



World Bank Administrative Tribunal

2014

Decision No. 498

**CK,
Applicant**

v.

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

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

**CK,
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), Mónica Pinto (Vice-President), Ahmed El-Kosheri, Andrew Burgess, Abdul G. Koroma, and Mahnoush H. Arsanjani.

2. The Application was received on 14 November 2013. The Applicant was represented by Veronika Nippe-Johnson, Schott Johnson, LLP. The Bank was represented by David R. Rivero, Chief Counsel (Institutional Administration), Legal Vice Presidency. The Applicant's request for anonymity was granted on 16 September 2014.

3. The Applicant seeks rescission of the 16 July 2013 decision of the Vice President, Human Resources (HRVP) that the Applicant committed misconduct as defined by Staff Rule 3.00.

FACTUAL BACKGROUND

4. The Applicant is a 50 year old former Bank staff member. He joined the Bank in 1994 on a short-term contract, and obtained an open-ended staff position in 1999. In 2008, the Applicant was promoted to Level GG.

5. In August 2012 the Applicant was the subject of an investigation by the Office of Ethics and Business Conduct (EBC) following allegations of sexual harassment. The Complainant, Ms. X, was hired by the Applicant's unit on 1 February 2012 as a short-term consultant (STC). At the time she was 23 years old and a recent graduate. The Applicant was the Complainant's supervisor from 1 February 2012 until early August 2012, and they worked closely together on several projects. From 11 June to 6 July 2012 the Applicant and the Complainant undertook a

five-week mission overseas. After that mission, the Applicant and the Complainant again travelled together on a two-day mission from 16 – 17 July 2012.

6. The alleged incidents occurred on 2 and 7 August 2012 in Washington, DC. In light of the differences in the accounts by the Applicant and the Complainant, the facts which form the subject matter of the investigation are set out below in the order of the allegations made (A – F) in the Notice of Alleged Misconduct issued by EBC to the Applicant.

Allegation A

“Touching [the Complainant] on the back all the way down to the posterior, patting her on her posterior while walking in the street on the way to the International Finance Corporation (IFC) building on Thursday, August 2, 2012.”

7. On 2 August 2012 the Applicant and the Complainant walked together from the second headquarters building of the International Monetary Fund (IMF HQ2) to attend a meeting at the IFC office in Washington, DC. The Complainant described what transpired to EBC investigators as follows:

[The Applicant] had walked ahead of me a little, I was walking a little slower. And he stopped and waited for me to catch up. And he put his hand on my back and rubbed my back all the way down to my bottom and kind of pushed me along, I guess giving me the signal to walk a little quicker or something to that effect. But, at that point, I felt violated, at that point.

8. According to the Applicant he “stopped and, to make [the Complainant] catch up and walk next to him, lightly placed his open hand on her back. The touch lasted for only a few seconds while [he], with [his] thoughts on the meetings ahead, kept talking about the upcoming discussions.” The Applicant asserts that the Complainant did not react when he touched her. During his interview with EBC investigators the Applicant denied touching the Complainant “all the way down to [her] bottom.”

Allegation B

“Grabbing and holding [the Complainant] by the waist, and squeezing [her] waist in front of the IFC building on Thursday, August 2, 2012.”

9. The Complainant informed EBC investigators that the Applicant touched her a second time as they walked to their meeting at the IFC:

And so as we were walking to IFC, [the Applicant] brought up this topic of [his] leaving again. And we were in front of IFC, walking up towards the doors, and he put his hand around my waist kind of, I guess, in a way hugging me with his arm, and started squeezing my side with his hand, and looked at me, and said, you know, it will be a shame if I leave, because I won't get to work with people like you anymore.

10. The Applicant asserts that the second incident of physical contact occurred as they arrived at the IFC building and he “for only seconds placed his hand on [the Complainant’s] back while talking about the meeting.” During his interview with EBC the Applicant denied that he “squeezed” the Complainant’s waist:

I did not like squeeze her waist. I touched her with an open hand on the back, in the middle of the back.

Allegation C

“Cornering [the Complainant] in an elevator in the HQ2 building of the International Monetary Fund, and rubbing her back on Thursday, August 2, 2012.”

11. Once the meeting at the IFC concluded, the Applicant and the Complainant returned to their offices in IMF HQ2. The Complainant alleged that the Applicant once again touched her inappropriately upon entering the IMF HQ2 building:

And then we walked – we walked back, we got in the elevator, and again, I was feeling extremely uncomfortable at that point. So I was already, you know, suspicious and so on. So I purposely walked into the elevator and stood next to the keypad or whatever you call it with the numbers. And I pressed that floor, and I stood in that corner, which maybe in hindsight it was a bad idea to stand in the corner, but I kind of – I felt like that was the way I would be most isolated from him. And when he walked in the elevator, he walked into the middle and

kind of back to the other corner a little bit, but once the door closed he started getting closer and closer and closer and closer to me, and he clearly cornered me. And before the elevator opened, he started rubbing my back again, inappropriately. And he said something like, thank you. I don't really remember now what the context was, anyway. But he started rubbing my back. The minute the door opened, I walked directly to my office. I didn't even check any emails or anything, I just grabbed my bag and walked out.

He – I felt violated not once, but three times, within the span of a few hours.

12. While acknowledging that he touched the Complainant on the back the Applicant provides a different version of what took place in the elevator. According to the Applicant “while taking the elevator up ... to their offices together, and standing next to [the Complainant], [he] placed [his] open hand on [the Complainant's] back for a few seconds while talking to her.” According to the Applicant “until then, all three of [his] gestures had been semi-conscious and out of familiarity while [his] mind was still focused on the IFC evaluation. Towards the end of the elevator ride, however, [he] realized that placing his hand on [the Complainant's] back while standing that close to her might be too familiar a gesture and could be making her uncomfortable, and he dropped his hand before the elevator ride ended.” The Applicant denies cornering the Complainant.

13. Following the incident in the elevator, the Complainant left the office and went home. The following morning, the Complainant sent the Applicant an e-mail message stating: “Hi ... I will not be coming into the office today and will be in on Monday. Have a great weekend.” The Applicant responded stating: “Thanks ... that sounds good. Let me know if you are free to talk at some point over the weekend.” The Complainant did not respond.

14. The following Monday, 6 August 2012, the Complainant met with a Respectful Workplace Advisor (RWA) who advised her to speak with the Applicant about her discomfort with the way he touched her. The Complainant reported that she was told “it's best if you try to talk to him first, but you have other options. You can have someone come speak with – you can have someone go speak with him on behalf of you, we can have a three-way conversation with him, you can talk to his supervisor, but the supervisor has to report him, and then the last option was to come [to EBC].” The Complainant stated that she informed the RWA that she “did not

think that [talking with the Applicant] would really get us anywhere.” The Complainant stated that following her meeting with the RWA she “felt a little better, because [she] felt like [she] knew what [her] options were, and [she] knew [she] had to take some action, but [she] wasn’t exactly sure what it would be.”

