



World Bank Administrative Tribunal

2010

No. 439

**BI,
Applicant**

v.

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

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

**BI,
Applicant**

v.

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

1. This judgment is rendered by a Panel of the Tribunal, established in accordance with Article V(2) of the Tribunal's Statute, composed of Jan Paulsson (acting Vice President of the Tribunal) as President, and Judges Florentino P. Feliciano and Mónica Pinto.

2. The Application was received on 15 January 2010. The Applicant was not represented by counsel. The Bank was represented by David Rivero, Chief Counsel (Institutional Administration), Legal Vice Presidency. The Applicant's request for anonymity was granted on 27 September 2010.

3. The Applicant challenges the ratings in her Overall Performance Evaluations ("OPE") for 1 April 2006 to 31 March 2007 ("2007 OPE") and 1 April 2007 to 31 March 2008 ("2008 OPE"). The Applicant also challenges the corresponding Salary Review Increases ("SRI") which she received for both these periods.

FACTUAL BACKGROUND

4. The Applicant has been employed by the Bank at its headquarters since 26 July 1999. At all times relevant to the present Application, she was a level GC Program Assistant working with the Human Resources Vice-Presidency.

5. During the 2007 OPE period the Applicant worked in a department in the Human Resources Vice Presidency ("HR"). The Applicant's supervisor in this department (Mr.

A) was replaced, on 6 November 2006, by a new manager (Mr. B). The Applicant and Mr. B appear to have had a number of disagreements leading to a difficult working relationship.

6. The Applicant met with Mr. B on 21 March 2007 to discuss and review her performance as part of the 2007 OPE evaluation process. The Applicant rejected Mr. B's assessment of her performance describing, by her own account, his assessment as "outrageous." It appears from the Appeals Committee's report that the Applicant's initial supervisor, Mr. A, had provided Mr. B with written feedback on the Applicant's performance from 1 April to 5 November 2006, describing the Applicant's performance as "generally positive."

7. On 7 May 2007, the Applicant was transferred to another department in the HR, where she was later supervised by a new manager, Mr. C. On 24 July 2007, the Applicant's former manager, Mr. B, sent the Applicant a draft of her 2007 OPE. In this draft, the Applicant was rated "Fully Satisfactory" in three areas of her Results Assessment, and "Partially Successful" for her Resource Management responsibilities. The Applicant was also rated "Partially Successful" in three out of four areas in her Behavioral Assessment. These ratings were in contrast to her previous OPEs for 2004, 2005 and 2006 in which the Applicant primarily received "Superior" ratings, and never received a rating below "Fully Satisfactory."

8. With regard to the Applicant's Resource Management duties, Mr. B stated in the draft OPE:

[The Applicant] generally handles routine SAP transactions in a satisfactory manner. The [Chief Administrative Officer's] office has had a few questions raised by the Quality Assurance team in Chennai about her transactions. She tries hard, though not always successfully, to be a good

TRS coordinator and to ensure that SOEs and other transactions are handled in a timely manner. However, she has problems with more complex transactions mainly because she has difficulty applying basic principles to specific cases and in working constructively with staff in the unit and outside of it to get the cause of problems identified and solve them in a constructive and timely manner.

[The Applicant] has difficulty in using proper judgment on when and how to pursue matters. She has on a number of occasions aggressively pursued a number of matters when the more appropriate course would have been to get approval from her manager and move on. She invests a lot of time and energy chasing reimbursements for small amounts or full documentation and justification for small miscellaneous reimbursements. In most cases by the time she has finished the follow up had cost more in staff time than the whole transaction was worth and has distracted more senior staff to an unnecessary degree.

While she manages to handle the basic budget projection work required by [the department], the [Chief Administrative Officer's] office often had to make changes in her projections because she failed to anticipate the implications of staffing changes and changes in the timing of delivery of ... products. This is attributed to her lack of knowledge of basic SAP/budgeting concepts.

In summary, [the Applicant] tries hard but she lacks a good basic understanding of [Resource Management] matters and the ability to apply budgeting principles to specific transactions. Moreover she lacks the judgment and the softer skills needed to be an effective [Resource Management] person.

