

Decision No. 304

D,
Applicant

v.

International Finance Corporation,
Respondent

1. The World Bank Administrative Tribunal, composed of Francisco Orrego Vicuña, President, Bola A. Ajibola and Elizabeth Evatt, Vice Presidents, Robert A. Gorman, Jan Paulsson, Sarah Christie and Florentino P. Feliciano, Judges, has been seized of an application, received on April 24, 2003, by D against the International Finance Corporation (IFC). The President of the Tribunal, on June 23, 2003, granted the Applicant's request for anonymity on the basis that the publication of the Applicant's name was likely to be seriously prejudicial to him. The Applicant's request for oral proceedings was, however, denied on September 29, 2003 because the evidence in the written record was deemed to be sufficient for the Tribunal to make a determination in the case. The usual exchange of pleadings took place and the case was listed on September 30, 2003.

Factual Background

2. The Applicant joined the Nairobi Country Office of the IFC in February 1991. During the 1990s, he received several additional appointments as a Local Consultant, and throughout this period he served as an Investment Officer. In that capacity, he identified potential clients for the IFC, appraised projects, recommended loans to IFC management, negotiated the terms of those loans and supervised their servicing. Although no regular annual performance evaluations were prepared for the Applicant, given his position as Consultant, there is no dispute in the record of this case that the Applicant was an excellent performer, and his judgment and productivity were very highly regarded by his managers.

3. In 1993, one Mr. S, a client of IFC and Managing Director of the TBS Company, based in Tanzania, was instrumental in obtaining an IFC loan for TBS in the amount of \$250,000. The Applicant was the Investment Officer for that loan, which was fully and timely repaid. In June 1996, Mr. S signed as guarantor for a second loan agreement between the IFC and TBS, this time in the amount of \$500,000. Once again, the Applicant served as the Investment Officer. That loan too was, some four years later, fully and timely repaid by TBS.

4. Some ten weeks after the second loan was approved, on August 22, 1996, the Applicant issued a personal check in the amount of \$50,000 to Mr. S, who, the Applicant claims, explained his need for a loan because of a "personal emergency." It appears that the families of Mr. S and the Applicant had known each other since the 1920s. This \$50,000 loan from the Applicant was made orally and without written documentation. The evidentiary record raises a question whether the parties understood that interest was to be paid by Mr. S; the Applicant now contends that the loan was without interest, but the Respondent contends that the Applicant initially acknowledged to the Respondent that he expected to be paid 10% interest. The \$50,000 check was cashed and paid out by the bank on September 5, 1996.

5. Some three and one-half years later, in March 2000, the Applicant's employment was converted to an Open-Ended appointment, and he was transferred to Headquarters in Washington, D.C. to continue work with the Sub-Saharan Africa Department as an Investment Officer at grade G. At that time, the \$50,000 loan of 1996 from the Applicant had not yet been repaid by Mr. S.

6. On September 8, 2000, the Applicant forwarded the details of his bank account to Mr. S, apparently so that Mr. S could repay the loan directly into the account. On November 9, 2000, Mr. S sent the Applicant an e-mail

asking for a delay in repaying because of an increase in fuel prices in Tanzania, to which the Applicant wrote back that “there is no pressure.” In another e-mail, dated April 3, 2001, Mr. S requested further forbearance, again because of fuel prices as well as vehicle problems. These problems appear not to have interfered with the contemporaneous repayment by TBS of its loan from the IFC.

7. In November 2000, the Bank’s Corruption and Fraud Investigations Unit and the investigative functions of the Office of Business Ethics and Integrity were merged to form the Department of Institutional Integrity (INT). One of the core functions of INT is to investigate allegations of staff misconduct, first by making a preliminary inquiry and then, if there is deemed to be sufficient inculpatory evidence, to conduct a more formal and broad-scale investigation.

8. In early 2001, the Investigations Unit of INT (INTIU) received information from a World Bank staff member employed in the Resident Mission in Tanzania that induced INTIU to initiate an inquiry directed against the Applicant. The Tanzanian staff member had heard from an IFC client at a French Embassy reception in Dar-es-Salaam that the Applicant had received kickbacks (10% in exchange for ensuring IFC financing) and was referred to in the Tanzanian business community as “Mr. Ten Percent.”

9. Deciding that this accusation had sufficient credibility, INT appointed two senior investigators to look into the matter. Their inquiry into these charges began on April 25, 2001. As is apparently common in such cases in which e-mails and other materials retained on computers may provide useful information, the INT investigators were able, without the knowledge of the Applicant, to review the contents of his Lotus Notes e-mail account. During that review, INTIU uncovered the above-noted e-mails between the Applicant and Mr. S, indicating that a financial relationship existed between them at the same time that the Applicant was serving as the IFC Investment Officer on the loan that was given to TBS, Mr. S’s company. The examination of the Applicant’s e-mails also uncovered some business dealings by the Applicant on behalf of private companies, as well as pornographic and obscene materials.

10. Between August 14 and 23, 2001, the two INT investigators traveled to Tanzania, where they interviewed Mr. S – again, without informing the Applicant. Although in certain respects the answers provided by Mr. S were evasive, for he was taken by surprise by the interrogation and he was uncertain about its impact on the Applicant, Mr. S was unequivocal and consistent in his statements to the investigators that he had paid no commission or “kickback” to the Applicant or to any other IFC official, and that he had not been subjected to any pressure to do so. After initially denying having had any business dealings in 1996 with the Applicant, Mr. S ultimately acknowledged such dealings (while declining to describe them) but reiterated that they were of a personal nature and strictly apart from the business of the IFC.

11. After having reviewed the Applicant’s e-mail records and conducted their interviews with Mr. S in Tanzania, the investigators concluded that there was credible evidence to support the charge that the Applicant had taken moneys from Mr. S. This charge, along with others formulated after the earlier review of the Applicant’s e-mails, were incorporated by the Manager of the Office of Business Ethics and Integrity, INT, in a “Notice of Alleged Misconduct” dated August 27, 2001, which was served upon the Applicant. This was the first notification to the Applicant of the investigation into alleged wrongdoing on his part. By that time, however, the investigators had concluded – based on their interviews of several IFC clients – that the charge that the Applicant had taken kickbacks was merely unfounded rumor and did not merit further investigation or formal allegations of misconduct.

12. This Notice, citing Staff Rule 8.01 on “Disciplinary Measures,” stated that an investigation was being conducted of the following allegations: (1) the Applicant “abused [his] position in the IFC for financial gain by having a business relationship” with Mr. S between June 10, 1996 and January 4, 2001, this “business relationship [having] included the receipt of monies” from Mr. S; (2) “concurrent with your employment with the IFC, you have been, and continue to be, engaged in outside business activities in Kenya and elsewhere by making strategic and significant business decisions on behalf of, among others,” four named companies “without the approval of the World Bank Group’s Outside Interests Committee”; (3) during the period from July 6, 2000 to June 6, 2001, the Applicant “engaged in the unauthorized use of World Bank Group computer

resources by having received, reviewed and in some cases forwarded pornographic and obscene material over the Internet.” The Notice of Alleged Misconduct cited the various staff rules alleged to have been violated and outlined the various stages of the investigative process.