15. That day the Complainant avoided the Applicant, who in turn was unable to speak to her due to other meetings.

Allegation D

“Having rubbed the hand of [the Complainant] while she was in his office on Tuesday, August 7, 2012 and having asked how she felt when he did that.”

16. On Tuesday, 7 August 2012, the Applicant and the Complainant attended a meeting together. According to the Complainant the Applicant again touched her inappropriately during that meeting, though it is unclear from the record what part of her body he touched. She informed EBC investigators:

And he again, during this meeting, you know, did the pokes, kind of the little rub, not anything as kind of, I want to say, sexual as it was in the elevator, and the day before, but there was definitely physical contact. And he doesn’t do this towards anyone else.

17. Later that day, the Applicant requested to meet with the Complainant in his office to discuss work and she agreed. According to the Applicant, he initiated this conversation because he sensed there was some tension between them which he hoped to resolve through a frank conversation. While in his office, the Applicant asked the Complainant for her views on him as a manager. The Complainant made general comments but did not allude to any discomfort with the way he touched her. They also discussed the Applicant’s plans to leave the Bank, as well as aspects of the Complainant’s work program and deliverables. According to the Applicant, in order to provoke a direct discussion about the tensions between them, he touched the Complainant’s hand. He informed EBC investigators that:

And then at a certain point, I touched her hand. And I said, you know, “I have an urge to do that. What should I do?” And I asked her not “How would you feel?” but “How should I handle that?” And then she told me, “I am uncomfortable” or she said, you know, “I think I’ve made it clear.”

18. According to the Complainant the Applicant “reached across the desk and stroked one of [her] hands.” He asked her “how do you feel about that?” and she reported responding “I don’t feel good about it, I think it’s inappropriate and I would prefer you not touch me.”

19. Both the Applicant and Complainant acknowledge that the Applicant apologized and stated that the physical contact would not happen again. Upon further questions from the Complainant, the Applicant revealed that he was attracted to her and the Complainant informed the Applicant of the psychological impact his behavior had on her.

Allegation E

“Having admitted to [the Complainant] on Tuesday, August 7, 2012, that he cannot help touching her and that, when he cornered her in an elevator on August 2, 2012, he had to restrain himself from doing more than what he did.”

20. The Complainant alleged that during their discussion on 7 August 2012 the Applicant admitted that he had to restrain himself from “doing more than what he did” when they were in the elevator on 2 August 2012. She informed EBC investigators that:

[The Applicant] admitted to the fact that he cornered me in the elevator. He said he did. And he told me that he had to stop himself from not doing more than what he did in the elevator. Yeah. And I told him explicitly that I felt violated on Thursday, and I felt like it was absolutely inappropriate, everything he did.

21. According to the Applicant he “stated something along the lines that [he] could not help standing next to her in the elevator and putting [his] hand on her back. However, [he] did not say that [he] had to restrain [himself] from doing anything else. At no point did [he] consider doing anything ‘more’ than placing [his] hand on her back during the 20 second elevator ride.”

Allegation F

“Having told [the Complainant] on Tuesday, August 7, 2012, that, while he was on mission with her, he had plenty of opportunities for trying to sleep with her and yet did not do so.”

22. The Complainant informed EBC investigators that during their discussion on 7 August 2012 the Applicant “made a comment that we were on mission together for a very long time, and that he could have had the chance to sleep with me, but he didn’t.” She added that the Applicant “made some sort of comment that he thought ... that by touching me, he would be sexually satisfied and wouldn’t need to sleep with me, or something to that effect.” She informed EBC investigators that she left the Applicant’s office at that point.

23. The Applicant denies that he made the comments as described by the Complainant. According to the Applicant:

[The Complainant] had asked me several times as to why I had put my hand on her back in the street and elevator on Aug 2nd. I told [her] that I was not trying to sleep with her so that she need not worry about this. To reinforce this point I told her that during our 5 week mission, I did not make any efforts to try to sleep with her. I was trying to reassure her. While in retrospect this was not very effective, it was a genuine effort on my part to discuss and resolve the issue and reassure her of my motives. This effort to reassure her of my motives was not an act of misconduct.

24. The Applicant further stated in his comments on the draft EBC Report that he did not make any statements to the effect that he would be “sexually satisfied” by touching the Complainant. According to the Applicant, the Complainant left his office on 7 August 2012 after he said “perhaps sometimes your behavior may have given me mixed signals.” He stated that he immediately regretted suggesting to the Complainant that she had given him mixed signals since he did not think that she had done so intentionally. After the Complainant left the Applicant’s office he sent her a text message stating:

That was pretty distressing and am sincerely sorry. I have always fully respected you as a very competent, dedicated professional and did not mean anything otherwise. Take care call me if you can as feel terrible.

25. When the Complainant did not respond, the Applicant sent her another message:

As we have worked well together over the past six months i am going to call u now to see if can talk a bit more would like to listen to u and see what we can do to put this behind us without any permanent damage hope this ok thanks.

26. The Applicant called the Complainant but she did not answer his phone call.

Ensuing EBC Investigation, Finding of Misconduct and Disciplinary Measures

27. The following day, 8 August 2012, the Applicant e-mailed the Complainant to talk about the matter but she did not respond. The same day, the Complainant filed a complaint against the Applicant with EBC alleging sexual harassment. On 9 August 2012 EBC investigators conducted an interview with the Complainant. During her interview, the Complainant suggested that EBC investigators interview a consultant who interacted with both the Applicant and Complainant during their five-week mission overseas. The consultant was interviewed on 13 August 2012. The consultant stated that he did not notice any inappropriate behavior from the Applicant towards the Complainant during the mission. He observed the cultural differences between the Applicant and the Complainant and noted that in the Applicant's culture "there is much more of a physical interaction." He encouraged the investigators to "think about cultural interactions in your investigation ... because it could be something as simple as that, which does not excuse, of course inappropriate actions in any means. But it could also be something that is being misunderstood."

28. On the basis of the Complainant's interview, a Notice of Alleged Misconduct was issued to the Applicant on 14 August 2012. The Notice of Alleged Misconduct included the above six allegations (A – F) and two additional allegations:

Allegation G: Having ignored the fact that the above physical contacts and sexually harassing comments were unsolicited and unwelcome by [the Complainant]

Allegation H: In doing any and/or all of the above, having abused his authority ... and as the manager of [the Complainant].

29. The Applicant was interviewed by EBC investigators on 16 August 2012. He submitted to the investigators the names of three female colleagues who could attest to his character and professionalism. These character witnesses were interviewed on 16 October, 5 November and 6 November 2012 respectively. They collectively stated that the Applicant had “never (a) made inappropriate advances towards them, in particular no sexual advances, and (b) never behaved inappropriately towards them.” The draft EBC report was sent to the Applicant on 12 December 2012. He provided initial comments on 22 December 2012 and – when afforded more time by the investigators – provided revised comments on 4 January 2013.

