



World Bank Administrative Tribunal

2013

Decision No. 474

**BZ,
Applicant**

v.

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

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

**BZ,
Applicant**

v.

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

1. This judgment is rendered by the Tribunal in plenary session, with the participation of Judges Stephen M. Schwebel (President), Florentino P. Feliciano (Vice-President), Mónica Pinto (Vice-President), Francis M. Ssekandi and Ahmed El-Kosheri.
2. The Application was received on 8 May 2012. The Applicant was represented by Marie Chopra of James & Hoffman, P.C. The Bank was represented by David R. Rivero, Chief Counsel (Institutional Administration), Legal Vice Presidency. The Applicant's request for anonymity was granted on 8 February 2013.
3. The Applicant challenges: (i) the Bank's decision not to confirm his appointment; (ii) his interim Overall Performance Evaluation ("OPE"); and (iii) his placement on administrative leave and the restriction of his access to Bank premises.

FACTUAL BACKGROUND

4. The Applicant joined the Bank on 18 October 2010 on a three-year Term appointment as Adviser, Level GH, to head the Communications and External Relations cluster of the Education for All ("EFA") Fast Track Initiative ("FTI") Secretariat. His appointment was subject to a one-year probationary period. The FTI Secretariat is based in the Education Department of the World Bank's Human Development Network anchor ("HDNFT") and its staff members report to Mr. P, Head of the FTI Secretariat. FTI, which has been renamed the Global Partnership for Education, is a trust fund entity and global partnership between low-income countries and donor agencies to ensure that all children in low-income countries receive quality basic education. The EFA FTI Secretariat provided administrative and technical support to the Board of Directors and Chair of FTI, who was Ms. B. The Applicant came to FTI with, among other things, a long career of over 25 years in print and broadcast journalism with the British Broadcasting Corporation and Canadian Broadcasting Corporation, more than 20 years working in Washington in the international affairs arena, a fellowship at Harvard University and having been a senior manager with an international development think tank. After being selected and recommended by an

interview panel as the top candidate, the Applicant was interviewed by the hiring manager, Mr. P, who made him a verbal offer of appointment on 13 August 2010.

5. On 18 August 2010, the Applicant was interviewed by the Chair of FTI, Ms. B, who made clear her strong opposition to his selection. Ms. B favored another candidate, who had been ranked third by the interview panel for the position. She considered the Applicant an “old fashioned communications guy” and believed that he had no experience in fundraising which, in her view, was the most important requirement for working in FTI at that point. She asked Mr. P to hire a consultant, Mr. C, an Australian national, on a one year contract as Director of Replenishment in order to support her and Mr. P.

6. In November 2010, the FTI annual Board meeting took place in Madrid. The Applicant as well as Mr. P attended the meeting. During that meeting, pursuant to a request of Mr. P to the Applicant to check into Mr. C’s CV, the Applicant inquired of Board members about Mr. C. In particular, he inquired from the Australian observer at the Madrid meeting (who, as it turned out, had recommended Mr. C to Ms. B) who then informed Ms. B of the Applicant’s conversation with him. Thereafter, Ms. B complained to Mr. P about the Applicant’s inquisitiveness regarding Mr. C. On 11 November, the Applicant wrote to Mr. P to tell him that he was concerned about conflict of interest issues in relation to Mr. C’s employment, and that more due diligence should be done. That same day, Mr. P responded stating that while due diligence was important, the Applicant should let him handle delicate conversations. He also suggested that the Applicant keep interactions with Ms. B to a minimum and that they discuss interactions with her when back in Washington, D.C.

7. The Applicant’s relationship with Ms. B was not good during the Madrid Board meeting. The Applicant complains about an incident in which Ms. B pushed his hand away when he was about to shake the hand of a Minister of Education and generally about her “bullying and unprofessionalism.” Furthermore, in an e-mail message dated 10 November 2010, Ms. B wrote to the Applicant, copying Mr. P, stating that, in the future, quotes from her should not be included in press releases reviewed by the Applicant as she could not trust him to keep his word. Her complaint referred to a detail in the last paragraph of a press release which discussed the grants of \$180 million by FTI to “Educate Children Around the World.” The press release when published in Washington, D.C. mistakenly quoted her as having said that “around 20” partner countries had informed FTI that they would request funding while she, in fact, had requested that the word “many” replace the phrase “around 20.” The Applicant explained that it was an inadvertent mistake, but took issue with Ms. B’s questioning his integrity and wrote her a long e-

mail message strongly complaining about her so doing. Mr. P warned the Applicant that there could not be “an escalating clash of individuals” as “the overall agenda [was] too important.”