13. The Notice was presented to the Applicant on August 30, 2001 by the two investigators and a colleague from INT. In the interview with them, the Applicant stated that he had extended a personal loan to Mr. S in the amount of \$50,000, under an oral agreement, and that he expected a return of “10% prime” (an acknowledgment later denied by the Applicant), and he also stated that he had not disclosed the loan to his managers. In his written response to the Notice, on September 4, 2001, the Applicant explained that Mr. S was a longstanding friend and that the loan in question was a personal one. As to the second allegation, the Applicant claimed that his only active involvement in outside businesses consisted of providing limited assistance and advice to his family’s businesses in which he held shares, and that such involvement was in fact well known to his supervisors within IFC (although the businesses were in no way involved with the IFC). The Applicant also admitted to receiving, reviewing and storing pornographic and obscene material on his IFC computer, and he stated that he would not do so again.

14. On September 13, 2001, the Applicant was placed on administrative leave and escorted out of his office by a security guard along with an HR representative in front of IFC staff. When several staff members, who were disturbed by observing this incident, approached the Applicant’s Department Director to express concerns, she told them that the Applicant was being placed on administrative leave because of an ongoing investigation by INT; there is some conflict as to whether mention was made of “kickbacks” at that meeting.

15. The investigators conducted further interviews in late September. They were informed by the Applicant that the loan was intended for Mr. S and not, as Mr. S had been claiming, for his late nephew, and that the Applicant had been urging Mr. S to cooperate with the investigators. They were informed by Mr. S that the loan had nothing to do with dealings between TBS and IFC and was purely personal, and that while he had initially agreed orally with the Applicant that no interest would be paid, he (Mr. S) planned nonetheless to reimburse the Applicant with interest for the help given “in time of need.” The Applicant’s then manager told the investigators that he had never heard of the Applicant taking kickbacks, that Nairobi was “a place of rumors,” and that everyone “generally speaking” had “some sort of allegations leveled against them during their stay in Kenya.”

16. On November 19, 2001, the Applicant was furnished a copy of the draft Investigation Report prepared by INT, to which he made a written response on November 20, 2001. Among other things, the Applicant reiterated that the \$50,000 loan was altogether personal, that it had been interest-free, that Mr. S suggested payment with 10% interest (although no interest had yet been paid), and that Mr. S had repaid \$28,000.

17. The investigators issued their final Investigation Report to the Vice President for Human Resources (VPHR) of the Bank on December 3, 2001. They concluded, *inter alia*, that: (i) while an IFC Investment Officer in 1996, the Applicant had provided a \$50,000 personal loan to Mr. S for 10% interest, without informing the IFC; (ii) he thereby took a *de facto* interest in the IFC investment with TBS and Mr. S; (iii) the Applicant, with the use of IFC computers, had been involved in outside business activities without authorization; and (iv) he had made unauthorized use of IFC computers in 2000 and 2001 to receive, review and forward pornographic and obscene materials. In that report and in a later memorandum of January 8, 2002, the investigators stated that during the period of the earlier interviews, Mr. S and the Applicant had conversed with one another and had altered and coordinated their testimony.

18. The VPHR, by a memorandum of February 13, 2002 titled “Notification Regarding Decision into [sic] Allegations of Misconduct,” informed the Applicant of her conclusion that he had committed misconduct by: (i) abusing his official position in the IFC for financial gain in his relationship with Mr. S, from whom he had received money; (ii) engaging in unauthorized outside business activities; and (iii) engaging in unauthorized use of Bank computers to receive, review and forward pornographic and obscene material over the Internet. The VPHR announced her decision to terminate the Applicant’s employment immediately, based on the first finding. She further stated that “given the discipline of termination that I am imposing with respect to the first allegation, I am not imposing any further discipline in respect of” the remaining two counts.

19. The Applicant filed a timely appeal with the Appeals Committee which, after conducting a hearing, rendered a written report and recommendations on November 6, 2002. The Appeals Committee concluded that the VPHR had abused her discretion in terminating the Applicant's employment. It found little or no evidence that the Applicant had received interest or made any profit from the 1996 loan, and it found that the loan did not derive from any abuse of position on the Applicant's part. The Committee concluded, however, that the Applicant, by using poor judgment in making the loan, had failed to observe generally applicable norms of prudent professional conduct in violation of applicable staff rules, which created the "appearance of an impropriety and a potential conflict of interest." The Appeals Committee found that termination should not have been automatically imposed for this delinquency, and that the VPHR should have given consideration to the Applicant's performance record, especially the absence of evidence of like occurrences in the past. The Committee further concluded that there was insufficient evidence of "misconduct" in the Applicant's alleged outside business activities and involvement with pornography. It also found that there had been unfair process in not promptly informing the Applicant of the charges at the outset of the inquiry and in publicly escorting him from the building under guard. As a remedy, the Appeals Committee recommended revision of the Notification of Misconduct, reconsideration of the termination decision, and payment of four months' salary for the violations of due process.

20. The Managing Director – to whom the recommendations were forwarded, in view of the earlier involvement of the VPHR – did not, however, accept the recommendations of the Appeals Committee. He wrote on December 30, 2002 to the Applicant, *inter alia*, that making a personal loan

to an individual who was also the sponsor and guarantor of a loan under an IFC loan agreement constitutes conduct that is incompatible with the high ethical standards IFC has adopted as well as the obligations imposed on staff by the Principles of Staff Employment. . . . Your making this loan in itself represents on your part a failure to observe generally applicable norms of prudent professional conduct and constitutes misconduct for which termination of employment is warranted. The fact that you may not have received financial gain [by expecting or receiving interest] or that such loans may be customary in other contexts does not mitigate the impropriety associated with your having made a personal loan to someone with whom IFC had a professional relationship of which you were not only aware but for which you were responsible. The appearance of impropriety and conflict of interest situation that resulted is unacceptable in the World Bank Group. I therefore let stand [the VPHR's] decision to terminate your employment for misconduct.

The Managing Director also stated that the Applicant's admitted outside business activity, even on behalf of family businesses, without review by the Outside Interests Committee, and the misuse of his computer with respect to pornographic and obscene material, constituted misconduct.

Contentions of the Parties

21. This application to the Tribunal followed. The Applicant's principal contention is that he never abused his position at the IFC and never sought or secured financial gain from that position. The Respondent acknowledges that there is no evidence whatever of the Applicant seeking or securing a commission or kickback. The Applicant asserts that the loan to Mr. S was based on a long-time friendship, was interest-free and not for profit, was unrelated to his position with the IFC and the IFC loans to TBS, did not affect the IFC relationship with TBS or have an adverse impact on the repayment of the TBS loans, and produced no conflict of interest on his part. The Applicant thus denies having engaged in misconduct or otherwise having violated the pertinent staff rules. This is also true, in his judgment, with respect to the merely "technical" violations relating to the minimal assistance he provided to his own family's businesses, which were known to his managers, and with respect to his retention and sharing of pornographic and obscene material, which he asserts not to be uncommon within the Bank. The Applicant makes a number of claims of denial of due process in connection with the investigation by INT, including its suspect source in offhand remarks at a cocktail party, the interrogation of Mr. S without prior notification to the Applicant, the Applicant being publicly escorted from his IFC office when placed on administrative leave, and the involvement in the termination decision (contrary to his earlier request) of the VPHR of the IFC. The Applicant seeks rescission of the decision to

terminate his employment, reinstatement or a mutually agreed separation, a clean record, lost pay and benefits, compensation for emotional and reputational injury, and costs.