30. On 25 February 2013 EBC submitted its Final Report of Findings (Final Report) to the HRVP. The Final Report noted that “in light of the fact that [the Applicant] admitted to having touched [the Complainant] ‘inappropriately’ on several occasions on August 2nd and 7th, 2012, the investigators find the allegations substantiated.” The Final Report further noted that the Complainant did not clearly communicate that she found the Applicant’s conduct offensive during any of the three alleged incidents on 2 August 2012. The investigators found that “the age difference between [the Applicant] and the [Complainant] ... as well as [the Complainant’s] relative inexperience as a junior staff member, might have made it more challenging for her to find an effective way to reject the [Applicant’s] advances, such as by clearly saying ‘no’.” The investigators further noted that the Complainant stated that the Applicant had “previously told [her] that she was unfriendly, which resulted in her being afraid to appear unfriendly by being more explicit about her dislike for [the Applicant’s] advances.” The investigators found that the Applicant’s behavior had a “strong negative impact” on the Complainant and “created an intimidating, hostile and offensive work environment for her.” They observed that since the Applicant was the Complainant’s sole supervisor there was “an intrinsic power imbalance” in their relationship. The Final Report concluded with a recommendation for disciplinary measures against the Applicant as set forth in Staff Rule 3.00, paragraph 10.06.

31. On 16 July 2013 the HRVP informed the Applicant, by letter, that there was sufficient evidence to support a finding that the Applicant had engaged in misconduct as defined under Staff Rule 3.00:

- (i) paragraph 6.01(a) – abuse of authority;
- (ii) paragraph 6.01(b) – reckless failure to identify, or failure to observe, generally applicable norms of prudent professional conduct;
- (iii) paragraph 6.01(c) – acts or omissions in conflict with the general obligations of staff members set forth in Principle 3.1(c) of the Principles of Staff Employment, including the requirements that staff avoid situations and activities that might reflect adversely on the Bank Group (Principle 3.1) and conduct themselves at all times in a [manner] befitting their status as employees of an international organization (Principle 3.1(c)); and/or
- (iv) paragraph 6.01(e) – harassment, contributing to a hostile work environment.

32. According to the HRVP the record showed “clear and convincing evidence presented in the Final Report to support a finding that on several occasions [the Applicant] touched [the Complainant] inappropriately and made inappropriate comments to her.” The HRVP informed the Applicant of his decision to impose the following disciplinary measures:

- Demotion to grade level GF;
- Ineligibility for [a Salary Review Increase] for the review period 2012 – 2013;
- This letter will remain on your staff record with indefinite duration; and
- Should this type of incident recur, you may be subject to further disciplinary measures up to and including dismissal from the World Bank.

33. On 19 July 2013 the Director of the Applicant’s unit sent an e-mail message to the HRVP stating:

Many thanks for sending me copy of the letter you have addressed to [the Applicant], of which I was notified last Friday July 12. Without prejudice to its contents and in particular to your decision on this serious matter, which I deeply respect, I would take exception to the affirmation stated on the first paragraph of the letter, which reads “after consultation with your sector manager,” To be precise, at no point during this process I have been consulted in this serious matter nor I have knowledge of any consultation with our manager The only moment at which HR contacted me with regard to this case – through [the HRVP designee] – was, as I said before, last Friday, to kindly notify me via telephone call that this letter was coming as well as to let me know the

disciplinary measures that in accordance to the Final Report and the relevant staff rules, you had decided to implement. I hope this clarification is useful, for the benefit of the integrity and transparency of the process.

34. On 24 July 2013 the Applicant sent an e-mail message to the HRVP requesting reconsideration of the sanctions decision on the grounds that the findings were not based on facts and that the sanctions were significantly disproportionate to the alleged acts. He copied the Director of his unit on the e-mail message. On 29 July 2013 the HRVP responded to the Applicant stating:

I do not agree with your characterization of what transpired between you and your STC. If harmless and benign as you maintain, I very much doubt the young woman would have filed a complaint with the EBC regarding your inappropriate behavior.

...

Through my designee, ... I consulted with [the Director of the Applicant's unit] prior to the issuance of your Letter of Misconduct. [My designee] called your manager a number of times, and when finally connected, informed him of HR's review, my decision on appropriate disciplinary action and that your letter would be issued reflecting same. [the Director of the Applicant's unit] thought the outcome harsh, but accepted it. If [the Director of the Applicant's unit] would like to discuss further anything with respect to your inappropriate behavior and my decision, I encourage and invite [him] to make an appointment with me.

Otherwise, you have the right to appeal my decision to the Administrative Tribunal.

35. On 29 July 2013, the Applicant gave notice of his decision to resign from the Bank effective 31 August 2013.

36. The Applicant filed this Application on 14 November 2013. He seeks three years' salary as compensation for the moral injury done to him and his personal distress, as well as for irreversible harm done to his professional and personal life, and reputation due the Bank's failures; all actual legal fees and costs incurred as a result of these Tribunal proceedings; and any other relief deemed fair and appropriate by the Tribunal.

SUMMARY OF THE MAIN CONTENTIONS OF THE PARTIES

The Applicant's main contentions

37. The Applicant raises five main contentions, namely that: 1) there is insubstantial evidence to support the finding of facts alleged to legally constitute misconduct; 2) the sanction of a permanent record of the written censure is not provided in the law of the Bank; 3) the sanctions were unreasonable and disproportionate to the Applicant's conduct; 4) there were procedural irregularities with the HRVP's decision; and 5) there is evidence of bias in the manner EBC conducted its investigation and how the HRVP handled his sanctions decision.

38. With regard to insubstantial evidence to support the finding of facts alleged to constitute misconduct, the Applicant argues that a careful review of the record demonstrates that the facts do not support a finding of: harassment contributing to a hostile work environment; abuse of authority; reckless failure to observe the norms of prudent professional behavior; and acts or omissions in conflict with the general obligations of staff members. He contends that the Complainant's statements must be "weighed against the irrefutable fact that [he] never made any efforts or overtures to spend any private time with her, and he never invited her to private meals or excursions during the mission, as [the Complainant] stated herself."

39. First, the Applicant argues that his actions on 2 and 7 August 2012 did not amount to sexual harassment. According to the Applicant his "three very brief touches" on the Complainant's back on 2 August were neither objectively offensive nor of a sexual nature either in the manner in which they occurred or their motivation. He contends that he never engaged in any conduct that could be interpreted as "unwanted pursuit" of the Complainant, whether in person or in writing. He avers that once he sensed her discomfort he ceased any possible questionable conduct and "at the soonest opportunity sought out a meeting with [her] to discuss the issue and then apologized and reassured her that he would not repeat any such acts."