9. The Applicant did not sign this draft OPE. The Applicant was awarded an SRI rating of 3.1 in 2007. On 7 August 2007, the Applicant filed a complaint of retaliation against Mr. B with the Department of Institutional Integrity ("INT"), and included with it a comparative list of [her] OPE ratings and copies of 2000 to 2006 OPEs." By letter dated 8 February 2008, INT advised the Applicant that it

completed its review of your complaint against [Mr. B] and determined that there is no basis to investigate this matter in the context of misconduct as we had not identified any evidence of retaliation or harassment. INT has reviewed the transcript of your August 7, 2007 interview and the performance evaluation materials submitted by you to INT. With your express permission, INT has also spoken to your current manager, [Mr. C], regarding his recent efforts to intervene informally on your behalf with

[Mr. B]; these efforts were unsuccessful, as you have rejected the revised draft OPE proposed by [Mr. B].

10. Mr. C gave evidence to the Appeals Committee Panel tasked with reviewing the Applicant's grievance, explaining that he had attempted to intervene between the Applicant and Mr. B as an "informal mediator," so that her 2007 OPE might be finalized. Mr. C explained that "as a result of this process, [Mr. B] agreed to raise three ratings in the [Applicant's] Behavioral Assessment from Partially Successful to Fully Successful," but refused to raise the "Partially Successful" rating in the Results Assessment relating to the Applicant's Resource Management duties.

11. The Applicant and Mr. C signed her 2007 OPE on 30 April 2008. In so doing, the Applicant noted

I sincerely believe that all these ratings are unacceptable based on the past and continuing high standards of performance I uphold for myself. I truly consider this as a blip in my valuable 8-year career employment in the Bank. My moral integrity and professional qualifications were tested and unfortunately I was discriminately rated this way because I strongly disagreed with my manager's budget expenditure whims. ... I would like to thank [Mr. C] for his intervention to contain and resolve the situation. It would be most appreciated if my SRI can be revisited following this OPE revision.

12. Mr. C included the following remarks in her 2007 OPE:

In this OPE cycle, HRS is adhering to the Bank-wide effort to ensure that OPE ratings are applied uniformly across the institution and are consistent with the OPE guidelines. As a result, some OPE ratings may be lower than in previous years. This does not necessarily reflect a decline in the staff member's performance. The comments [in the OPE] consist of the aggregation of responses from feedback providers (including clients and peers)

In respect of the Applicant's Resource Management duties, Mr. C stated:

[The Applicant] is largely responsible for all SAP transactions and she undertook her responsibilities satisfactorily. She is also responsible for the basic budget projections for the compensation unit. In this respect, the [Chief Administrative Officer] has had to make changes in some of [the

Applicant's] planned projections. I have discussed with [the Applicant] the need to deepen and enhance her knowledge and skills in the budgeting and general [Resource Management] arena so as to hone her effectiveness in this discipline.

13. The Applicant and Mr. C later signed her 2008 OPE, for the period 1 April 2007 to 31 March 2008, on 10 October 2008. In this OPE, the Applicant was rated "Fully Successful" in all categories, including Resource Management. The Applicant was awarded an SRI rating of 3.1 for the same period.

14. In the 2008 OPE, Mr. C stated:

My work now links me directly with [the Applicant]. I appreciate her prompt approach to issues. I have also advised [the Applicant] that we will be working on the questions relating to her philosophical approach to [transaction processing] work. In the coming year, we have agreed that [the Applicant] will assume more [transaction processing] work She will also promptly redirect questions either to my person or to the office of the [Chief Administrative Officer] to avoid any misunderstanding.

Amongst her comments, the Applicant remarked:

I could have done more in terms of the shortlisting/interviews that my [Administrative Client Support] colleagues perform if I were given the opportunity. Overall I feel that I cannot be less productive than my peers as my manager claimed it.