8. In light of the Madrid experience, Mr. P decided to change the Applicant’s work program by limiting his travel on mission because he questioned the Applicant’s ability to interact with stakeholders independently on behalf of FTI.

9. In December 2010, Mr. C was hired as a consultant and Replenishment Advisor and reported to Mr. P and Ms. B.

10. In early December 2010, Mr. P asked the Applicant to prepare, as part of his work program, a detailed Communications Strategy. The Applicant claims that he was given minimal guidance and was advised by colleagues that such a strategy could only be effectively prepared after auditing FTI’s past and current work and traveling to FTI countries. Mr. P considered the first draft unusable and asked the Applicant to write a second version. The Applicant revised the draft on 28 January and 2 February 2011.

11. On 14 March 2011, and before Mr. P had made his comments on the Applicant’s Communications Strategy, Ms. B sent an e-mail message to Mr. P regarding the Applicant stating:

[A]s we are getting closer to the May Board meeting I write to urge this be attended to before the Board meeting.

It is certainly your decision but I do want to remind of the concerns expressed by many board members (and we are hearing them again) about this.

further, from a staffing and budget perspective, having two senior [communications] folks may not send the best message. [Mr. C] seems to have someone in mind—I have no idea who—but I would certainly take a look at this person.

finally to remind—you do have much of the board behind you should you choose to act and make the change.

12. Within minutes Mr. P responded: “This matter is already being dealt with. I will brief you on the specifics shortly.”

13. Two days later, on 16 March 2011, Mr. P gave the Applicant critical comments on his Communications Strategy, concluding that the strategy lacked focus.

14. Between late March and early April 2011, the Applicant sent, informally, copies of the draft of the Communications Strategy to a number of external contacts, experts in education and development, as well as to some Bank experts, all of whom gave him favorable comments and told him that he was on the right track.

15. In March 2011, FTI published the keynote report “Fast Tracking Girls’ Education,” by a Senior Education Specialist in FTI and launched it with a public endorsement by Mr. Arne Duncan, United States Secretary of Education, in a speech during Human Development Week at the Bank. The Applicant had collaborated with Mr. Duncan’s office to arrange his endorsement of the report. The launching of this report, which was one of the Applicant’s assignments, was praised by all and Mr. P found it to be “a fine job” by “the unit.” A third project in which the Applicant had been involved, which was also well-received, was the Social Media Outreach in relation to which “he revamped FTI’s website” and “encouraged a major blogging initiative” and “redesigned FTI’s publications.”

16. On 17 March 2011, one day after sending him his critical comments on the Communications Strategy, Mr. P met with the Applicant to tell him that it was not likely that his appointment would be confirmed. Subsequently, on 25 March 2011, Mr. P sent the Applicant a detailed memorandum mentioning the areas of his performance that he considered problematic. These included (i) the Applicant’s conversations at the time of the Madrid Board meeting with a number of FTI donor representatives during which he had expressed unhappiness with Ms. B and had questioned the suitability for employment of Mr. C, thus causing concern to Mr. P about the Applicant’s judgment and interpersonal skills; (ii) his “overall strategic leadership on communications issues” problems with which were demonstrated by the Applicant’s presentation in Madrid which was considered weak and his preparation of a Communications Strategy that failed to “articulate a clear strategic vision for the communications function”; and (iii) his “management and leadership of the communications unit” which included unwelcome interactions with his staff and jokes that were perceived as inappropriate, as well as the lack of substantive support for the replenishment effort in FTI. Mr. P also mentioned a few positive contributions of the Applicant’s unit to FTI. Mr. P concluded that, as already notified, the Applicant was not on a track that would lead to confirmation. He further stated that he would follow up on a decision regarding confirmation after Mr. P’s return from mission and that although the decision would have an impact on the Applicant, Mr. P’s priority was the optimal functioning of the Secretariat.

17. On 7 April 2011, the Applicant met with the Vice President and Head of Network (“HDNVP”), the Sector Director HDN Education Team (“HDNED”), and the Acting Chief Ethics Officer. Following this meeting, an OPE process was initiated.

18. Thereafter in April and May 2011, Mr. P, in preparation for the Applicant’s OPE, sought and received confidential written feedback from the Applicant’s proposed feedback providers, other feedback providers, including Mr. C and Ms. B, and FTI Board members and donors at the Madrid FTI Board meeting. Mr. P received both positive and negative feedback regarding the Applicant’s performance.