40. According to the Applicant a central element of the definition of sexual harassment in the Bank's Code of Conduct "is that the conduct must either be *per se* offensive or otherwise be clearly signaled to be 'unwelcome.'" The Applicant asserts that the Bank disregards the

Complainant's failure to make him aware of her concerns prior to 7 August 2012. The Applicant further contends that it is not convincing to suggest that the isolated events of 2 and 7 August 2012 "after over five months of a working relationship without incident and no other evidence of private or improper physical or verbal conduct or 'pursuit' immediately created a hostile or intimidating workplace environment for the Complainant." The Applicant argues that the "back touches" were semi-conscious acts which occurred in public or in semi-public settings. They were not advances or deliberate and purposeful acts as claimed in the EBC Report. According to the Applicant "a light touch in the middle of the back would probably be found to be an innocuous and inoffensive gesture by many Bank staff with higher tolerance for physical social contact."

41. Secondly, the Applicant contends that he did not abuse his authority. He observes that the Bank's Code of Conduct defines "abuse of power" as "the misuse of authority in the course of performing work," and argues that he did not misuse his supervisory powers in the course of performing work to coerce the Complainant to commit any improper act or omission. According to the Applicant proper legal analysis would demonstrate that he did not abuse his authority when he asked the Complainant to speak with him in his office. The Applicant asserts that he lacked the requisite intention nor was the meeting in his office a "formal 'performance management meeting'" as the Bank attempts to portray. The Applicant asserts that he and the Complainant met on a "daily basis in the afternoons to discuss work projects."

42. Thirdly, the Applicant contends that his conduct did not fall short of generally applicable norms of prudent professional conduct. He avers that his conversation with the Complainant on 7 August 2012 was an attempt to proactively address and resolve the tension between himself and the Complainant, and not an act of misconduct. He nevertheless acknowledges that the manner in which he began addressing the issue (touching the Complainant's hand and asking her what he should "do about" it or attempting to assure her of his good intentions by saying that he never sought to "sleep with" her) were "perhaps ill-advised and under the circumstances unintentionally caused distress to [the Complainant]."

43. The Applicant disputes the Bank's conclusion that in making his "absent-minded gestures" on 2 August 2012 he failed to exercise the "caution and care required of a Bank supervisor under the circumstances." The Applicant argues that the Bank failed to give him the benefit of the doubt, positing that he had "malicious sexual intentions, or did not pay enough attention, but never once considering that three brief and innocent pats on the back may not actually amount to misconduct at all."

44. Regarding his second contention that the placement of the written censure indefinitely in his personnel record is a sanction not provided in the law of the Bank, the Applicant draws the Tribunal's attention to the fact that Staff Rule 3.00, paragraph 10.06 does not provide for the permanent placement of written censures in a staff member's record. He refers to the staff misconduct and sanctions rules of the IMF which note that the records of disciplinary measures shall be purged from a staff member's personnel file after a three-year period provided there has been no recurrence of the misconduct during that time. The Applicant also notes that most sanction decision letters are ordered to remain in a staff member's file for a limited time and not longer than five years. He argues that a permanent record would have a disproportionately detrimental effect on a staff member's career for an unforeseeable time into the future.

45. In respect of his third contention that the sanctions were unreasonable and disproportionate to his conduct, the Applicant asserts that even if, *arguendo*, he were to be found to have committed misconduct, the sanctions imposed by the HRVP were excessive and significantly disproportionate to such "misconduct." He avers that his demotion to level GF combined with the salary increase ineligibility for a year and the indefinite record in his personnel file, in essence "dead-ended" his career at the Bank, and resulted in his decision to resign. According to the Applicant the HRVP failed to take certain factors into account while making his decision namely: 1) the seriousness of the matter; 2) any extenuating circumstances; 3) the situation of the staff member; 4) the interests of the Bank Group; and 5) the frequency of the conduct. The Applicant notes that he did not aggravate the physical contact with inappropriate comments, nor is there evidence of an unwelcome "pursuit" of the Complainant. The Applicant contends that his case is significantly different from other cases of sexual

harassment where the complainants were subjected to advances that they clearly signalled were unwelcome but nevertheless continued, and *quid pro quo* cases.

46. The Applicant contends that due consideration was not given to extenuating circumstances which included his “apologetic stance from the beginning, his own attempt to resolve the matter by discussing the issue with [the Complainant] who was avoiding him, his proven assurances to her that he would never repeat his actions even before [she] nonetheless escalated the matter to a formal EBC complaint, and of course [his] full cooperation as well as his open acknowledgment and reflection about the core facts during the EBC investigation.” The Applicant argues that his lack of prior misconduct in his almost 20-year career at the Bank, strong performance record and accolades from witnesses and colleagues should have been considered in his favor. The Applicant further argues that milder sanctions would have been in the best interest of the Bank Group.

47. Concerning his fourth contention that there were procedural irregularities with the HRVP’s decision, the Applicant alleges two procedural irregularities. First, he contends that the HRVP took almost five months to notify the Applicant of his decision after receiving EBC’s Final Report. Secondly, the Applicant contends that the HRVP failed to consult the Applicant’s manager prior to making a decision on whether misconduct occurred and the disciplinary measures to be imposed. The Applicant asserts that failure to do so constituted a violation of Staff Rule 3.00, paragraph 10.11 which mandates such prior consultation.

48. Regarding his fifth contention, namely the allegation of bias by EBC and the HRVP, the Applicant refers to “subjective evaluations of the evidence that constantly favor only the complainant, and a palpable lack of sympathy for the accused without demonstrable justification.” In particular the Applicant argues that the investigators drew conclusions without any factual basis, such as that the Applicant treated the Complainant differently from other staff. The Applicant also argues that the EBC investigators misstated facts and attributed testimony to the wrong events, distorted the Complainant’s own testimony and hid important exonerating facts in a footnote such as the Complainant’s note and interview testimony that “as late as June she had not felt sexual harassment.” The Applicant further maintains that the HRVP’s statement

in his e-mail of 29 July 2013 evidences bias, or “at least a basic misconception that once a staff member submits a complaint ... an irrefutable assumption applies that the alleged misconduct occurred.” According to the Applicant such a conception runs counter to the presumption of innocence.

The Bank’s main contentions

49. Regarding the Applicant’s first contention, the Bank avers that there is substantial evidence to support the findings of facts alleged to constitute misconduct. The Bank notes that according to the Code of Conduct “impact – not intent – is a key factor. If conduct is reasonably perceived to be offensive or intimidating – whether or not it was intended to be so – it should be stopped.” The Bank further asserts that the legal framework on sexual harassment provides that a “single incident can be considered harassment if it is so severe that it has a negative impact on the individual or the work environment.” The Bank notes that the Applicant “admitted to touching the ‘lower back’ of his subordinate ... several times on August 2, 2012, each time opposite her belly button for several seconds.” The Bank argues that the Applicant “even acknowledged in retrospect that the [Complainant] had given him clear signals that she did not reciprocate his attraction to her, but he had not interpreted these well enough.” According to the Bank the Applicant should have known and in fact did know that his conduct towards the Complainant was wrong.