15. On 27 and 30 October 2008, the Applicant challenged her 2007 and 2008 OPEs and SRIs before the Appeals Committee. On 7 August 2009, the Appeals Committee recommended "going forward that the [Applicant's] supervisor incorporate specific examples of the [Applicant's] work into her OPE to provide her with clear feedback on the positive and negative aspects of her performance." In its report, the Appeals Committee recorded that "with respect to the [Applicant's] 2007 OPE, one Panel member found that there was insufficient evidence in the record to ascertain whether the Partially Successful rating for the [Applicant's] Resource Management responsibilities was made on a reasonable and observable basis." The Appeals Committee concluded, however,

that the Respondent did not abuse its discretion and recommended that the Applicant's claims be denied.

16. The Applicant filed her present Application on 15 January 2010, in which she challenges her 2007 and 2008 OPE and SRI ratings, arguing that they were arbitrary, awarded contrary to the applicable Bank procedures, and were discriminatory or retaliatory.

17. As relief, the Applicant seeks "any salary differential and damages for both years resulting from this appeal based on the proposed OPE ratings ... and its subsequent recalculations." The Applicant also requested

that all managers undertake the Living our Values courses offered by the Ethics Office. Also I request all senior leadership ... to reprimand reported bad managers or even dismiss them permanently. Moreover I request an open door policy and clear 2-way communications between managers and staff so that a genuine, transparent, open and ethical environment is established.

18. On 30 September 2010, the Applicant filed a Request for Admission of Additional Information. The additional information offered by the Applicant consisted of two e-mail messages, providing positive feedback about the Applicant's performance from an Accounting Officer and a Contracts Officer, dated 23 and 24 September 2010 respectively.

19. The Tribunal called upon the Bank to comment on the Applicant's request. The Bank noted that this additional information was not contemporaneous with her performance evaluations in her 2007 and 2008 OPEs, and requested the Tribunal to discount the additional information.

THE PRINCIPAL CONTENTIONS OF THE PARTIES

20. The Applicant's principal contention is that her OPE and SRI ratings in 2007 and 2008 were arbitrary and unwarranted. She claims that the Bank did not comply with the Staff Rules in awarding her these ratings and had been motivated, or influenced, by Mr. B's ill-will towards her.

21. In response, the Bank argues that the Applicant's claims should be dismissed and the requested relief denied. The Bank contends that it had followed the appropriate procedure in evaluating the Applicant's performance, and the ratings had a reasonable and observable basis.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

22. The Tribunal has consistently held that the assessment of a staff member's performance is a matter that falls within the Bank's discretion. In *Desthuis-Francis*, Decision No. 315 [2004], para. 19, the Tribunal held:

The evaluation of a staff member's performance is in principle a matter within the Respondent's discretion. What constitutes satisfactory performance is to be determined by management ... and management's appraisal in this respect is final absent an abuse of discretion. In *Marshall*, Decision No. 226 [2000], para. 21, the Tribunal provided some elaboration of the abuse of discretion standard applicable in reviewing the decisions of a reviewing manager in conducting a performance evaluation and salary review:

Even if the merit rating and SRI were not a product of intentional ill-will, they might still be overturned by the Tribunal if they were arbitrary or capricious. As the Tribunal has often stated, it may review such decisions of the Respondent to determine whether there has been an abuse of discretion, in that the decision was arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure.

23. The Tribunal will accordingly review whether the Bank properly exercised its discretion and observed the applicable rules and procedures in arriving at the Applicant's OPE and SRI ratings in 2007 and 2008.

Did the Bank fail in its obligation to give the Applicant appropriate notice of inadequacies in her performance?

24. With regard to her 2007 OPE, the Applicant contends that Mr. B failed to "substantially discuss" with her the feedback he had received about her performance so that she might improve. In response, the Bank states that the Applicant was on notice of deficiencies in her performance and, in that regard, various meetings had been held with her about these matters during the OPE cycle.

25. The relevant provisions of Staff Rule 5.03, paragraph 2.02, which define the procedure for the annual review of a staff member's performance, state:

At least once in a twelve month period, the Manager or Designated Supervisor and the staff member shall meet and discuss the staff member's performance, achievements, strengths, areas for improvement, and future development needs The Manager or Designated Supervisor shall provide the staff member with a written summary assessment of the staff member's performance during the review period. (Emphasis added.)