19. In June 2011, Mr. P completed the Applicant’s OPE for the period between 18 October 2010 to 18 April 2011. Out of a total of nine categories, the Applicant was rated “Unsuccessful” three times; “Partially Successful” five times; and “Fully Successful” only once. In the Overall Comments in the OPE, Mr. P listed some of the Applicant’s positive contributions but stated that they had been offset by a number of serious concerns. He stated, among other things, that “[f]eedback from donors consistently refers to an aggressive style of interaction” and noted complaints from the Applicant’s colleagues about e-mail messages and spoken communications that crossed acceptable boundaries. He also mentioned the Applicant’s frequent negative references to the Chair.

20. Mr. P then noted that he had not seen the required level of improvement in the areas of concern mentioned in his notice to the Applicant of 25 March 2011 and concluded: “Overall, the lack of support from the donor constituencies who constitute a key audience for FTI’s communications work, and the poor internal working relationships have compromised [the Applicant’s] ability to provide substantive senior leadership within the Secretariat.”

21. The Applicant responded providing extensive comments in his OPE stating that he found the OPE unfair and the feedback not sufficiently balanced to reflect the overwhelmingly positive contributions he had brought to FTI and the Bank. He complained about the feedback provided by Ms. B and Mr. C in the OPE. He also expressed his regret about the negative perceptions of individuals at FTI, stated that he would try to be more diplomatic and adjust to the culture and the institution and apologized for making some inappropriate remarks. He also pointed out, among other things, that he had been prevented from doing his work because he had not been able to travel, which would have been important for FTI’s communication and outreach.

22. On 30 June 2011, Mr. P discussed with the Applicant the feedback he had received in writing during the OPE process and they thereafter signed the OPE. The Reviewing Manager, (the Director of HDNED) signed the OPE on 5 August 2011 concurring with the decision of the Applicant's manager not to confirm the Applicant's appointment.

23. In the meantime, on 21 July 2011, Mr. P informed the Applicant via e-mail that he would not be confirming the Applicant's appointment with the EFA FTI Secretariat and that no further extension of the probation period was warranted. He stated that the effective date of the Applicant's termination was 3 October 2011. The Applicant left on a pre-arranged family vacation on the next day.

24. On 22 July 2011, Mr. P wrote again to the Applicant informing him that the Applicant had been removed from the management advisory group and that he had been relieved of his former responsibilities at the FTI Secretariat until 3 October 2011. He immediately thereafter informed Ms. B that he would take over formal responsibility for coordinating the communications team but that for all practical purposes Mr. C would be the coordinator. Ms. B responded by expressing her appreciation.

25. On 4 August 2011, Mr. P requested that the Lead Specialist and Head of Human Resources ("HR") Corporate Operations place the Applicant on administrative leave pursuant to Staff Rule 6.06, paragraph 9.10. The reason given was that administrative leave was "the only option available to minimize the potential disruption to the operations of FTI Secretariat." Mr. P cited, without elaboration, "the pattern of inappropriate interaction and emails" over the last few months and "a number of staff complaints about disruptive, inappropriate behavior," and also requested that "access to Bank Group premises be restricted and that access to Lotus Notes and other Bank electronic systems be suspended." Mr. P had also reported some of the Applicant's allegedly inappropriate actions to the Bank's Corporate Security Office.

26. On 8 August 2011, the Lead Specialist and Head of HR Corporate Operations issued a Notice informing the Applicant that he would be placed on Administrative Leave beginning on or around 8 August 2011 until and including 3 October 2011. He also added that the Applicant's access to Bank Group electronic systems, including his Lotus Notes account, would be suspended. That same date, upon the Applicant's return to work from his vacation, Mr. P met the Applicant in his office, provided him with the Notice of Administrative Leave and took the Applicant's keys, Bank identification card, and Blackberry telephone. He told the Applicant that

he would be barred from all Bank premises and that he would have no further access to his Lotus Notes e-mail accounts, effective immediately. The Applicant had to vacate his office right away.

27. On 24 August 2011, the Applicant filed a Request for Review with Peer Review Services (“PRS”) challenging the non-confirmation decision and claiming that the Bank discriminated and retaliated against him by preventing him from performing his work. PRS found no basis for the Applicant’s claims and unanimously recommended that his requests for relief be denied.

28. On 8 May 2012, the Applicant filed the present Application. He requests, among other things: reinstatement and the reversal of the decision not to confirm his appointment and terminate his employment; payment of his salary for the remaining period of his contract (i.e., from 3 October 2011 through 18 October 2013); other compensation for the humiliation suffered by the Applicant, the violations of due process, the damage to his reputation, and for pain and suffering; and attorneys’ fees and costs in the amount of \$19,847.29.