50. The Bank further asserts that the Applicant’s “inappropriate physical contacts and sexually harassing comments” created a hostile working environment for the Complainant and negatively impacted her well-being. According to the Bank, the Applicant, “an experienced supervisor should not have needed to be told that” the Complainant was entitled to perform her duties in the work place without “fear of her manager touching her on any part of her body that could possibly be perceived to be, or confused with her posterior.”

51. The Bank contends that the Applicant’s behavior was especially inappropriate and abusive in light of his role as the Complainant’s direct supervisor and the “imbalance of power inherent in any supervisor-subordinate relationship.” According to the Bank this imbalance was

intensified due to the vast difference between the Applicant and Complainant in age, position and standing at the Bank. The Bank asserts that the Applicant abused his authority by inviting the Complainant to discuss the issues and asking her how “she felt about his attraction to her” under the pretext of a performance management meeting. The Bank argues that regardless of the Applicant’s intentions, his actions on 7 August 2012 “demonstrated a failure to distinguish between the personal and the professional, with insufficient regard for how this might impact [the Complainant].”

52. According to the Bank, the Applicant’s conduct also demonstrated a reckless failure to identify and observe generally applicable norms of prudent professional conduct. The Bank maintains that the “Applicant’s pursuit of a personal relationship with [the Complainant] demonstrated unacceptably poor judgment, or lack thereof.” The Bank contends that given the Applicant’s appreciation of the Complainant’s discomfort after the elevator incident on 2 August, “there is no excuse for his continued touching of August 7.”

53. With respect to the Applicant’s second contention, the Bank argues that though the Staff Rules do not provide for the indefinite duration of the written censure, they do not prescribe precise penalties for each situation “sensibly [leaving] the determination of the appropriate penalty to the HRVP, who must weigh the unique facts and circumstances of each case.”

54. Concerning the Applicant’s third contention, the Bank states that the sanctions imposed were proportionate to the serious nature of the misconduct in question and, though severe, these sanctions did not “dead-end” the Applicant’s career. The Bank notes that other staff members found to have committed similar misconduct have faced harsher penalties including termination of their employment contracts.

55. The Bank responds to the Applicant’s fourth contention by stating that there were no procedural irregularities with the manner in which the HRVP concluded his sanctions decision. The Bank notes that the delay of almost five months was due to the HRVP’s workload. Additionally, the Bank disagrees with the Applicant’s interpretation of the consultation requirement in Staff Rule 3.00, paragraph 10.11. The Bank argues that HRVP’s decisions are

made based on the investigative report which is not shared with the manager. Hence, the purpose of the HRVP's consultation with the manager is not "to discern other facts that may be relevant to the merits of the case." This, the Bank asserts, is the role of EBC's investigators. The Bank avers that the purpose of prior consultation with the manager is: "(a) informing the manager of the misconduct and the proposed disciplinary measures so that the manager may make alternate personnel arrangements (in cases of termination or reassignment), and (b) soliciting the manager's views on how a proposed disciplinary measure may impact the manager's business needs." The Bank states that on 12 July 2013, "HR informed [the Director of the Applicant's unit] of the review and impending decision." In response to the Tribunal's order for the production of additional information, the Bank stated that the Applicant's immediate manager was not consulted.

56. The Bank responds to the Applicant's fifth contention by noting that it is the Applicant's own testimony about his conduct and not any bias on the part of EBC or the HRVP that resulted in the finding of misconduct.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

SCOPE OF REVIEW

57. The Tribunal's scope of review in disciplinary cases is well established and extends to an examination of (i) the existence of the facts; (ii) whether they legally amount to misconduct; (iii) whether the sanction imposed is provided for in the law of the Bank; (iv) whether the sanction is not significantly disproportionate to the offence; and (v) whether the requirements of due process were observed.

58. The Tribunal has held that the Bank bears the burden of proof of misconduct and the standard of evidence "in disciplinary decisions leading ... to misconduct and disciplinary sanctions must be higher than a mere balance of probabilities" (*Dambita*, Decision No. 243 [2001], para. 21.) There must be substantial evidence to support facts which amount to misconduct. (*See P*, Decision No. 366 [2007], para. 33; *Arefeen*, Decision No. 244 [2001], para. 42.)

59. With respect to sexual harassment, the Tribunal held in *M*, Decision No. 369 [2007], para. 60 that “sexual harassment is a grave offense that entails the sanction of termination, and the standard of proof must be demanding to the point of being clear and convincing. The fact of such misconduct cannot be ‘established’ by conjecture or speculation. It is not enough to assert that there is ‘reasonably sufficient’ evidence to support a finding of misconduct in this type of allegation. In situations where, because of the nature of the allegation, there might be no direct evidence, the evidence available must be so clear as to generate conviction in the mind of a reasonable person.”

60. The Tribunal’s role is to “ensure that a disciplinary measure falls within the legal powers of the Bank.” *M*, para. 54. This however

does not mean that the Tribunal is an investigative agency. The Tribunal simply takes the record as it finds it and evaluates the fact-finding methodology, the probative weight of legitimately obtained evidence, and the inherent rationale of the findings in the light of that evidence. The judicial function cannot be reduced to a mechanical formula. Decisions will perforce be fact-specific; the ideal of perfect and general predictability must give way, to some degree, to the individual discernment of those called upon to judge a given case. *Id.*

THE EXISTENCE OF THE FACTS

61. Having laid out the standard and burden of proof, the Tribunal now considers the first element in its scope of review. In accordance with *Dambita*, the Tribunal must consider whether the established facts support the HRVP’s findings to a standard higher than a mere balance of probabilities.

62. The facts on which the disciplinary measures were based occurred on 2 and 7 August 2012. It is undisputed that the Applicant touched the Complainant’s back three times on 2 August 2012 and touched her hand once on 7 August 2012. The dispute centers on the characterization and extent of the physical contact.

63. In light of the fact that there were no witnesses, nor is there any other evidence to support either the Complainant’s or the Applicant’s assertions, the Tribunal concludes that the facts

which can be established from the record are as follows. First, that on 2 August 2012 the Applicant touched the Complainant on her lower back while walking from IMF HQ2 to IFC. Secondly, that on 2 August 2012 the Applicant touched the Complainant on her lower back at the IFC. Thirdly, that on 2 August 2012 the Applicant stood close to the Complainant who was standing in a corner of an elevator. During this time he touched the Complainant on her lower back. Fourthly, that on all these occasions the Applicant touched the Complainant on her lower back opposite her belly button. Finally, that on 7 August 2012 the Applicant touched the Complainant's hand and asked her a question with respect to touching her. The Complainant expressed her discomfort. The Applicant apologized and a conversation ensued on why the Applicant had touched the Complainant in a manner she considered inappropriate.

64. The Tribunal is aware that these facts did not occur without context. The record shows that the Applicant acknowledged that a physical attraction to the Complainant began to develop "towards the end of" their five-week mission overseas. These feelings of attraction solidified once they returned to Washington, DC. The Applicant acknowledged that it was not normal behavior for him to put his hand on the Complainant's back while walking with her:

It was the first time that I have done that with her. I mean, I have done it probably with other colleagues or put my arms around her, but no. This was not normal.