26. The Bank submits, and the Applicant does not refute, that the Applicant and Mr. B met in March 2007, for the purpose of discussing her performance and preparing her 2007 OPE. In this draft OPE, Mr. B provided the Applicant with detailed comments on aspects of her performance, in particular on her Resource Management duties and her general behavior. The Applicant disagreed with this assessment, and refused to sign this version of the OPE.

27. The Tribunal finds that the Applicant's allegation that these inadequacies in her performance were not "substantially discussed" with her is not supported by the record.

Was there a reasonable and observable basis for the ratings assigned in the Applicant's OPEs in 2007 and 2008?

28. The Applicant claims that since Mr. B, who was responsible for preparing the draft of her 2007 OPE, had been her manager only for five of the twelve months under review, he should have weighed both the positive and negative feedback about her performance to fully appreciate and rate her performance.

29. She claims that the ratings in her 2007 OPE were influenced by Mr. B's ill-will towards her. She concedes she had a difficult relationship with this manager, and they had a number of disagreements concerning her performance of Resource Management duties for the department. She contends that Mr. B misinterpreted her attempts to gain guidance on such matters as insubordination and he accordingly bullied and retaliated against her. The Applicant also submits that the Bank's efforts to standardize the performance ratings were only applied to her and not to her peers, thus causing her to receive comparably lower OPE ratings.

30. With regard to her 2008 OPE and SRI ratings, the Applicant claims these ratings were arbitrary since Mr. C had primarily relied on "his prior biased knowledge of my encounters with some HRS managers and his knowledge of my alleged 'limited' HR tasks that fell short from my ACS colleagues." The Applicant believes that Mr. C did not give her the opportunity to work on tasks which he valued highly in the context of OPE ratings, and did not assign other HR officers for her to support, since they assumed that she was "difficult to deal with."

31. The Bank submits that the Applicant's OPEs for 2007 and 2008 had a reasonable and observable basis and were fair, balanced and not vitiated by any bias, prejudice or other extraneous factors. The Bank contends that the Applicant's SRIs for both these

years were awarded in accordance with the SRI Guidelines and Process. The Applicant's SRI ratings for both those years "correspond to Fully Successful performance ratings, albeit they suggest typically the need for improvement" and were thus consistent with her OPEs.

32. It is not the Tribunal's role to undertake a microscopic review of the Applicant's performance, and to substitute its own judgment about the Applicant's performance for the Bank's. As the Tribunal explained in *Prudencio*, Decision No. 377 [2007], paras. 73-74,

In the context of performance evaluation, the Tribunal does not interfere or substitute its own judgment for the Bank's absent an abuse of discretion The Tribunal cannot and should not conduct a microscopic inquiry into each facet of the Applicant's work program and behavior during the assessed period. ... It would be difficult and probably fruitless to assess each individual task and change to the work program, given the number of internal and external clients, managers and team members involved, and also given the Unit's broader work needs and responsibilities with respect to which the Tribunal is ill-equipped to evaluate each decision. The only effective approach is to assess whether the evidence ... satisfies the abuse of discretion test.

33. Furthermore, in *Yoon (No. 5)*, Decision No. 332 [2005], paras. 47-48, the Tribunal noted the difficulties in reviewing positive evaluations, such as the "Fully Successful" ratings which are being challenged here. The Tribunal noted that, where a staff member's performance has been determined to be unsatisfactory,

[i]t is obvious that an evaluation which may have been a factor in termination, non-confirmation or redundancy requires an unmistakable foundation.

In contrast, where a staff member's performance is determined to be "satisfactory but nuanced," the Tribunal stated that:

Of course, staff members who are convinced that their performance has been undilutedly superlative may be legitimately irritated if their evaluation contains inexplicable and unsubstantiated reservations, or even

suggestions for improvement. Managers have a duty to carry out meaningful evaluations, and staff members have a corresponding entitlement. The problem is rather that with respect to *satisfactory* performance: (a) the prejudice arising from below-superlative assessment is incomparably less manifest than in cases of termination; and (b) the feedback underlying such assessments is likely to be more subjective than instances of objective non-fulfillment of precise tasks.