THE CONTENTIONS OF THE PARTIES

The Applicant’s main contentions

29. The Applicant claims that the “interim” OPE was an abuse of managerial discretion as it was extraordinarily unbalanced and disregarded the excellent feedback he received from some contributors. The Applicant further states that he was never given the opportunity to defend himself against accusations of behavioral misconduct or an opportunity to improve. Instead, he points out, Mr. P terminated his employment just three weeks after the signing of the OPE on 30 June 2011.

30. The Applicant also claims that the non-confirmation decision was unfair and arbitrary to the extent that it was based on his OPE and that he was never offered guidance or training. The Applicant states that the decision to terminate the Applicant’s employment in March 2011 had been taken months before he had received any written OPE and resulted from Ms. B’s pressure on Mr. P.

31. The Applicant further claims that Ms. B harassed and abused him throughout his probationary period and that Mr. P was equally responsible for the hostile work environment in which the Applicant had to operate.

32. The Applicant alleges that Mr. P and HR further violated the Applicant's due process rights and severely damaged his reputation when they summarily removed him from his office and treated him as if he had been found guilty of serious misconduct.

The Bank's main contentions

33. The Bank contends that the decision not to confirm the Applicant's appointment was not an abuse of discretion. It states that the Applicant's OPE was balanced and accurately reflected the feedback Mr. P received regarding the Applicant's performance, as well as Mr. P's assessment of the Applicant's performance.

34. The Bank further alleges that the Applicant was given a detailed work program and had regular one-on-one sessions each week with his supervisor to discuss how to improve his performance, was advised of his deficiencies at an early stage, and was given guidance that would help him be successful in his work.

35. The Bank states that placing staff members, such as the Applicant, on administrative leave in cases of non-confirmation is usual practice, when they have been so informed, have no remaining duties and have the potential to cause disruption in the work place. It adds that the restriction of the Applicant's access to Bank premises was necessitated by some troubling statements by the Applicant which, in the Bank's view, raised security concerns.

36. The Bank states that the fact that the Applicant did not have the best relationship with Ms. B does not translate into harassment of the Applicant by Ms. B. Furthermore, the Bank argues that the Applicant has not met the statutory requirement of exhaustion of internal remedies with regard to his claim of harassment as the Applicant had not raised it before PRS.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

37. In defining the scope and extent of its review of non-confirmation decisions the Tribunal stated in *McNeill*, Decision No. 157 [1997], paras. 30 and 34:

The scope and extent of the review by the Tribunal of the Bank's decisions concerning confirmation or non-confirmation of appointment during or at the end of the probationary period rest on the basic idea that the purpose of probation is "the determination whether the employee concerned satisfies the conditions required for confirmation" (*Buranavanichkit*, Decision No. 7 [1982],

para. 26), that is to say, in the language of Staff Rule 4.02, the determination whether the probationer is “suitable for continued employment with the Bank Group.” The probationer has no right to tenure The assessment of his suitability is a matter of managerial discretion

It is, therefore, for the Bank to establish the standards which the probationer should satisfy. The Tribunal has determined that these standards

may refer not only to the technical competence of the probationer but also to his or her character, personality and conduct generally in so far as they bear on ability to work harmoniously and to good effect with supervisors and other staff members....
(*Buranavanichkit*, Decision No. 7, [1982], para. 26).

It is also for the Bank to determine, at the end of the probation or at any time during the probation, whether the probationer has proven either suitable or unsuitable for Bank employment and to terminate his employment whenever it concludes that he is unsuitable. As the Tribunal has repeatedly stated, it will not review the exercise by the Respondent of its managerial discretion unless the decision constitutes an abuse of discretion, is arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure.

...

Regarding probation, the problem is not so much whether the probationer has performed satisfactorily as whether he has proven his suitability to the specific requirements of the Bank regarding the work which he would have to perform if he were to be confirmed.

38. Furthermore, in *Khan*, Decision No. 293 [2003], para. 39 the Tribunal noted with regard to the procedural guarantees for fair treatment:

In assessing whether there has been an abuse of discretion, the Tribunal will review whether the Bank has extended to the probationer the procedural guarantees of due process and the right to have a fair opportunity to prove her ability. (*McNeill*, Decision No. 157 [1997], para. 44.)