22. The Respondent contends that the Applicant, an IFC Investment Officer, consciously engaged in a conflict of interest contrary to the ethical standards and staff rules of the IFC, of which he was aware. He has acknowledged that making the loan was a violation of staff rules and reflected the appearance of impropriety. He misused his official business relationship with an IFC client to seek out a personal investment opportunity and thereby to become a competing creditor of the borrower. The Applicant admitted to expecting a payment of 10% interest, but the loan was improper regardless whether he was to receive interest. There was no reason, claims the Respondent, to doubt the credibility of the source of the initial allegation against the Applicant, and the evidence of wrongdoing subsequently uncovered by examining his e-mails could not be ignored. The Respondent relies upon various provisions in Staff Rules 3.01 (Outside Activities and Interests) and 8.01 (Disciplinary Measures) to support its claims of misconduct; these will be explored as pertinent in the course of the judgment below. With respect to the discipline imposed, the Respondent asserts that termination of the Applicant was mandated by Staff Rule 8.01, para. 4.01(a), which although promulgated in 1997 is applicable here; and even if it were not mandated, termination is reasonable and justified. With respect to the investigatory process, the Respondent asserts that all of the requirements of due process set forth in Staff Rule 8.01 were satisfied during the preliminary inquiry and formal investigation: the Applicant received written notice, an overview of the process, an explanation of his rights and obligations, and an opportunity to respond to the initial allegations and to the subsequent INT Report. The investigators did not inform the Applicant of their interviews of Mr. S because of a reasonable concern regarding collusion, cover-up or evidence tampering; the latter concern also justified the manner in which the Applicant was removed from his IFC office and placed on administrative leave (an issue that, in any event, was not timely raised by him before the Appeals Committee).

Powers of the Tribunal

23. The Tribunal has on a number of occasions set forth its powers in reviewing disciplinary decisions by the Bank. It stated in *Cissé*, Decision No. 242 [2001], para. 26:

The Tribunal has held that in disciplinary cases, it may examine: (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. . . . The Tribunal has also held that in disciplinary matters, its review is not limited to determining whether there has been an abuse of discretion but encompasses a fuller examination of the issues and circumstances.

And as more recently stated by the Tribunal in *Kwakwa*, Decision No. 300 [2003], para. 20:

The jurisprudence of this Tribunal is clear to the effect that the scope of its review in connection with disciplinary cases is broader than with respect to decisions of a purely managerial or organizational nature; indeed, the Tribunal may in a case such as this review the merits of the Respondent's decision. (See, e.g., *Courtney* (No. 2), Decision No. 153 [1996], para. 29.) Moreover, the threshold of proof in disciplinary decisions leading to dismissal "must be higher than a mere balance of probabilities" (*Arefeen*, Decision No. 244 [2001], para. 42).

The 1996 Loan to Mr. S

24. The primary alleged misconduct for which the Applicant's employment was terminated in 2002 was his extending a \$50,000 loan to Mr. S in 1996, while the Applicant was serving as Investment Officer in connection with a still-outstanding loan by the IFC to TBS, for which Mr. S, the Managing Director of the company, signed as guarantor. The central questions are whether the loan constitutes misconduct for which discipline may be imposed and, if so, whether the termination of the Applicant's employment is in proportion to that misconduct.

25. Several undisputed facts should be recited here. The remark made at a cocktail reception in 2001 in Dar-es-Salaam, to the effect that the Applicant had a reputation for taking kickbacks for his services as an Investment Officer with the IFC, has not been substantiated. The INT investigators promptly confirmed this early in their visit to Tanzania in August 2001, and soon thereafter informed the Applicant that any allegations of kickbacks were “off the table.” The Applicant was ultimately found to have engaged in misconduct that took the form not of *taking* money from an IFC client but rather of *giving* money to an IFC client, in the form of an oral and undocumented loan. (Compare *Kwakwa, supra*, in which a staff member employed by the IFC in Ghana was discharged for taking a \$50,000 kickback in connection with his service as an Investment Officer on two pending loans to the person making the payment.) The Respondent does not contest that the families of Mr. S and the Applicant had been friendly since the 1920s, and that the loan was made because of Mr. S’s financial emergency. This emergency did not, however, affect the two loans to TBS – in the amounts of \$250,000 and \$500,000 – which were timely and fully repaid by TBS. The evidence does not show that the loan to Mr. S was other than personal. Nor does it establish any direct and material relationship between that loan and the IFC loan to TBS.

26. What is in dispute is whether the Applicant stood to gain financially through the charging of interest to Mr. S. The Respondent observes that the Applicant admitted that he was expecting 10% interest, when questioned by the INT investigators for the first time on August 30, 2001, after they had already met with Mr. S. From that time onward, both the Applicant and Mr. S have asserted that the loan was initially to be without interest, and that the matter of interest was raised on the initiative of Mr. S after the loan repayment was years in arrears.

27. The Bank in any event chooses to rest its claim of conduct warranting discharge not upon the charging or collection of interest, and thus “financial gain” on the part of the Applicant, but simply upon the making of the loan in itself. Indeed, the Managing Director expressly so stated in his letter to the Applicant dated December 30, 2002, in which he rejected the recommendations of the Appeals Committee and concluded that the loan was a form of imprudent conduct for which termination was appropriate. It is thus the Respondent’s position that important staff rules have been violated when an Investment Officer makes a personal loan to an individual who is the principal of a client company that has only recently been extended an IFC loan (here, in the amount of \$500,000) which is still to be re-paid. The Respondent asserts that the personal loan and the IFC loan presented conflicting obligations, so that the Applicant “essentially put himself in an adverse position to the IFC.” At greater length, it explains in its Answer:

It is important to emphasize that whether or not the personal loan was interest bearing, the giving of a personal loan by an IFC Investment Officer to the recipient of an IFC loan that the same Investment Officer is handling creates a conflict of interest and an improper financial relationship. Such a transaction undermines the assets and liabilities analysis upon which the IFC loan was based (i.e., a previously non-existent liability is added), and possibly places the borrower in the position of having to decide in the event of financial hardship, whether to pay the lender of the personal loan or the IFC.

28. The Respondent contends that the conflict of interest created by the Applicant manifested both extremely poor judgment as well as a serious failure to adhere to the high ethical standards expected of IFC staff members in the position of the Applicant. It cites several staff rules that it asserts have been violated by the Applicant:

Staff Rule 8.01, para. 3.01(d): Disciplinary measures may be imposed whenever there is a finding of misconduct. Misconduct does not require malice or guilty purpose. Misconduct includes, but is not limited to, the following acts and omissions: . . . [m]isuse of Bank Group funds or other public funds for private gain in connection with Bank activities or employment, or abuse of position in the Bank for financial gain;

Staff Rule 3.01, para. 4.05: Staff members . . . may not accept any remuneration from . . . governments, entities or persons [external to the Bank Group] in connection with their appointment or service with the

Bank Group.

