



World Bank Administrative Tribunal

2017

Decision No. 558

**DC (No. 2),
Applicant**

v.

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

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

**DC (No. 2),
Applicant**

v.

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

1. This judgment is rendered by a panel of the Tribunal, established in accordance with Article V(2) of the Tribunal's Statute, and composed of Judges Stephen M. Schwebel (President), Abdul G. Koroma, and Marielle Cohen-Branche.
2. The Application was received on 23 June 2016. The Applicant was represented by Marie Chopra of James & Hoffman, P.C. The Bank was represented by David R. Rivero, Director (Institutional Administration), Legal Vice Presidency. The Applicant's request for anonymity was granted on 10 April 2017.
3. The Applicant challenges his 2013 Overall Performance Evaluation (OPE), Salary Review Increase (SRI), and the decision to place him on an Opportunity to Improve Unsatisfactory Performance Plan (OTI).

FACTUAL BACKGROUND

4. The Applicant joined the Bank as a short-term consultant in September 2001. On 2 January 2002, the Applicant's position was converted to an open-ended staff position as a Resource Management Analyst.
5. In 2005, the Applicant moved to the Bank's headquarters in Washington, DC.
6. In 2009, the Applicant became a Program Officer in a Vice-Presidential Unit (VPU) at the Bank. Specifically, the Applicant managed a fund which provides funds for Ph.D. and Masters programs. As a Program Officer, the Applicant was responsible for: payments of tuition, stipends,

and other benefits such as travel and health insurance; communications with scholars and universities; and participation in the annual Steering Committee meeting.

7. In late 2012 and early 2013, there were changes to the management structure in the Applicant's department. In December 2012, Ms. Y became Operations Manager while Ms. X became the Applicant's supervisor in February 2013.

8. After several years of a fully successful performance at the Bank, in 2013 and under a new supervisor, the Applicant received a partially successful OPE. The Applicant's 2013 OPE and SRI were determined on the basis of his performance between 1 July 2012 and 30 June 2013.

9. On 25 July 2013, the Applicant met with Ms. X and Ms. Y to discuss his OPE. At that meeting the Applicant was informed that he received a "Partially Successful" rating in two out of three work areas namely: (i) Trust Fund Management, and (ii) General Support to "the VPU's" Daily Operations.

10. On 27 August 2013, a Departmental Management Review meeting was held to discuss the performance of all staff in the VPU. At that meeting, the Applicant was "identified as a bottom performer compared to his peers" at the GF level based on the two "Partially Successful" ratings. As a result, management recommended an SRI of 2.2 for "Unsatisfactory Performance."

11. On 10 September 2013, a VPU due diligence review was held at which Directors and Senior Management reviewed individual staff performance and compared them to the staff in the same grade level across the departments. At the end of the meeting, the Senior Management team concurred with the proposed 2.2 SRI and determined that placing the Applicant on an OTI was the best course of action.

12. On 25 September 2013, Ms. X met with the Applicant for the full OPE discussion. According to the Applicant, it was at this stage that Ms. X showed him the written OPE, supervisor comments and performance ratings. The Applicant expressed surprise at the evaluation which he believed was unjustified and inaccurate.

13. On 8 October 2013, Ms. Y informed the Applicant of the outcome of the VPU Senior Management team discussion on his performance, his final SRI rating, and the need for an OTI.

14. On 10 October 2013, the Applicant sent an email message to Ms. Y with copy to Ms. X contesting the decision on his performance. In his email the Applicant addressed each comment Ms. X had made in his OPE.

15. In October and November 2013, the Applicant held several meetings with his managers and Human Resources about the performance review. Ms. X agreed to add some somewhat more positive comments to the OPE. In addition, Ms. X asked Ms. AA, the Applicant's former supervisor, to contribute more comments on his performance.

16. On 6 November 2013, Ms. AA sent Ms. X an email stating "I found several notes in my original OPE feedback that can be included to give a more well-rounded overview of [the Applicant's] work with the Scholarships Program." These comments included that:

[The Applicant] had full responsibility of the TFs for the [...] accounts and the [...] disbursement accounts. He oversaw the payments for the [...] scholars competently and responded to the audit questions with assistance from the Transaction Processor. [The Applicant] continued to assume a more prominent role in the relationships with the universities and scholars in the portfolio. He successfully arranged two visits of the [...] ED's Office representatives to the [...] Partner programs in [...] and [...]. Additionally, [the Applicant] successfully contacted scholars and universities and acquired academic records and copies of thesis papers in response to a special, urgent query from the Government of [...].

17. In addition, Ms. AA proposed that Ms. X add that "[i]n providing oversight of the [...], [the Applicant] took the initiative to follow up with one of the [...] Fellows who had withdrawn from the program after receiving his first payment (50% of the full award). This involved a considerable amount of effort and follow up, especially since the Fellow's bank was very slow in responding."

18. On 21 November 2013, the Applicant was placed on an OTI for three and a half months. The memorandum noted the following aspects of his performance which were considered unsatisfactory:

Trust Fund Management

- Issues of accuracy, attention to detail, and overall command of core elements of the position, including periodic errors in funding amounts specified in scholarship award letters.
- Inadequate oversight of Trust Funds, including signing LORs when an audit issue was pending and delivering GRMs late and with inaccuracies.
- Failure to independently and on a timely basis deliver accurate projections on commitments for expenditures.
- Lack of review on deliverables under the [...] program required to ensure fiduciary oversight of disbursements.