34. The Tribunal faces similar difficulties here, where the Applicant contends that her performance warranted ratings better than “Fully Satisfactory.” While it is clear that the Applicant’s ratings in her 2004, 2005 and 2006 OPEs indicated that she was a good and often superlative performer (indeed, the Applicant received numerous “Superior” ratings, and some “Outstanding/Best Practice” ratings), on the basis of the record, the Tribunal is unable to conclude that the positive ratings challenged by the Applicant, i.e. “Fully Successful” ratings in her 2007 and 2008 OPEs, were unwarranted and too low.

35. The Tribunal will now turn to consider the basis upon which the Bank arrived at the “Partially Successful” rating for the Applicant’s Resource Management duties in her 2007 OPE. In this regard, the Tribunal recalls its decision in *Lysy*, Decision No. 211 [1999], para. 68, in which it stated:

A performance evaluation should deal with all relevant and significant facts, and should balance positive and negative factors in a manner which is fair to the person concerned. Positive aspects need to be given weight, and the weight given to factors must not be arbitrary or manifestly unreasonable.

36. The Tribunal notes that Mr. B, who was responsible for preparing her 2007 OPE, became her manager only in November 2006, seven months into the 2007 OPE cycle. The Applicant’s previous manager, Mr. A, had provided written feedback to Mr. B on the Applicant’s performance pertaining to the seven-month period from 1 April to 5 November 2006, to be used for the purpose of preparing her 2007 OPE. The Appeals Committee’s report described Mr. A’s feedback as “generally positive” regarding the

Applicant's performance, and noted that Mr. A had stated before the Appeals Committee that the Applicant "typically performed reliably and consistently in duties such as [Resource Management]." Under Mr. A's supervision, the Applicant was rated "Superior" (2006 OPE) and "Outstanding/Best Practice" (2005 OPE) for her Resource Management duties.

37. The Tribunal ordered the Bank to provide "any documents that have a bearing on the 'Partially Successful' rating in respect of Resource Management in the Applicant's 2007 OPE," and "irrespective of the existence of such documents ... called upon the Bank to provide such explanation for the 'Partially Successful' rating as it can."

38. In response, the Bank presented feedback submitted at the time by the Chief Administrative Officer in the Applicant's department to Mr. B for the purposes of preparing the 2007 OPE. That feedback included specific comments in which limitations of the Applicant's performance on Resource Management matters were identified and some examples provided. Much of the Chief Administrative Officer's feedback was reflected in Mr. B's comments in the draft OPE (as set out in paragraph 8 above).

39. The Bank also referred to an instance where Mr. B was unable to provide evidence when requested by the Appeals Committee, since he was on external service at the time and did not have access to the Bank's e-mail system. The Bank also appears to suggest that Mr. B might be similarly unavailable for the purposes of replying to the Tribunal's order. The Bank provided no further explanation for the adverse rating.

40. In considering the basis upon which the Respondent arrived at its adverse assessment of the Applicant's performance, the Tribunal notes the positive evaluation by Mr. A (set out in paragraph 36 above), with whom she worked for seven months of the

2007 OPE period, and the negative evaluation from the Chief Administrative Officer, with whom the Applicant appears to have worked directly on Resource Management matters.

41. Mr. B states in the draft 2007 OPE that his comments on the Applicant's performance were "also based on input from feedback providers, peers and clients." The Tribunal notes that Mr. B's comments on her performance on Resource Management matters essentially restate, often verbatim, the Chief Administrative Officer's feedback. It is not clear whether, and to what extent, Mr. A's positive feedback was considered in arriving at this rating.

42. Taking into account the evidence before it, in particular the Applicant's specific response to management's assessment in this regard, the Tribunal does not consider that the "Partially Successful" rating in the Applicant's 2007 OPE is unwarranted. While there were other more positive assessments of the Applicant's performance, the Tribunal cannot disregard the negative feedback from the Chief Administrative Officer with whom the Applicant worked on Resource Management matters.