65. According to the Applicant this level of familiarity stemmed from having worked closely with the Complainant for seven months. It also stemmed from a desire for "contact" with the Complainant. The Applicant acknowledged that when he stood close to the Complainant in the elevator on 2 August 2012 he "was responding to an instinct." The Applicant also admitted that he considered his physical attraction to the Complainant inappropriate. During his interview with EBC investigators he stated that he did not speak to any friends or colleagues about his attraction to the Complainant stating "partially because in my brain, I know how inappropriate it is, but ... you know, sometimes ... it is not the brain that's thinking."

WHETHER THE ESTABLISHED FACTS LEGALLY AMOUNT TO MISCONDUCT

66. The Tribunal now considers whether the established facts legally amount to the misconduct cited in the disciplinary decision letter, namely:

- (i) paragraph 6.01(a) – abuse of authority;
- (ii) paragraph 6.01(b) – reckless failure to identify, or failure to observe, generally applicable norms of prudent professional conduct;
- (iii) paragraph 6.01(c) – acts or omissions in conflict with the general obligations of staff members set forth in Principle 3.1(c) of the Principles of Staff Employment, including the requirements that staff avoid situations and activities that might reflect adversely on the Bank Group (Principle 3.1) and conduct themselves at all times in a [manner] befitting their status as employees of an international organization (Principle 3.1(c)); and/or
- (iv) paragraph 6.01(e) – harassment, contributing to a hostile work environment.

67. The Tribunal observes that neither party raised contentions concerning the alleged violation of Staff Rule 3.00, paragraph 6.01(c). Accordingly, the Tribunal will limit its review to the findings that the Applicant’s conduct amounted to violations of Staff Rule 3.00, paragraphs 6.01(a), 6.01(b), and 6.01(e).

Abuse of Authority

68. The Bank argues that the Applicant abused his authority by “pursuing a personal relationship with [the Complainant]” during a “performance management meeting” on 7 August 2012. The Bank contends that regardless of the Applicant’s alleged intention to use the meeting as an opportunity to address the apparent discomfort the Complainant felt, he abused his authority since “mixing professional and personal matters in this way creates a substantial risk of confusion about whether the subordinate’s failure to meet the manager’s personal expectations would negatively affect the subordinate’s professional success.” The Applicant disputes the characterization of the 7 August 2012 meeting as a “performance management meeting,” and asserts that he and the Complainant met regularly to discuss work priorities. The Complainant appears to have corroborated this.

69. The Tribunal observes that the Bank's Code of Conduct does not expressly define abuse of authority, but refers to abuse of power as the "misuse of authority in the course of performing work." While the record does not support the Bank's finding that the Applicant pursued a "personal relationship with [the Complainant]" during the 7 August 2012 meeting, the Tribunal considers that the Applicant's use of the meeting to attempt to address the incidents of 2 August 2012 amounted to an abuse of authority. The record shows that the Applicant had requested the Complainant to contact him over the weekend of 3 – 5 August 2012, and the Complainant did not respond. Having informed the Complainant on 7 August 2012 that he wished to see her in his office to discuss work, the Complainant was not at liberty to decline. The Applicant himself acknowledged that the purpose of the 7 August 2012 meeting was to try to resolve any tensions between himself and the Complainant, and not really a conversation to address the Complainant's work program. The Tribunal finds that by concealing his intent when he asked the Complainant to meet with him, the Applicant misused his authority as the Complainant's supervisor to oblige her to meet him.

Reckless failure to identify, or failure to observe generally applicable norms of prudent professional conduct

70. The Applicant argues that his conduct did not fall short of the generally applicable norms of prudent professional conduct. He refers to his "three very brief touches" on 2 August 2012, and the fact that he ceased any possibly questionable conduct once he was told on 7 August 2012 that the Complainant found such physical contact inappropriate.

71. As the Tribunal held in *P*, para. 69 "the relationship between a staff member and his or her supervisor is an objective fact which in and of itself should cause managers to understand that attempts to extend a professional relationship into a personal one must be viewed with great caution." The Tribunal finds that the record is replete with substantial evidence that the Applicant failed to observe generally applicable norms of prudent professional conduct on both 2 and 7 August 2012 in his actions and choice of words. The Applicant himself acknowledged that his conduct on 2 August 2012 was inappropriate because it was "overly familiar and friendly" with a colleague. His behavior and choice of words on 7 August 2012 also demonstrated, at the

minimum, poor judgment. The Applicant's characterization of his conduct on 2 August 2012 as "three very brief touches" and that he ceased any questionable conduct once he was told by the Complainant on 7 August 2012 that they are inappropriate, in and of itself represents lack of judgment and appreciation of professional behavior in a work place.

72. As a long-time employee in a senior position, the Applicant should have been well aware that physical contact, as the Applicant admits himself, such as touching the Complainant on the lower back "opposite her belly button" is inappropriate and may be considered by a co-worker as an infringement of personal space. This act is aggravated by the fact that the Complainant was a junior staff member on a short term contract who, as the Applicant's subordinate, may not have been able to expressly state her discomfort.

Harassment, contributing to a hostile work environment

73. The Tribunal now addresses the serious allegation of sexual harassment. Harassment is defined in the Bank's Code of Conduct as:

Any unwelcome verbal or physical behavior that interferes with work or creates an intimidating, hostile or offensive work environment.

74. Sexual harassment is further described as:

Any unwelcome sexual advance, request for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature that interferes with work; is made a condition of employment or creates an intimidating, hostile or offensive work environment.

75. As was held in *CB*, Decision No. 476 [2013], para. 39, the definition of harassment "does not require conduct to be hostile or abusive. Thus, it is possible that attempts to forge a 'benign friendship' could constitute harassment if these are unwelcome and have the result of interfering with work or creating an intimidating, hostile or offensive work environment."

76. While it is not the Tribunal's intention to "inhibit healthy personal and professional relationships among staff members and the promotion of a congenial atmosphere in the

workplace” *Rendall-Speranza*, Decision No. 197 [1998], para. 80, staff members are required to contribute to an environment which is conducive to work, free from sexual harassment, hostility and intimidation. Supervisors in particular are held to a higher standard, since they have a greater duty of care towards subordinates. Managers “have a primary responsibility in ‘establishing the tone for a healthy working environment,’” which includes “avoiding even the appearance of improper conduct.” *Id.*, para. 78.

77. The Tribunal recognizes that not every instance of inappropriate behavior or physical conduct amounts to sexual harassment. Indeed, “‘touching’ in and of itself, even ‘repeated touching’ cannot be a decisive criterion” in determining whether sexual harassment occurred. *P*, para. 67. Nor can this determination rest solely “on the basis of mere assertions that there was conduct which the Complainant perceived as harassment.” *Id.*, para. 68. As was observed in *P* “[t]he ordinary courtesy of helping to put on a coat can be transformed into an intimate act, and be met with enthusiasm or a shudder. In some cultures, on the other hand, a social kiss – somewhere in the open space at the side of the face – can be so perfunctory as to be devoid of the slightest personal interest.” *Id.*, para. 67.