39. In *Zwaga*, Decision No. 225 [2000], the Tribunal held in paras. 37-38:

In connection with probation, the Tribunal has singled out “[t]wo basic guarantees” as “essential to the observance of due process”:

First, the staff member must be given adequate warning about criticism of his performance or any deficiencies in his work that might result in an adverse decision being ultimately reached. Second,

the staff member must be given adequate opportunities to defend himself. (*Samuel-Thambiah*, Decision No. 133 [1993], para. 32.)

In addition, the Tribunal has held that one of the basic rights of an employee on probation is the right to receive adequate guidance and training (*Rossini*, Decision No. 31 [1987], para. 25) and that it is its duty to make sure that the Bank's obligation to provide a staff member on probation with adequate supervision and guidance has been complied with in a reasonable manner. (*Salle*, Decision No. 10 [1982], para. 32.)

Non-confirmation of the Applicant's appointment

40. The Tribunal will first examine whether there was evidence of problems with the Applicant's performance, as alleged by Mr. P, which showed that he was unsuitable for further employment. In this case, such problems were described first in the e-mail communication of Mr. P to the Applicant on 25 March 2011. Mr. P had identified three areas which he had found problematic: (i) the behavior of the Applicant at the FTI Madrid Board meeting; (ii) his overall strategic leadership on communications issues which related, on the one hand, to the Applicant's weak presentation in Madrid to the FTI Board members and, on the other hand, to his preparation of an unsatisfactory draft of a Communications Strategy; and (iii) the Applicant's leadership and management of the communications unit, including both his interactions with his staff and use of inappropriate jokes as well as his failure to engage substantively on core themes raised and to provide substantive support for the replenishment effort in FTI.

41. The Tribunal notes that Mr. P's negative assessment in the 25 March 2011 communication was largely based on complaints made to him verbally and on some written evidence, including notes and e-mail messages regarding the Communications Strategy, e-mail messages showing the Applicant's jokes which some perceived as inappropriate, as well as a few e-mail messages showing the Applicant's and Ms. B's poor relationship during the Madrid meeting. As will be examined further below, most written evidence in support of Mr. P's statements in his 25 March communication and his conclusion that the Applicant was "not on a track that will lead to confirmation" was gathered after that date (i.e. in April and May 2011) in the form of feedback from feedback providers in the Applicant's OPE covering the period 18 October 2010 to 18 April 2011 ("interim OPE"), subsequently requested by the HDNVP and the Director, HDNED.

42. In this respect, the Applicant has made the claim that the non-confirmation decision was tainted by improper motivation and, in particular, that it was based on the improper influence of

Ms. B who clearly disliked the Applicant. The record does not show Ms. B providing extensive feedback in relation to the Applicant's OPE because, as she stated, her interactions with him had been very limited, after the Madrid meeting. However, the sequence of her communications with Mr. P regarding the Applicant at the critical times during his probationary period lends support to the Applicant's claim that she played a decisive role in the non-confirmation of his appointment. After her first interview with him, in October 2010, she wrote a very negative assessment of the Applicant and tried to convince Mr. P to hire her preferred candidate instead of him. When Mr. P decided to engage the Applicant and offered to create another position for someone to take care of the fundraising aspect of the position, she continued to press for bringing on someone of her choice as a consultant at a senior level. She finally succeeded in hiring Mr. C who reported only to her and Mr. P. Following her unpleasant interactions with the Applicant at the Madrid meeting and her complaints to Mr. P about the Applicant, her communication of 14 March 2011 shows that she urged Mr. P to take action regarding the Applicant before the next Board meeting, stating that Board members had expressed concerns about the Applicant and would support any change, suggesting as well that Mr. C had someone in mind to replace the Applicant.

43. Mr. P's response to her was "that the matter is being dealt with." Three days later, he announced to the Applicant that it was not likely that his appointment would be confirmed. A few days later, on 25 March 2011, he sent the Applicant a notice listing his performance deficiencies and informing him that he was not "on a track" that leads to confirmation. Thereafter, during the process of the Applicant's OPE in June 2011, Ms. B asked Mr. P if anything "has moved." On 22 July, almost immediately after issuing the Applicant the notice of non-confirmation, Mr. P promptly informed Ms. B that the Applicant has been relieved of his responsibilities and that for all practical purposes Mr. C would be the coordinator. Mr. P also informed Ms. B that the replenishment team (headed by Mr. C) and the communications team (previously headed by the Applicant) would be combined as a single communications and external relations team. Ms. B responded to Mr. P thanking him for "pushing" the matter.

