the Applicant's and not the Bank's, it finds that there is a causal link, on the one hand, between the unjustified prolongation of the stressful investigation and the failure of INT to arrive in a timely manner at its ultimate findings exonerating the Applicant and, on the other hand, the Applicant's retirement on 31 July 2008.

130. The Tribunal notes the Bank's argument that if the Applicant's health really had made it impossible for her to continue working in November 2007, there were alternatives to resignation. These include disability leave, a sabbatical, or reassignment, all of which would have allowed her to continue to receive some compensation, and even remain eligible for pension benefits. In other words, the Applicant failed to mitigate her losses. It is true that recourse to these possibilities was not a matter of the Applicant's choice alone; they would have required the approval of the Bank, which cannot be presumed. In assessing damages due to the Applicant, the Tribunal will accord the foregoing considerations the weight it deems appropriate.

131. The Applicant has also requested that the Bank notify witnesses, among others, that the Applicant has been exonerated of any wrongdoing. The Tribunal finds that the course of the investigation injured the Applicant's professional reputation. Recalling that the Bank has agreed and implemented such requests in the past, as well as the significant adverse effect that the investigation had on the Applicant's life and reputation, the Tribunal concludes that this request should be granted.

132. The Applicant requests that her legal costs incurred during the investigative process be repaid to her. In its jurisprudence, the Tribunal has found that legal costs of the

investigative process should not be awarded if the investigation was pursued in good faith and after a full and fair investigation into the allegations of misconduct. (*G (No. 2)*, Decision No. 361 [2007], para. 33.) In this case, however, the Tribunal has found that a number of errors and irregularities have been identified and that INT exercised inadequate judgment, largely by failing to take into account exculpatory factors in a timely manner. A review of the record indicates that the Applicant's counsel was instrumental in his defense of the Applicant (through the response to the two Draft Reports) in ultimately persuading INT to review the evidence again, take into account relevant factors, reverse its earlier erroneous judgments and arrive at the finding that the Applicant had not engaged in misconduct on any count. It was reasonably foreseeable that once the Applicant was put in a position of having to counter allegations which were ultimately shown to have been unreasonably maintained by INT, one cannot plausibly suggest in favor of the Bank that she should not have hired counsel at all or that she should have hired less painstaking and qualified lawyers, or that she should have instructed them to limit her claims. The intervention of her lawyers in both the investigative process and before this Tribunal served to establish that her grievance was well-founded. The fact that the Tribunal will not award the full amount of compensation requested does not in this case militate in favor of a reduction of recovery on account of costs. The Applicant accordingly should recover her legal costs and expenses incurred in defending herself during the INT proceedings and in making her case to this Tribunal.

DECISION

The Tribunal decides that:

- (i) the Bank shall pay compensation to the Applicant in the amount of three years' salary, net of taxes, based on the last salary drawn by the Applicant;
- (ii) HRSVP shall send a letter to all witnesses interviewed by INT informing them that the Applicant has been cleared of all allegations of misconduct;
- (iii) the Bank shall pay the Applicant's costs and expenses during the investigative process, in the amount of \$137,187.50;
- (iv) the Bank shall pay the Applicant's costs before the Tribunal in the amount of \$63,785.92; and
- (v) all other pleas are dismissed.

/S/ Jan Paulsson
Jan Paulsson
President

/S/ Olufemi Elias
Olufemi Elias
Executive Secretary

At Washington, DC, 9 December 2009