Staff Rule 3.01, para. 7.01: Neither a staff member nor a member of his immediate family shall accept a direct financial interest in any Bank Group transaction, whether by way of compensation, commission, favorable buying or selling arrangements, gift, or otherwise.

Staff Rule 8.01, para. 3.01(b): Misconduct includes . . . [r]eckless failure to identify, or failure to observe, generally applicable norms of prudent professional conduct

29. Throughout the disciplinary proceedings against the Applicant, it has been the Bank's central assertion that the Applicant abused his position in the Bank "for financial gain," in violation of Staff Rule 8.01, para. 3.01(d). This allegation was made by the Manager, INT, in her Notice of Alleged Misconduct dated August 27, 2001; it was confirmed by the investigators in their post-investigation Report that was forwarded by the Director, INT, to the VPHR on January 8, 2002; and it was the conclusion of the VPHR in her Notification Regarding Decision into [sic] Allegations of Misconduct dated February 13, 2002. It was that conclusion that led the Respondent to take the view that termination was mandatory under Staff Rule 8.01, para. 4.01, as amended in 1997.

30. It is, however, the conclusion of the Tribunal that there has been no showing by the Respondent of an "abuse of position for financial gain." The core example of such misconduct is the kickback or "commission." (See *Kwakwa, supra.*) What is offensive in such misconduct is the staff member's taking advantage of his position with the Bank, and his securing financial gain because of Bank action that he is able to influence or effectuate. Although there may be other conceivable examples of a violation of para. 3.01(d), it is instructive that the Applicant's conduct is altogether outside of this core illustration.

31. The Applicant's loan was not a product of his own initiative or solicitation, but was rather requested by Mr. S. It was derived not from the Applicant's official role and service as an Investment Officer, but because of a longstanding personal relationship with Mr. S and between their families. The loans from the IFC to TBS had already been awarded when the personal loan was proposed by Mr. S, and those IFC loans were in no apparent way induced by or a product of the private loan agreement. Most tellingly, the moneys involved did not flow *into* the Applicant's bank account, as a form of enrichment, but flowed *out*, leaving him out of pocket for several years. If, in fact, there was no agreement for the payment of interest to the Applicant, and he merely expected repayment after several years had passed, that cannot reasonably be regarded as "financial gain" to him. And even if – either from the outset or only after a number of years at the insistence of Mr. S – interest at the rate of 10% was to be paid, so that one might view that as a form of "financial gain," the Respondent has not established that any such gain derived from an abuse of the Applicant's position as an Investment Officer overseeing the loans to TBS.

32. For the same reasons, the Applicant cannot be held to have engaged in the misconduct described in Staff Rule 3.01, para. 4.05: accepting remuneration from entities and/or persons in connection with an appointment with the World Bank Group. This too was a charge leveled at the Applicant at each stage of the disciplinary proceedings against him. It is doubtful that the repayment of a loan can reasonably be viewed as "remuneration," which is of course generally understood to mean compensation for the rendering of a service. This presumably does, however, accurately embrace the payment of interest. But the Tribunal cannot find that the Applicant's receipt of the repayment of the loan, with or without interest, would be "in connection with an appointment with the World Bank Group," as distinguished from being in connection with a personal loan to a personal friend, which did not derive from the Applicant's activities as an IFC Investment Officer.

33. The Tribunal strongly endorses the Respondent's policy of "zero tolerance" of fraud and corruption and of those who abuse their Bank position for financial gain or who take compensation from outsiders for doing the work that they are employed to do with honesty and integrity. Zero tolerance is properly understood to justify severe discipline for those who clearly engage in such proscribed grave misconduct. But this applies only when such conduct clearly falls within the Bank's prohibition.

34. The fact that the Respondent has failed to demonstrate that the Applicant engaged in the two most severe forms of misconduct with which he was charged does not mean that he was blameless or that he is immune from appropriate disciplinary measures. Indeed, the Tribunal has little doubt that the Applicant committed a serious error in judgment when he made his loan to Mr. S – ten weeks after a loan was granted by the IFC to TBS, in which Mr. S was Managing Director and loan guarantor – at a time when the IFC loan was still subject to repayment, and when the Applicant was still an IFC Investment Officer.

35. The Applicant was the representative of the IFC in monitoring an important business transaction in which Mr. S had a central role. It was important that the Applicant maintain a distance from Mr. S in personal financial matters, lest those be misinterpreted in any number of inappropriate ways – as a sign that the Applicant had been partial and undemanding when acting as Investment Officer in the initial granting of the \$500,000 loan to TBS, or might subsequently be less than rigorous in holding TBS and Mr. S to the terms of that loan, or that the Applicant might use his position as Investment Officer to curry favor with Mr. S with a view toward future beneficial business dealings (a subtle form of “kickback”). While the Tribunal notes that some of the same misperceptions could well flow from the fact – even without the \$50,000 loan to Mr. S – that the two principals had been longtime personal friends and that their families had been friendly for some 70 years, the possible perception of conflict of interest could only have been intensified by the personal loan, as well as by the lingering failure of the Applicant to collect on it fully for more than five years.

36. In his response of November 20, 2001 to the investigators’ draft Report, the Applicant did acknowledge: “I probably should have discussed with the IFC manager in Nairobi prior to making the loan to Mr. [S]. I did not, however, make any financial gain or ‘abuse’ my position. . . . [A]t best, I should have disclosed the nature of the loan and that maybe [sic] a technical violation of Staff Rules. . . . I regret the lack of judgment in making the loan as it reflects the appearance of impropriety.”

37. The Tribunal therefore finds that the Respondent was justified in identifying the loan to Mr. S as a violation of Staff Rule 8.01, para. 3.01(b): a failure to observe generally applicable norms of prudent professional conduct.

38. Although the Respondent asserts that there is more than an apparent conflict of interest, but an actual one that warranted the most severe disciplinary measure, the Tribunal does not find this claim convincing. The Respondent claims that the loan to Mr. S may have directly jeopardized the collection of the IFC loan to TBS, in which Mr. S was a principal. In hard times, Mr. S would be torn between seeing that his personal loan was paid to the Applicant and seeing instead that the business loan of TBS was paid to the IFC; the Applicant was in a directly competing position with the IFC as a creditor in a situation of two directly competing loans. It is principally for this reason that the Respondent would find serious misconduct on the part of the Applicant regardless whether he was or was not to be paid interest on his loan to Mr. S.