44. A review of these events indicates that even if there had been objective reasons for the non-confirmation of the Applicant's appointment, Ms. B's influence in that decision was significant and may have led Mr. P to issue a notice of an expected non-confirmation as early as 25 March 2011, less than six months after the Applicant was hired and before obtaining any written feedback regarding the Applicant's performance. Her influence appears not only to have affected the basis of the non-confirmation decision but also deprived the Applicant of a fair chance to prove his suitability for continued employment as discussed further below.

45. This sequence of events suggests that Mr. P, after initially not following Ms. B's views and hiring the Applicant, came to be unduly influenced by the negative view of Ms. B. With regard to Mr. C, it is clear that he was hired at Ms. B's urging and was put in charge of the replenishment initiative (an area also included in the accountabilities of the Applicant). Mr. C also would have been unhappy with the Applicant's inquiry into his background before he was hired, and it is Mr. C who offered to find a replacement for the Applicant once he was separated. Therefore he could not be expected to give an impartial assessment of the Applicant's performance.

46. The Tribunal concludes that the non-confirmation decision was not based on a fair and objective evaluation of the Applicant's performance as a whole but may have been influenced by extraneous factors.

The Applicant's OPE

47. The performance areas described in Mr. P's 25 March communication were later included in the Applicant's OPE covering the period 18 October 2010 to 18 April 2011. However, the OPE was more detailed as it was prepared in part by the Applicant and covered all areas of his work during the first half of his one-year probationary period. Such areas of work in the OPE included: (i) the increase of "the external profile of EFA/FTI in the wider public policy, ..., for which the Applicant received an "Unsuccessful" rating; (ii) "initiatives to spread EFA FTI's messages through appealing publications, website outreach, use of Social Media, and traditional media" for which the Applicant received a "Fully Successful" rating; (iii) Consolidation and augmentation of "the Communication's Team's output in traditional and innovative ways," and collaboration "with the replenishment initiative ...", for which the Applicant got an "Unsuccessful" rating; (iv) "Production of 'a detailed communications strategy' on short, medium, and long-term goals"; "significant expansion of web outreach"; "a revamped and expanded FTI main brochure"; "a major new emphasis on Social Media"; "creation and continuing expansion of blogging for FTI"; "the March 3 Girls Education Report Initiative"; "telling the FTI tale by sending of a writer/photographer/videographer to Rwanda and Zambia" for which the Applicant got a "Partially Successful" rating and (v) "Collaboration with Secretariat Teams" for which the Applicant also received a "Partially Successful" rating.

48. In the "Behavioral Assessment," Section of the OPE, the Applicant received three "Partially Successful" ratings for "Client Orientation," "Drive for Results," "Learning and Knowledge Sharing" and one "Unsuccessful" rating for "Teamwork."

49. The Tribunal recalls its judgment in *Desthuis-Francis*, Decision No. 315 [2004], para. 23, where it held that there must be “a reasonable and objective basis for ... adverse judgment on a staff member’s performance.” Furthermore, the Tribunal has held that it will also examine whether a performance evaluation dealt with all relevant and significant facts and balanced positive and negative factors in a manner fair to the staff member. “Positive aspects need to be given weight and the weight given to factors must not be arbitrary or manifestly unreasonable.” (See *Lysy*, Decision No. 211 [1999], para. 68 citing *Romain (No. 2)*, paras. 19 and 20.)

50. The record shows that Mr. P based his assessment of the Applicant’s performance on feedback from (i) feedback providers listed by the Applicant in his OPE; (ii) other staff in FTI that had worked with the Applicant and (iii) external FTI donors and a selected number of Board members, as well as on his own observations and assessment. The feedback given by the external FTI donors and selected Board members and other staff members not listed in the Applicant’s OPE was mostly negative. Of the fourteen feedback providers listed in the Applicant’s OPE two did not respond. Of the remainder the majority gave positive feedback regarding the Applicant’s performance, and three gave negative feedback. Regarding the positive feedback, the feedback providers noted that the Applicant had worked to increase FTI’s use of social media and the website and had helped with the effective release of the FTI’s girls’ education report. Even though a number of feedback providers praised his Communications Strategy and his Teamwork as well as his leadership of the team and his collaboration with teams, the Applicant received either “Partially Successful” or “Unsuccessful” ratings. The negative feedback consisted of critical comments on the Applicant’s performance by some providers on the same issues where others had rated him positively, i.e. the Communications Strategy, his Teamwork and other behavioral competencies, his managerial skills and his collaboration with other teams. The Applicant was also criticized particularly in relation to the collaboration of the replenishment initiative for which he got an “Unsuccessful” rating.