78. Given the seriousness of an allegation of sexual harassment for both the complainant and the subject of the allegation, the Tribunal has held that the “issue is not one of private morality, but of unacceptable behavior relating to the workplace. Once that is understood, the circumstances become somewhat easier to evaluate.” *Id.*, para. 69. Invariably, an assessment of whether conduct amounts to sexual harassment involves a review of both subjective and objective factors; whether the complainant perceived sexual harassment, and equally importantly, whether the applicant’s conduct, physical or otherwise, would be perceived as sexual harassment by a reasonable person. The complainant’s personal characteristics such as age and employment status are also relevant. The central question is whether a reasonable person would consider the Applicant’s conduct amounted to sexual harassment of the Complainant. The Applicant’s conduct must be assessed in context.

79. The Applicant contends that his conduct was not of a sexual nature, and the Bank’s claims of sexual advances and pursuits are not supported by the record. He further contends that

the Complainant never informed him that the manner in which he touched her was unwelcome or inappropriate. These points are essential to the question of whether sexual harassment occurred. The Tribunal will address each point in turn.

Whether the Applicant's conduct was of a sexual nature

80. It is clear that the Complainant considered the Applicant's conduct – placing his hand on her lower back on three occasions on 2 August 2012, and touching her hand on 7 August 2012 – as well as the words he uttered to have been of a sexual nature. An objective assessment of this conduct would take into consideration where on the Complainant's body the Applicant touched her, in what context the Applicant touched her (e.g., in what physical location, whether other people were present), and any apparent reasons for or intent of the Applicant in engaging in the physical contact.

81. The Tribunal finds that with respect to the three instances of physical contact on 2 August 2012, the Applicant's conduct amounted to conduct of a sexual nature. It is observed that even if the physical contacts were unconscious or absent-minded as the Applicant claims, the record makes clear that they stemmed from the Applicant's admitted physical attraction to the Complainant. Although the Applicant did not make any overt sexual advances towards the Complainant, the record establishes that the Applicant was attracted to the Complainant, and considered that this physical attraction was the reason he touched the Complainant in such a familiar manner on her lower back. Thus, the underlying sexual attraction, the point of contact on the Complainant's body, and the Complainant's assessment of the physical contacts support a finding that the physical contacts on 2 August 2012 were of a sexual nature. The Tribunal considers that, in the present case, where the incident of touching occurred – in a public or semi-public setting – does not affect its conclusion that the physical contacts were of a sexual nature.

82. The Tribunal observes that, the physical contact on 7 August 2012 amounted to contact of a sexual nature in light of its purpose and what the Applicant admitted having said to the Complainant "I have an urge to do that. What should I do?" The Applicant touched the

Complainant's hand to convey his desire, or "urge" as he put it, to have physical contact with her.

83. Having found that the conduct in question was of a sexual nature, the next question is whether the Applicant knew, or should have known that it was unwelcome. The record demonstrates that prior to 7 August 2012 the Complainant did not expressly inform the Applicant that she found his physical contact inappropriate or unwelcome. The Tribunal also observes that the Complainant made clear to EBC investigators that she did not think the Applicant had touched her in a sexual manner in the months prior to 2 August 2012.

84. Nevertheless, the Tribunal considers there is substantial evidence that the Applicant should have known that physical contact with the Complainant was unwelcome. The Applicant admitted to EBC investigators that on more than one occasion during his five-week mission with the Complainant, he observed that she physically distanced herself from him in the presence of others. The Applicant stated that he expressly asked her if she thought he was trying to "get fresh" or "make a pass" at her. This evidence suggests that the Applicant was not as oblivious to the Complainant's discomfort as he asserts, or to the fact that the possibility crossed her mind that he was displaying conduct of a sexual nature, i.e. making a "pass" at her.

85. As stated above, a manager owes a greater duty of care to ensure a safe working environment for his or her staff. This situation is compounded by the fact that the Complainant was in a vulnerable position as a short-term consultant embarking on her first employment. As a senior professional with extensive experience working in a multi-cultural environment the Applicant knew, or certainly should have known, that such physical contact with the Complainant could have raised ambiguity about his motives. As a manager, he should also have known that a junior staff member may find it difficult to express her discomfort to her supervisor for fear that it might disadvantage her in connection with her employment. The Tribunal finds the Complainant's statement that she did not want to appear unfriendly by expressing her discomfort compelling. Rather than seeking express signals of discomfort, the Applicant should have been aware that a young and junior staff member holding a precarious employment contract is limited in her ability to clearly inform her supervisor that his physical contact with her is

unwelcome. The Tribunal also observes that silence on the part of a complainant of sexual harassment that a particular conduct, physical or otherwise, of a sexual nature is unwelcome does not change the legal character of the conduct as sexual harassment.

86. In light of the above, the Tribunal finds that the elements of sexual harassment have been established. The Tribunal is satisfied that the Applicant's conduct was of a sexual nature and inappropriate in the work place. The Applicant's behavior was particularly objectionable as he held a supervisory role over the Complainant. The record shows that the conduct was not welcome by the Complainant, nor did she encourage the Applicant's behavior. The Applicant himself acknowledged this. The Tribunal finds that the fact that the Complainant did not verbally object to the physical contacts until 7 August does not excuse the Applicant's behavior.

WHETHER THE DISCIPLINARY MEASURES IMPOSED
ARE CONTAINED IN THE STAFF RULES

87. The Applicant asserts that indefinite placement of the written censure in his personnel file is a sanction not provided for in the law of the Bank. The Tribunal observes that the sanction in question, namely the written censure, is provided for in Staff Rule 3.00, paragraph 10.06(a). The Applicant's arguments concerning the duration of the written censure in his file are best addressed as a question of proportionality.

WHETHER THE DISCIPLINARY MEASURES IMPOSED
WERE SIGNIFICANTLY DISPROPORTIONATE TO THE MISCONDUCT

88. Having found that the Applicant committed serious misconduct, namely sexual harassment and abuse of authority, the Tribunal considers that the sanctions of a demotion, ineligibility for a salary review increase for the year in which the misconduct occurred and a written censure are not significantly disproportionate to the misconduct. The Applicant's conduct was aggravated by the disparity between the senior position he occupied and the very junior position held by the Complainant, as well as the differences in age and years of professional experience.

89. The Tribunal is not oblivious to the Applicant's stellar professional record and the fact that this is his first instance of misconduct in almost twenty years of service to the Bank. The Tribunal also takes into account the Applicant's apology and cooperation with the investigation. The Tribunal finds that the placement of a written censure in the Applicant's personnel file for an indefinite period is unduly harsh.