39. While there is some theoretical plausibility to the Respondent’s analysis, there is no evidence of an actual conflict of interest. The Respondent is altogether unconvincing when, in its Answer, it states that the Applicant’s personal loan “undermines the assets and liabilities analysis upon which the IFC loan was based (i.e., a previously non-existent liability is added)”; it overlooks the fact that matching that new liability on the part of Mr. S is the new asset in the form of the loan amount of \$50,000. In fact, the two TBS loans – totaling \$750,000 – were paid in full without any adverse impact from the Applicant’s loan to Mr. S. It was only the latter loan that Mr. S left unpaid, over a period of several years. Rather than revealing a creditor acting in competition with the repayment of the IFC loan, the few e-mails between the two men that were uncovered by the INT investigators evidenced two appeals by Mr. S in 2000 and 2001 for patience on the part of the Applicant in the collection of the loan, and a response from the Applicant disclaiming any concern. In effect, the parties kept the IFC loans and the personal loan altogether separate and free of any conflict in repayment and collection.

40. In sum, the Tribunal finds that the Applicant’s loan, although imprudent and a form of misconduct under Staff Rule 8.01, did not amount to abuse of position for financial gain, or any of the most serious forms of misconduct, so that a disciplinary measure substantially less than termination would have been appropriate.

Conducting Outside Activities and Viewing of Pornography

41. Much less need be said about the two other allegations directed against the Applicant, relating to his engaging in outside business activities, partly through the use of his IFC computer, “by making strategic and significant business decisions” on behalf of several family enterprises without approval of the World Bank Group’s Outside Interests Committee, and his receiving and transmitting, through the use of his IFC computer, pornographic and obscene materials. Neither of these activities was what precipitated the disciplinary inquiry on the part of INT. These were rather the product of the scrutiny of the contents of his computer by INTIU which followed the assertion, made at a diplomatic reception in Dar-es-Salaam, that the Applicant was known for taking kickbacks in connection with his IFC work.

42. Because the Respondent found that the Applicant had abused his official position for financial gain and summarily terminated his employment with the IFC for that reason, it labeled these other acts as two distinct forms of misconduct but imposed no separate discipline for them.

43. Staff Rule 3.01, para. 6.01(a), provides in pertinent part: “Except with the approval of the [Outside Interests] Committee, a staff member . . . shall not engage in self-employment for profit nor perform any service for any outside private entity, whether as employee, director, or partner.” Paragraph 6.03 of that same staff rule provides in pertinent part: “A staff member shall neither use Bank Group services, supplies or facilities for private gain nor permit other persons to do so.” In his November 20, 2001 response to the investigators’ draft Report, the Applicant stated, *inter alia*: “As to the conducting of other businesses while at the IFC, even the [investigators’] Report concludes that I was monitoring a family business, and that was a technical violation of the Rules at best.”

44. The language of Staff Rule 3.01, para. 6.01(a), is strict indeed, for it bars unauthorized performing of *any* service for *any* outside entity. But there is doubt that such a strict application is meant to be enforced by the Bank. For one thing, the Applicant was, throughout the disciplinary proceedings, charged with “making strategic and significant business decisions” on behalf of named companies. There is, however, no evidentiary support for this allegation, which appears to overstate considerably the Applicant’s activities. Certainly the few e-mails proffered by the Respondent do not support that claim. Moreover, those charges and e-mails are focused on the Applicant’s activities, when he was already in Washington, D.C., and when substantial and significant involvement in his family businesses in Kenya was on its face unlikely, at least absent more documentary evidence. Moreover, although during the course of the investigation the Respondent appears to have been under the impression that the Applicant was involved in the continuing operations of four enterprises, there were in fact two – a convenience store (KPS) and a property-holding company.

45. The record does not contradict the Applicant’s assertions that these had been family-owned and operated businesses since 1939, that he had held shares since he was a child, that he was the only educated family member with a financial background, and that he has helped infrequently with business transactions. Even more significantly, the record supports the conclusion that the Applicant’s manager in the Nairobi office, although not aware of the Applicant’s positions as director and shareholder, knew that he had some continuing interest in at least KPS and that he in fact on a number of occasions visited that convenience store and saw the Applicant helping there. That manager, moreover, testified to the Appeals Committee that none of the Applicant’s activities in the family-owned businesses in any way conflicted with his IFC work, either in substance or in commitment of time, and that the Applicant was by far the most productive Investment Officer under his supervision.

46. At most, therefore, the Applicant’s violation of the staff rule requiring the approval of the Outside Interests Committee was a technical one, as the Applicant contends. It is therefore within the discretion of the Bank to impose a proportionately modest disciplinary measure for its violation.

47. The Tribunal believes that the Applicant’s actions with respect to the use of his computer to store and transmit pornographic and obscene material also constitute misconduct. Although little or nothing can be done to prevent one’s own receipt of unwanted obscene material by e-mail, this can be promptly erased; it is

obviously more unacceptable for a staff member to store that material on his or her computer, and even more so to transmit such material to one's colleagues at the Bank (and, apparently as here, to friends outside of the Bank). Even if the Applicant were accurate in asserting that others (he claims, many) at the Bank were commonly involved in the same transgressions as he, the Bank would be reasonable in concluding that the Applicant has thereby violated Staff Rule 8.01, para. 3.01(b): "failure to observe . . . generally applicable norms of prudent professional conduct."

48. The Applicant in fact, in his response of November 20, 2001 to the investigators' draft Report, stated: "As to the transmission of inappropriate material, I regret that this occurred and only pledge to cease any recurrence of such activity." The Respondent's own contemporaneous actions with respect to computer pornography suggest that the Applicant's regret and pledge should be sufficient to satisfy the purposes of the Bank's disciplinary system. For, in a memorandum dated October 9, 2001, which was sent to all IFC staff members at Headquarters and in the field offices, and was signed by the IFC Chief Information Officer and the VPHR of the IFC, it was stated:

It has been brought to our attention that some staff are using IFC's Internet and IT facilities to view and store sexually explicit material. This is considered an improper use of World Bank Group facilities and IT resources This message is to remind all staff that this practice is not acceptable and must cease immediately. Staff must remove any sexually explicit material saved on IFC computer devices or hard-drives, and must refrain from accessing websites whose content may negatively reflect on IFC and its mission and could be viewed as offensive by other staff members. *Staff who are found to have engaged in this kind of activity will be contacted individually by their respective managers to discuss their behavior. No further disciplinary action will be taken at this time.* However, in the future, we intend to enforce this policy and will impose disciplinary action as deemed necessary.

(Emphasis added.)

Proportionality of the Disciplinary Measure

49. Upon concluding that the Applicant had violated Staff Rule 8.01, para. 3.01(d), and in particular its ban upon "abuse of position in the Bank for financial gain," the Respondent applied para. 4.01 of that staff rule, as amended in 1997, which provided that "termination of service shall be mandatory." Even if the Tribunal were to agree that the Applicant had abused his position for financial gain, it could not uphold the Respondent's contention that termination is a mandated disciplinary measure, because this would constitute a retroactive application of the 1997 amendment. The Respondent points out that the Applicant's contract of employment as a Local Consultant in the Nairobi field office provided that "[y]our appointment is subject to the conditions of employment of the World Bank Group as are presently in effect and as they may be amended from time to time." But, while the latter phrase is meant to empower the Bank to make changes in its rules and most obviously to apply those new rules prospectively, it cannot reasonably be construed to give the Bank the authority to apply rules relating to discipline – whether of substance or of sanction – retroactively so as to embrace conduct that had occurred before. Conduct on the part of a staff member which was blameless at the time cannot be made punishable by a subsequently amended staff rule. Equally, the 1996 conduct for which termination was one of several possible disciplinary measures cannot by an amended rule in 1997 be sanctioned exclusively and necessarily by termination. Whether conduct is punishable at all, and how severely misconduct is to be punished, are issues sufficiently similar as to be subject to the same standards of due process of law.