51. The Tribunal finds that the ratings and comments in the Applicant’s OPE do not adequately reflect the positive feedback given by many feedback providers on his performance. Mr. P’s comments consisted mainly of negative views expressed by the feedback providers. In reflecting these negative views, Mr. P included only one brief comment describing the positive feedback regarding the Applicant’s teamwork and management of the unit, even though the record shows that many such positive comments existed. Furthermore, the rating of “Unsuccessful” for Teamwork disregards the very positive feedback by a number of feedback providers. The basis for the other “Unsuccessful” rating given to the Applicant for “the increase

of the ‘external profile of EFA/FTI in the wider public policy’” is also questionable given the fact that some positive feedback had been given in this respect by some feedback providers. The Tribunal concludes that the OPE ratings and comments were not objectively supported by the evidence and negative factors were given disproportionate weight.

52. Turning to the specific areas of the Applicant’s problematic performance, the Tribunal notes that his performance and behavior at the Madrid FTI meeting was criticized as one of his main problem areas. The Tribunal also notes that, while Mr. P had asked the Applicant to keep a low profile after Mr. P received criticisms from some Board members, the Applicant was reported to have been overly aggressive in approaching some donors while at the Madrid meeting thereby not creating a favorable impression. These donors, in turn, made verbal complaints about him to Mr. P, most of which were later supported by their critical feedback in the context of the Applicant’s OPE. In addition, the Tribunal notes that Mr. P was understandably dissatisfied with the Applicant’s handling of the issuance of the press release discussed in paragraph 7 above that included an error in the quote by Ms. B. While the error appeared to have been minor and Ms. B’s reproach of the Applicant rather overstated, the reaction of the Applicant to her criticism was ill-judged. Notwithstanding the hostile nature of the Applicant’s relationship with Ms. B, for which she admittedly contributed by her open opposition to his recruitment, the Tribunal finds that he ought to have handled his interactions with her in a more diplomatic manner. Certainly, he should have avoided complaining about her both to Board members and donors while at the Madrid meeting and later, throughout the term of his probationary period, to the FTI Secretariat staff.

53. The Tribunal notes, however, that the Madrid meeting was in fact only the first mission undertaken by the Applicant on behalf of FTI less than a month after he assumed his post. Indeed, some Board members admitted when giving feedback on the Applicant that they had based their views on fairly brief interactions with him and having seen very little, if any, of his work. The Tribunal also notes that Mr. P solicited written feedback only from the donors who had complained about the Applicant and not from others who had participated in the Madrid meeting.

54. The Tribunal finds in this respect that the weight given to the feedback on the Applicant’s OPE, concentrating mostly on negative comments, was not balanced and puts in question the fairness and objectivity of Mr. P’s assessment of the Applicant’s performance. It also puts in question the persuasiveness of the grounds put forward in the 25 March 2011 communication for non-confirmation of the Applicant’s appointment.

55. Another major aspect of Mr. P's negative assessment of the Applicant was the preparation of a Communications Strategy for FTI. The notes and comments that Mr. P made on the drafts of the Communications Strategy show his dissatisfaction clearly. Notwithstanding Mr. P's assessment, however, the feedback from a number of feedback providers in the Applicant's OPE, including a former Bank Communications Sector Manager, a former Senior Communications Officer and a Senior Education Economist (and former Deputy Head of the FTI Secretariat) show positive reviews of that strategy. A number of outside peer reviewers to whom the Applicant sent it also gave largely positive comments while giving suggestions for improvement in specific areas. Overall the Communications Strategy would appear to have been given both positive and negative reviews by feedback providers. Mr. P had a negative view of the Communications Strategy but appears to have overlooked or given little weight to the positive reviews.

56. Regarding the Applicant's management of the communication unit, the record clearly shows that some comments by the Applicant were indeed perceived as inappropriate and affected the staff's view of him, even though upon being notified later he stopped making them. The Tribunal notes, however, that while some staff members had expressed uneasiness with the Applicant's remarks and did not consider his teamwork skills satisfactory, an equal number of feedback providers viewed his teamwork skills as superior. Their views, however, were not taken into account in the Applicant's OPE or in the 25 March 2011 communication to the Applicant.