43. The Tribunal is troubled, however, that it does not have the benefit of any explanation from Mr. B, who was responsible for preparing the 2007 OPE and who insisted that the Applicant be rated "Partially Successful" for her Resource Management duties, as to how he addressed and processed the mélange of positive and negative feedback he had received on the Applicant's performance, and whether he had "dealt with all relevant and significant facts, and ... balanced positive and negative factors in a manner which is fair to all concerned."

44. The Tribunal has provided ample scope for managers to provide an explanation for an OPE rating. In *Desthuis-Francis*, Decision No. 315 [2004], para. 23, the Tribunal found that where a manager's comments in an OPE do not attempt to identify the basis on which such conclusions rest,

this by itself is not necessarily a ground for complaint, so long as the reviewing Director is able to adduce outside the four corners of the [OPE] a reasonable and objective basis for his adverse judgment on a staff member's performance. This may be provided, for example, in contemporaneous oral or written communications, or even later, in testimony before the Appeals Committee.

45. The Tribunal considers that sound management dictates that a supervisor should make him or herself reasonably available to explain the basis upon which he or she arrived at an evaluation of a staff member's performance, especially when called upon to do so by the Tribunal. Mr. B's failure to provide an explanation, and the Bank's apparent inability to bring Mr. B. to comply with the Tribunal's order, amount to a failure to respect the Tribunal's role or, at best, a lack of understanding of the function of this Tribunal. This generates considerable concern on the part of the Tribunal, as it indirectly affects the ability of all staff members to seek meaningful recourse before it and aggravates the perception of unfairness by a staff member who has taken the required steps to pursue his or her claim.

Applicant's allegations of discrimination and retaliation

46. The Applicant claims that her adverse ratings in her 2007 OPE were the result of Mr. B's ill-will towards her. She claims that these were taken as retaliatory measures due to his dissatisfaction with her attempts to question his decisions. The Applicant also claims that her ratings in her 2008 OPE were unduly low since Mr. C discriminated

against her when he denied her the opportunity to work on certain tasks and to work with other HR officers.

47. As previously held by the Tribunal in *de Raet*, Decision No. 85 [1989], para. 57, when considering allegations of discrimination or abuse of power,

it is not the obligation of the Bank to demonstrate that there has been no discrimination or abuse of power – not, that is, until an Applicant has made out a *prima facie* case or has pointed to facts that suggest that the Bank is in some relevant way at fault. Then, of course, the burden shifts to the Bank to disprove the facts or to explain its conduct in some legally acceptable manner.

48. In this case, the Tribunal notes that the Applicant has not submitted evidence, beyond her own assertions, that the assessment of her performance by Mr. B and Mr. C were retaliatory or discriminatory in nature. It is evident that the Applicant has had a difficult working relationship with Mr. B, but the Applicant has not adduced evidence to suggest that her ratings were unwarranted and purposefully lowered by her manager due to a retaliatory or discriminatory motive. Neither has the Applicant adduced such evidence with regard to the 2008 OPE which was prepared by Mr. C. The Tribunal thus finds that the Applicant has not discharged her burden of proof to sustain these allegations.

49. In view of the foregoing, the Tribunal does not consider that the ratings awarded to the Applicant in her 2007 and 2008 OPEs lack a reasonable and observable basis. The Tribunal thus finds there is no need to re-examine the SRIs awarded to the Applicant for these years.

50. At the same time, the Bank has failed to show that the Applicant's manager, Mr. B, had indeed examined in a fair and balanced manner the mixed feedback he had received in respect of the Applicant's performance during the relevant OPE period. This

kind of evidence is particularly difficult, in the nature of things, for a complaining, relatively junior, staff member to access and verify and the Bank should show why it was not possible for Mr. B to comply with the Tribunal's order.

DECISION

The Tribunal decides that:

- (i) the Bank shall pay the Applicant the sum of US\$ 45,000, net of taxes, for the reasons set out in paragraphs 45 and 50 above; and
- (ii) the Application is dismissed.

/S/ Jan Paulsson
Jan Paulsson
President

/S/ Olufemi Elias
Olufemi Elias
Executive Secretary

At Paris, France, 29 October 2010