50. The facts of this case do not support in any event the decision to terminate the Applicant's employment with the IFC because, for the reasons set forth above, he cannot reasonably be found to have violated Staff Rule 8.01, para. 3.01(d) at all. His failure to exercise sound judgment by making a loan to a person who was in substance an IFC client for whom the Applicant had responsibilities as Investment Officer was, in the judgment of the Tribunal, a violation of Staff Rule 8.01, para. 3.01(b): a failure to observe generally applicable norms of prudent professional conduct. For such misconduct, Staff Rule 8.01, para. 4.03, provides that "[d]epending on

the circumstances of the case, one or more of the following disciplinary measures may be taken by the Bank Group,” including oral or written censure, suspension from duty, reassignment, demotion, and termination. The Respondent erred in this case by failing to exercise the discretion with respect to disciplinary measures that is given by Staff Rule 8.01 for imprudent and unprofessional behavior.

51. As noted above, the Tribunal is empowered in disciplinary cases to assess “whether the sanction is not significantly disproportionate to the offence.” (*Koudogbo*, Decision No. 246 [2001], para. 18.) The Respondent’s own rules for imposing disciplinary measures in the first instance also embrace the principle of proportionality, for Staff Rule 8.01, para. 4.01, provides in pertinent part:

Disciplinary measures imposed by the Bank Group on a staff member shall be determined on a case-by-case basis, taking into account the seriousness of the matter, extenuating circumstances, the situation of the staff member, the interests of the Bank Group, and the frequency of conduct for which disciplinary measures may be imposed.

In this case, the Respondent failed to exercise its discretion in such a manner as to take account of the particular facts of this case, the frequency of the offending conduct, and most significantly the situation of the staff member. (See *Smith*, Decision No. 158 [1997]; *Carew*, Decision No. 142 [1995].)

52. The Applicant’s managers had only the highest praise for his productivity and his high standards in performing his service as an Investment Officer. One manager testified before the Appeals Committee that “[h]e was actually always extremely good defending and protecting the interests of IFC. . . . [S]everal sponsors came back to me and said, yes, [the Applicant] really helped. . . . [H]e was tough, but he made sure our project was as good as could be. No, I think I’ve never had any suggestion of nonprofessional behavior by [the Applicant], and I would not have believed them.” That manager also stated that, with respect to the proper discipline for the loan to Mr. S, “then it was bad judgment, you know, a slap on the wrist, maybe a blame in your file, but I would have left it at that.” His other manager accorded similar very high praise to the Applicant, mentioning to the Appeals Committee that the President of the World Bank had described the Applicant “as one of the best investment officers in IFC of a group of 200 people.” (That manager did, however, state that he would “absolutely not” make a personal loan to an IFC client whose IFC loan he was currently servicing as Investment Officer.)

53. These assessments by immediate supervisors cannot of course bind the judgment and discretion of those higher managers within the Bank Group who are responsible for upholding ethical standards on a Bank-wide basis and considering the imposition of disciplinary measures. But, under the Bank’s own staff rules, the sorts of factors just mentioned relating to “the situation of the staff member,” including the quality and longevity of service, the lack of prior discipline and the one-time nature of the loan, must be taken into account.

54. The Applicant’s misconduct, even when viewed cumulatively, does not under the circumstances of this case justify termination of employment. It is the determination of the Tribunal that the decision to terminate the Applicant’s employment cannot stand.

Compliance with Due Process in the Disciplinary Proceedings

55. The Applicant has raised a number of claims of denial of due process in the conduct of the disciplinary proceedings against him. An understanding of those claims requires a brief summary of the investigation process in connection with charges of misconduct against a staff member of the World Bank, including the IFC. This summary is distilled from a number of Bank documents, particularly Staff Rule 8.01, Section 5, and a publication of INT titled *Standards and Procedures for Inquiries and Investigations* (April 19, 2001). As the latter document states, and as the Tribunal has held, the Bank conducts administrative investigations which are not adjudicatory in nature. Nevertheless, certain minimum guarantees must be observed, including that the accused staff member is informed of the allegation against him, given a fair opportunity to defend himself, to rebut accusations and to give his version of the pertinent events as to facts, arguments and conclusions. (See

Rendall-Speranza, Decision No. 197 [1998], paras. 57-63.)

56. The aforementioned Bank documents show that disciplinary proceedings are divided into two phases: a somewhat informal preliminary inquiry and, if appropriate, a more formal investigation. A complaint of misconduct may come to the attention of a manager or of INT through various channels, including a “walk-in,” a telephone call or an e-mail. Staff Rule 8.01, para. 5.02, provides: “Where an incident of possible misconduct is discovered, a preliminary inquiry will be undertaken if necessary to determine whether there is sufficient evidence to warrant further proceedings.” In other words, INT will initially question witnesses and examine documents for the purpose of deciding whether the evidence of misconduct is sufficient to merit a fuller and more formal investigation. If not, INT prepares a report on the results of the preliminary inquiry, and notifies the subject staff member, his manager and the complainant. But if so, an investigation is initiated: specific written allegations are given to the subject, who is afforded the opportunity to give a written response, and to identify witnesses and provide documents, and he is interviewed by INT; further interviews of third parties (including those named by the subject staff member) are conducted by INT, and additional documentary evidence is gathered. The INT investigators then evaluate the evidence, present their findings and conclusions in a written report and, if any charge of misconduct is considered to be substantiated, a draft of the report is given to the subject for comment. The report as revised in light of the comments may be given again to the subject, and it is then finalized and submitted to the VPHR for decision with respect to misconduct and possible discipline. As with all adverse decisions, the staff member may in the event of discipline take an appeal to the Appeals Committee and, ultimately, may file an application with the Tribunal.

57. The Applicant’s attacks upon the fairness of the disciplinary proceedings begin with the very outset of the preliminary inquiry, which was precipitated by what he characterizes as “loose talk . . . at a cocktail party” at the French Embassy in Dar-es-Salaam. He claims that INT should have tested the seriousness of the kickback charge by contacting and interviewing the initial accuser (an IFC client), the person within the Bank who passed the charge along to INT, and the Applicant’s former managers who could have testified to his history of conscientious and honest service over a period of several years. Such an inquiry would have shown the kickback charge to have been an unsubstantiated and dubious rumor, which would have halted the preliminary inquiry, including the search of the Applicant’s e-mails. The Respondent, however, contends that the charge came from a “credible source” and was “sufficiently detailed,” and that it was therefore proper to examine the Applicant’s electronic records (i.e. e-mails) which are the property of the Bank and may properly be examined at any time subject to the careful restrictions imposed in the Bank’s own policies.