ALLEGATIONS OF BIAS

90. The Applicant alleges bias and partiality in the Final Report and the HRVP's decision. In particular he argues that the EBC investigators misstated facts and attributed testimony to the wrong events, distorted the Complainant's own testimony and hid exonerating facts in a footnote. The Applicant also contends that the EBC investigators failed to properly examine the Complainant's credibility. In addition, he asserts that the HRVP's e-mail message of 29 July 2013 evidenced bias and the failure to afford the Applicant the benefit of the doubt. The Bank disputes these contentions.

91. The Tribunal has held that "[a]n investigation into a matter as delicate and sometimes impalpable as sexual harassment should be totally evenhanded, failing which concerns about its independence or objectivity inevitably arise." *M*, para. 85. In *P*, para. 67, the Tribunal observed that while there may be lack of sympathy for an applicant alleged to have committed sexual harassment, such lack of sympathy must be "justified, in order that the Tribunal as a third party intervening after the event can evaluate the Applicant's complaints."

92. Having conducted an independent review of the record, the Tribunal finds no evidence of bias by the HRVP or EBC. The Tribunal notes that the EBC investigators found the allegations substantiated in light of the Applicant's acknowledgments and their assessment of the Complainant's credibility. While the Tribunal does not find evidence of bias and partiality in the EBC investigation, the Tribunal observes that there are some mischaracterizations of statements made by the Applicant and Complainant which, contrary to the Bank's assertions, are more significant than mere typographical errors. In addition, the Tribunal considers that the investigation would have benefited from detailed questioning of the Complainant on some of the

allegations of the Applicant's inappropriate conduct prior to 2 August 2012. Though these allegations were not at the heart of the misconduct investigation, they provided background context likely to be taken into account in assessing the seriousness of the Applicant's misconduct.

93. Regarding the Applicant's allegation that the HRVP's e-mail message of 29 July 2013 contains evidence of bias, the Tribunal notes that the HRVP made the following statement: "If harmless and benign as you maintain, I very much doubt the young woman would have filed a complaint with the EBC regarding your inappropriate behavior." The Tribunal observes that this e-mail message was sent in response to the Applicant's request for reconsideration of the HRVP's final decision. Having reviewed the record, the Tribunal is satisfied that there is no evidence of actual bias in the decision making process. The Tribunal nevertheless recognizes that such a statement is subject to an interpretation of being biased and emphasizes the importance that the HRVP maintains even the appearance of impartiality at all times.

PROCEDURAL IRREGULARITIES

94. The Tribunal now addresses the Applicant's final contention namely procedural irregularities in the manner in which the HRVP concluded his decision. Regarding the allegation that the almost five-month delay amounted to a violation of due process, the Tribunal observes that the Applicant did not demonstrate he suffered any harm as a result of the delay.

95. Regarding the allegation that the HRVP failed to consult the Applicant's manager as required by the Staff Rules, it is noted that Staff Rule 3.00, paragraph 10.11 provides that:

The Vice President, Human Resources for the Bank, will decide, after consultation with the staff member's manager and based on EBC's findings, whether conduct warranting the imposition of disciplinary measures on a staff member occurred and what, disciplinary measures should be imposed.

96. The Bank argues that Staff Rule 3.00, paragraph 10.11 only requires the HRVP to inform the Applicant's manager prior to the issuance of the decision letter. The Bank asserts that the purpose of the HRVP's consultation with the Applicant's manager is "(a) informing the manager

of the misconduct and the proposed disciplinary measures so that the manager may make alternate personnel arrangements (in cases of termination or reassignment), and (b) soliciting the manager's views on how a proposed disciplinary measure may impact the manager's business needs."

97. In response to the Tribunal's order for the production of additional information the Bank states that the Applicant's immediate supervisor was not consulted on the HRVP's sanctions decision. The Bank also states that the Director of the Applicant's unit who was contacted did not object to the HRVP's characterization of the consultation, nor did he accept the HRVP's invitation to discuss the matter further.

98. The Tribunal observes that the Staff Rule does not define "consult" or what constitutes "consultation." Under Staff Rule 3.00, paragraph 10.11, it is the HRVP who is authorized to make the decision on (i) "whether conduct warranting the imposition of disciplinary measures on a staff member occurred", and (ii) "what disciplinary measures should be imposed". However, the HRVP makes such decisions "after consultation with the staff member's manager and based on EBC's findings." Hence, prior consultation with the staff member's manager is a requirement and not a formality. The Tribunal observes that the purpose of "consultation," in the context of Staff Rule 3.00, paragraph 10.11, is to genuinely ascertain the views of the relevant manager of the staff member in question, including, but not limited to, the impact of the disciplinary measure on the business of the Bank, and to take them into account. "Consultation," however, does not mean to secure consent of or to negotiate with the staff member's manager.

99. The Tribunal does not agree with the characterization of the Bank that the purpose of "consultation" is "to advise management of the proposed outcome and disciplinary measures, if any, and to discuss how these might impact the business of the Bank." As observed above the purpose of "consultation," under Staff Rule 3.00, paragraph 10.11, is to make sure that the HRVP is fully informed when he/she reaches a decision on a disciplinary measure. Hence, the purpose of consultation is not limited to seeking the manager's views on the impact of the disciplinary measure on the business of the Bank. It is to provide yet a further opportunity for the HRVP to ascertain the views of the staff member's manager who might be in a position to

express views or clarifications that would be helpful to the HRVP in reaching a fully informed decision on disciplinary measures.

100. In the present case, the Tribunal observes that the HRVP did not “consult” the Applicant’s manager even by the Bank’s own definition of “consultation” and merely “informed” the Applicant’s manager of the decision. Even though the consultation with the Director of the Applicant’s unit was held prior to the formal issuance of a decision letter, the record shows that a decision had already been made at the time the conversation between the HRVP’s designee and the Director took place. Informing the Applicant’s managers after a decision has already been taken is a procedural violation of Staff Rule 3.00, paragraph 10.11.

101. The Tribunal recognizes that failure of the Bank to adhere to its own rules represents an irregularity which, when affecting the rights of a staff member, may merit compensation as one form of a remedy. In assessing compensation the Tribunal considers the gravity of the irregularity, the impact it has had on an applicant and all other relevant circumstances in the particular case.

102. In the instant case, the Tribunal observes that non-compliance with Staff Rule 3.00, paragraph 10.11 may have deprived the Applicant’s manager of the opportunity to express his timely views, which, if expressed, might have been taken into account by the HRVP. If expressed, the manager’s view might have affected the severity of the disciplinary measures imposed on the Applicant. Taking into consideration this procedural irregularity and the disproportionality of the placement of a written censure in the Applicant’s personnel file for an indefinite period, the Tribunal reduces the duration of the written censure to three years.

DECISION

The Tribunal decides that:

- (1) The Bank shall reduce the duration of the written censure in the Applicant’s personnel file to three years.
- (2) All other pleas are dismissed.

/S/ Stephen M. Schwebel

Stephen M. Schwebel

President

/S/ Zakir Hafez

Zakir Hafez

Acting Executive Secretary

At Washington, D.C., 26 September 2014