57. Additionally, the Tribunal notes that Mr. P's communication of 25 March 2011 which provided the Applicant with notice of his performance problems did not provide him an opportunity to improve his performance given that Mr. P had already indicated to the Applicant therein that he was not "on a track" to confirmation. The Tribunal also notes that the interim OPE conducted after the March communication covered the first six months of the Applicant's probationary period, namely from 18 October 2010 to 18 April 2011. It should have been used by the Applicant's manager to share with him a written assessment of his performance, based on achievement of the work program, technical qualifications and professional behavior and to offer him an opportunity to improve thereafter. As it happened, the OPE failed to serve that purpose in view of the fact that a decision not to confirm the Applicant had apparently already been taken and communicated to him on 25 March 2011. Thereafter, and only three weeks after the completion of the OPE, he was informed of the decision to terminate his employment.

58. In the circumstances of this case, the Tribunal is not satisfied that the Applicant received a fair and objective evaluation of his performance before the decision not to confirm his appointment was taken.

Review of Feedback from Feedback Providers

59. The Tribunal wishes to express its concern about the Bank's use in this case of the feedback received from feedback providers, and especially the ability of the Applicant to respond properly to alleged negative feedback. The Tribunal notes that in this case the Applicant's lack of access to the full comments made by the feedback providers may have significantly hampered his ability to review the content of the feedback and provide a substantive response to the negative comments made about him before the non-confirmation decision was taken. A review of the feedback by the Tribunal *in camera*, as requested by the Bank, shows that some of the negative feedback was given by staff members who the Applicant thought had a positive view of his performance and behavior, suggesting that the Applicant may not have been notified in a timely manner of complaints during his probationary period and thus could not address any areas in which his performance may have needed improvement.

60. The Tribunal is also concerned that it is called upon to review the feedback *in camera* when the Applicant has not been afforded an opportunity to respond properly to such feedback even in the proceedings before the Tribunal. While this practice is consistent with the Tribunal's previous jurisprudence, and while the Tribunal understands the rationale for keeping the identity of feedback providers in the OPE confidential, the Tribunal also recognizes that there are cases like the present in which respecting confidentiality may hamper the staff member's ability to respond and defend himself as a matter of due process. In such circumstances, it is difficult for the Tribunal to give weight to such untested feedback. In order to ensure that due weight is accorded to the feedback upon which a staff member's evaluation is based, the Tribunal urges the Bank to consider adopting measures that respect both the confidentiality concerns as well as the due process rights of staff whose OPEs are based on such confidential information.

Other claims

61. The Applicant also challenges the decision to place him on administrative leave and the restriction on his access to the Bank's premises. While it has affirmed the Bank's obligation to respect the requirements of due process, the Tribunal has consistently held that the decisions to

place a staff member on administrative leave and to restrict his or her access to premises are matters of managerial discretion. (*Yoon* (No. 13, No. 14, No. 16, No. 17, and No. 18), Decision No. 447 [2011], paras. 72 and 75-78; *Q*, Decision No. 370 [2007], paras. 37 and 41). However, the Tribunal is troubled by the manner in which the Applicant was removed from his office, deprived of access to the building and escorted from the premises. The Tribunal recalls that it has had occasion to express disquiet about the fashion in which the Bank deals with such matters relating to the termination of appointments and administrative leave. (*See D*, Decision 304 [2003], para. 70.) In the present case, the Tribunal finds that the manner in which the Applicant was publicly removed from his office and escorted from the premises was not adequately justified by the Bank and did not respect the Applicant's dignity.

62. The Applicant also alleges harassment by Ms. B and Mr. P. The Tribunal notes that the Applicant has not exhausted internal remedies in relation to this claim and it is therefore inadmissible. In any event, to the extent that the claim of harassment relates to the failure of Mr. P to take appropriate measures to protect the Applicant from failing in an environment where the Chair of FTI was clearly predisposed against him, it has been addressed above. It should also be noted in this respect that, according to the record, the Applicant did not have frequent direct interactions with Ms. B and, when he did, he, too, resisted her criticism and was critical of her in his comments. The Tribunal finds that even if this claim were to be admissible, the Applicant has not established a case of harassment.

Conclusions

63. In the circumstances, the Tribunal finds that while confirmation or non-confirmation of an appointment is within the sole discretion of the Bank, the non-confirmation of the Applicant's employment was not based on a fair and objective evaluation of his suitability for employment. The Applicant, accordingly, is entitled to compensation.

DECISION

- (1) The Bank shall pay the Applicant compensation in the amount of six months' salary, net of taxes.
- (2) The Bank shall pay the Applicant's attorneys' fees in the amount of \$19,847.29.
- (3) All other pleas are dismissed.

/S/ Stephen M. Schwebel
Stephen M. Schwebel
President

/S/ Olufemi Elias
Olufemi Elias
Executive Secretary

At Washington, D. C., 13 February 2013