58. The Tribunal concludes that the Applicant’s criticisms are to a large degree warranted and that the Respondent was rather hasty in turning to the Applicant’s e-mail files, which ultimately produced no proof of the alleged kickback but revealed other irregularities in the Applicant’s e-mail use. Of central importance to the resolution of this issue is the Bank’s *Detailed Information Security Policy*, particularly Section I on Information Ownership:

I.1. . . . [T]he Bank legally owns all the information stored on or sent through its systems. Bank information is provided to users so they can perform their work; this information must not be used for any purpose other than authorized Bank activities. The Bank reserves the right to examine any and all stored information resident on its systems and networks where there exists a genuine business need.

I.2. . . . The Bank will not monitor the content of computer, telephone, or other electronic activities of staff unless there is a genuine business justification or there is *reason to suspect* a policy violation, a criminal act, or other misconduct. All instances of content monitoring must be pre-approved by the involved individual’s business unit manager, the Office of Professional Ethics, and the Vice President of the staff member involved.

(Emphasis added.) These provisions carefully balance the Bank’s interest in electronic files as employer and property owner with the staff members’ interest in a reasonable measure of privacy.

59. The Tribunal concludes that the “reason to suspect” standard in the second quoted paragraph was itself unreasonably applied by the Respondent. Except in situations in which an accusation is of a most grave and exigent nature, “reason to suspect” will ordinarily require some objective corroboration. The Tribunal acknowledges that the judgment of the several individuals who must pre-approve the “content monitoring” is not casually to be overturned, and that their very collaboration is a significant safeguard against abuse. But the sum total of what was known to the Respondent at the time it scrutinized the Applicant’s e-mails going back over more than a year is that in the informal environment of a diplomatic cocktail party an IFC client mentioned that the Applicant had a *reputation* for taking kickbacks, not that the client himself or someone known to him had been approached by the Applicant for that purpose. Although legal technicalities need not be applied in determining whether there is a reason to suspect wrongdoing, it is surely pertinent that the accusations that came to INT were from a staff member who was passing along what by that time was triple-hearsay, which he had heard in a setting in which the accusations hardly appeared to be pertinent or imparted in a serious and focused manner. The Respondent has alleged nothing further that would support its claim that the initial accusation leveled at the Applicant was “credible” and “detailed.”

60. Under these circumstances, it is the judgment of the Tribunal that scrutiny of the Applicant’s e-mails was precipitate, and could certainly have awaited at least a slight measure of corroboration of the accusation against him, for example, by a simple set of questions put to the source of the cocktail-reception rumor or to at least one of the Applicant’s managers. Such questions were indeed put to the former individual when the INT investigators went to Tanzania to pursue their preliminary inquiry; and it was learned from him, and from two other IFC clients, that the kickback accusations were simply unsubstantiated rumors. Had that questioning been done earlier, it is unlikely that INT would have perused the contents of the Applicant’s e-mails, which of course culminated in the termination of his employment.

61. A second issue relating to the fairness of the investigatory process concerns an alleged unfair delay in giving the Applicant notice that the process was in fact under way. The Applicant contends, and the Appeals Committee agreed, that he should have been notified of the fact that INT was about to interrogate Mr. S based on the e-mails that showed a business transaction and an exchange of bank-account information between the Applicant and Mr. S. The Bank responds that ordinarily the accused staff member is not informed of the interviews or document searches being carried out as part of the preliminary inquiry; it refers *inter alia* to Staff Rule 8.01, para. 5.04, which provides that “[w]hen the person conducting the investigation determines that the information available is sufficient to indicate a staff member appears to have committed misconduct, the staff member shall be notified in writing of the alleged misconduct and required to provide an explanation.” This provision, of course, deals only with the circumstances in which the subject staff member *must* be informed that he is the target of a disciplinary investigation. INT is *permitted* to inform him earlier, during the preliminary inquiry stage. Section 5.3 of the *Standards and Procedures* sets forth factors to be considered in deciding whether such early notification should be given, including whether “one or more witnesses have already been interviewed and as a result there is a risk of the spread of rumors or gossip concerning the allegations,” in which situation “it may be prudent to formally notify the subject of the allegations.” The Bank relies principally on the further language that: “On balance, the following two factors should also be considered on whether notification should be held in abeyance until the mandated threshold has been reached: 1. If there is a *reasonable* risk that material witnesses may be intimidated by the subject. 2. If there is a *reasonable* risk that physical or documentary evidence may be tampered or destroyed by the subject.” (Emphasis in original.)

62. The notification provisions quoted above, in the judgment of the Tribunal, are reasonable and, as asserted in Section 5.1 of the *Standards and Procedures*, they “incorporate prudent practices” among law enforcement agencies. The Respondent did not inform the Applicant of the preliminary inquiry because the INT investigators feared that he might intimidate or collude with Mr. S or might tamper with or destroy evidence of his financial dealings. This decision was within the range of the Respondent’s discretion, and although the matter is a close question the Tribunal cannot conclude that there was an abuse of that discretion. INT had in hand an exchange of e-mails which showed a financial transaction between the two, and possibly evidence of a kickback. Intimidation, collusion or tampering (with evidence other than the e-mails already in the hands of INT) could legitimately have been a source of INT concern had the investigators informed the Applicant earlier in the preliminary inquiry.

63. The Tribunal is, however, troubled about two related acts on the part of INT. First, in their preliminary inquiry, even before questioning Mr. S about the loan to him (or any kickback to the Applicant), the INT investigators had questioned at least three IFC clients – including the individual who had communicated at the Dar-es-Salaam cocktail reception the accusation that the Applicant was known regularly to take kickbacks in connection with his IFC service. This certainly seems, to the Tribunal, to fall within the category of cases in which the *Standards and Procedures*, Section 5.3, provide that consideration should be given to early formal notification to a subject staff member during a preliminary inquiry: “If one or more witnesses have already been interviewed and as a result there is a risk of the spread of rumors or gossip concerning the allegations.” It is true that the other charges (including financial imprudence) against the Applicant remained, and that with respect to those, there were reasonable concerns flowing from immediate notification of the Applicant. But those concerns should have been weighed – as they appear not to have been – against the Applicant’s reasonable interest in nipping in the bud the further spread of serious and unfounded rumors directed against him.

64. Second, and more troubling, is the fact that one of the INT investigators testified before the Appeals Committee that once the Applicant’s e-mails were scrutinized and these showed that the Applicant had forwarded bank information to Mr. S, evidencing “some financial relationship between these two,” “that would conclude the preliminary inquiry phase.” A decision was then promptly made by INT to send its mission to Tanzania to interview the IFC clients and Mr. S. It was only after those latter interviews were conducted that the Applicant was given formal notice of allegations of misconduct, as his disciplinary proceedings moved into the investigation phase and he was given an opportunity to respond to the charges. Yet, if INT had indeed concluded that the preliminary inquiry had come to an end because the e-mails alone were, in the words of Staff Rule 8.01, para. 5.04, “sufficient to indicate a staff member appear[ed] to have committed misconduct,” then the Applicant should have been given formal written notice sooner and before the Tanzania interviews were conducted. The point at which evidence of misconduct becomes “sufficient” can obviously be elusive and uncertain in some cases, but that should not be regarded as an invitation to the Respondent to delay the closing of the preliminary inquiry, along with the notifying of the subject staff member that a disciplinary investigation is under way and the formulation of specific allegations.

65. These observations suggest that a staff member who is the subject of a preliminary inquiry should be informed of that fact at the earliest reasonable moment, taking into account when justified the aforementioned concerns regarding tampering, collusion, and the like. Early notice – short of a formal Notification of Misconduct – can provide an opportunity to the subject to respond to the charges, to explain his suspect behavior, to inform the investigators, and so better to focus and expedite (and perhaps conclude) the preliminary inquiry. Had the Applicant been informed of what had been seen in his e-mails covering the period 2000-01, even though these were to an extent inculpatory, he might very well have been able to shorten or eliminate much of the time devoted by the investigators to the interviewing of witnesses in Tanzania, much to the benefit of the Bank, of INT, of the interviewees, and of the Applicant.

66. A third alleged failure of due process relates to the fact that on September 13, 2001, the Applicant was placed on administrative leave, with continuing pay, and escorted out of his office by a security guard in the presence of IFC staff. The Applicant contends that the imposition of leave was unwarranted, and that his physical removal was not only unwarranted but also seriously humiliating and damaging to his reputation. The Respondent’s principal defense is a jurisdictional one, as it asserts that the issues relating to the Applicant’s leave were not timely raised prior to and at the Appeals Committee stage, so that they have not been properly exhausted and the Tribunal lacks jurisdiction to review them. The Respondent also asserts, in any event, that its actions were warranted on the merits and did not constitute an abuse of discretion.

67. The Tribunal finds that these issues are properly here for resolution. The Applicant appears to have complained to the investigators in October 2001 about the removal from his office the month before; the Appeals Committee directly addressed this issue in its report and in fact supported the Applicant; and in any event it should not be reasonably expected that each of the various elements of a single pattern of investigation and termination of the Applicant (such as removal from an office or the explanation given at a

contemporaneous staff meeting) must be viewed discretely and challenged separately.

68. As to the merits, Staff Rule 8.01, para. 5.05, provides that a staff member may be placed on administrative leave pending completion of a disciplinary investigation. The Respondent relies upon the reasons given by the Applicant's Department Director for the decision to place him on administrative leave: to afford the Applicant more time to devote to his defense; to avoid the work disruptions that would likely come from future interviews of the Applicant; and, in the interests of the IFC, to remove from a position of financial responsibility a person being charged with serious financial wrongdoing.

69. If the administrative leave decision were to have rested solely on the first two reasons, the Tribunal would find it to have been an abuse of discretion; those reasons are patently unconvincing. The last reason, however, was asserted in good faith and carries sufficient weight as to render the decision on administrative leave within the range of reasonable discretion.

70. The Tribunal is, however, unconvinced – as was the Appeals Committee – that the Respondent had good reason to remove the Applicant from his office at Headquarters in such an intimidating and public fashion, with a security guard posted at his door and then escorting him from the building. Any apprehension concerning destruction of evidence in the Applicant's office was minimized by the earlier perusal by the Respondent of the Applicant's e-mails, and the Respondent has in any event not explained in any detail why it might have been fearful of any tampering or destruction; nor is there any apparent reason why the Applicant could not have been induced to leave the building in a less conspicuous manner. The circumstances in which the Applicant was ushered from his office were sufficiently unsettling to other staff members working nearby that they prevailed upon the Applicant's Department Director to summon them together to provide some explanation.

71. The Applicant raises a number of other challenges relating to due process. Although the Applicant asserts that the investigators exceeded their powers by going beyond factual findings in their report to the VPHR to state their conclusions regarding misconduct, Staff Rule 8.01, para. 5.07, expressly endorses consideration of the "findings of fact and conclusions from the person conducting the investigation." Nor is there any reason to fault the Respondent for the use by INT of the services of a Tanzanian attorney to assist in unearthing certain facts about the loan from the Applicant to Mr. S, and the failure to disclose that use in the INT report, although it would have been a better practice to make such a disclosure. The facts in the record are insufficiently clear to support the Applicant's assertion that the investigators wrongly offered to give money to Mr. S as reimbursement for supposed kickbacks paid by him. There is greater support for the Applicant's claims that he was wrongly condemned by the investigators for Mr. S's lack of cooperation in the preliminary inquiry, and that the VPHR of the IFC played an important role in the decision to terminate the Applicant's employment, despite his early request to INT that she not be further involved in the investigation in light of her perceived bias against the Applicant. It is not clear, however, that these failings, if such they were, resulted in any prejudice or other injury to the Applicant.

Remedies

72. As indicated above, it is the determination of the Tribunal that the decision to terminate the Applicant's employment cannot stand. Although the Tribunal would in the circumstances issue an order of reinstatement, the Applicant has evidenced in his prayer for relief a willingness to accept financial compensation in the event his termination is set aside. Accordingly, the Tribunal directs the Respondent to offer the Applicant and to negotiate with him, in good faith, a mutually agreed separation package (MAS). The terms of such an MAS shall reflect the fact that the Tribunal has set aside the most serious charges against the Applicant and shall take account of the terms of MAS packages commonly offered to staff members of the Bank. If no such MAS is agreed upon within three months of the receipt by the Applicant of this judgment (or any longer period on which the parties mutually agree), the Tribunal directs the Respondent to pay the Applicant three years' net salary as compensation for the improper termination of his employment. Whatever the outcome of the above, the Respondent shall also pay to the Applicant the equivalent of one year's net salary to compensate him for lost earnings, and for failures of due process in the disciplinary proceedings and injury to his professional reputation; this amount takes account of the fact that the Applicant has been found by the Tribunal to have

engaged in misconduct in violation of the staff rules requiring compliance with generally applicable norms of prudent professional conduct. The Respondent shall also forthwith remove from the Applicant's personnel file the final Report of the INT investigators and the decisions of the VPHR and Managing Director, and shall substitute a copy of this judgment.

Decision

For the above reasons, the Tribunal decides that:

- (i) the decision to terminate the Applicant's employment is set aside;
- (ii) the Respondent shall forthwith pay compensation to the Applicant in the amount of one year's net salary;
- (iii) the Respondent shall offer the Applicant and negotiate with him in good faith a mutually agreed separation package (MAS) pursuant to the terms of paragraph 72 *supra* and, failing any timely agreement between the parties, the Respondent shall pay the Applicant an additional compensation in the amount of three years' net salary;
- (iv) the Respondent shall forthwith remove from the Applicant's personnel file the final Report of the INT investigators and the decisions of the VPHR and Managing Director, and shall substitute a copy of this judgment; and
- (v) all other pleas are dismissed.

/S/ Francisco Orrego Vicuña
Francisco Orrego Vicuña
President

/S/ Nassib G. Ziadé
Nassib G. Ziadé
Executive Secretary

At Washington, DC, December 12, 2003