[The VPU] Operations

- Lack of proactivity in project and time management, affecting the quality and timely delivery of major tasks, including the selection of the finalists for the [...] scholarship.
- Lack of consistency in quality and timely engagement with inquiries from scholars.

19. The Applicant was informed that failure to improve “at a reasonable pace or to sustain satisfactory performance” could result in the termination of his employment from the Bank in accordance with Staff Rule 7.01: Ending Employment, Section 11. Itemized in the OTI memorandum was a list of action items which the Applicant was expected to complete.

20. On 22 November 2013, the Applicant requested mediation which was held on 22 January 2014. Ms. X agreed to add more positive comments in the OPE but informed the Applicant that management would not change the OPE ratings.

21. On 18 March 2014, following the failed mediation, the Applicant filed a Request for Review with Peer Review Services (PRS) – Request for Review No. 186. In his request for review, the Applicant challenged the 2013 OPE, his SRI, and the decision to place him on an OTI. He also alleged abuse of discretionary powers by his supervisor, Ms. X, and discrimination against him “in setting my 2013 SRI rating and denying me any salary award for my actually successful performance.”

22. The OTI continued alongside the PRS review. The OTI was extended twice.
23. On 1 June 2014, at the conclusion of the OTI, Ms. Y, the Applicant's Operations Manager, sent the Director, Mr. AB, a memorandum recommending that the Applicant's employment be terminated for unsatisfactory performance.
24. On 15 June 2014, the Applicant wrote to Mr. AB refuting the charges in Ms. Y's memorandum.
25. On 16 June 2014, the PRS Panel issued a decision on the scope of issues under review. The Panel stated that it will review

whether the Bank acted consistently with [the Applicant's] contract of employment or terms of appointment in evaluating his performance as set forth in his Overall Performance Evaluation covering the period July 1, 2012 through June 30, 2013 ("2013 OPE"); issuing him a 2013 Salary Review Increase of 2.2 and corresponding salary increase ("2013 SRI"); and deciding to place him on an Opportunity to Improve Unsatisfactory Performance Plan ("OTI Plan"). In answering this question, the Panel will examine the reasons supporting the Bank's decisions, whether the Bank followed the applicable procedures, and whether management acted in good faith.
26. On 14 July 2014, a Notice of Termination for Unsatisfactory Performance was issued to the Applicant. The Applicant's contract termination was to be effective 13 September 2014. The Applicant was placed on administrative leave and barred from the Bank's premises unless he received special permission from the Vice President, Human Resources.
27. On 17 July 2014, the parties agreed to engage in mediation about the termination of the Applicant's employment.
28. On 3 September 2014, a Memorandum of Understanding (MOU) was concluded between the Applicant and Mr. AB, acting on behalf of the World Bank Group regarding the terms of his departure from the Bank.

29. A subsequent dispute arose as to whether, by signing the MOU, the Applicant had waived his claims addressed in PRS Request for Review No. 186. As a result of this dispute, the Applicant was not provided the PRS Panel's report nor was he informed of the decision, if any, of the responsible Vice President.

30. In *DC* (Preliminary Objection), Decision No. 525 [2015], the Tribunal held that the MOU did not include a waiver of the Applicant's PRS claims and reinstated the case for decision.

31. On 15 January 2016, two months after the Tribunal's judgment, PRS announced that it was reopening PRS Request for Review No. 186 and would "re-submit its Report to [the Vice President] for his review and final decision." The Applicant queried why the report had to be re-submitted, given that it had been sent to the Vice President on 4 August 2014 and a decision must have been made. The Applicant was assured by the PRS Secretariat that the Panel members had not re-written the original report.

32. On 25 February 2016, the Applicant received a letter from a Lead Human Resources Specialist informing him that the decision maker had not made a decision within the prescribed time period and accordingly the PRS Panel's recommendations were being put into effect pursuant to Staff Rule 9.03, paragraph 11.02.

33. According to the PRS Panel report, the Panel found that:

Management provided a reasonable and observable basis for the 2013 OPE, the subsequent SRI, and the decision to place [the Applicant] on an OTI Plan. The Panel also concluded that management followed the applicable procedures in completing the 2013 OPE. The Panel determined further, however, that management did not provide [the Applicant] with the requisite notice of his performance deficiencies during the 2013 OPE period so he could anticipate that his performance would be rated "Unsuccessful" and that he should expect a 2.2 SRI. Because of the lack of formal feedback throughout the review period to support an award of a 2.2 SRI, the Panel concluded that the Bank did not act consistently with [the Applicant's] contract of employment and terms of appointment.

34. As compensation

for procedural irregularities associated with the 2.2 SRI, the Panel recommends that the Bank: rescind the 2.2 SRI from his records, and award compensatory damages to [the Applicant] in the amount of \$15,000.

35. On 23 June 2016, the Applicant submitted this Application to the Tribunal. He seeks: a) rescission of his 2013 OPE and SRI; b) rescission of the OTI; c) removal of all records of his 2013 OPE and SRI and of the OTI from his personnel records; and d) adjustment of his 2013 SRI to at least 3.2.

36. The Applicant further seeks in compensation: a) retroactive salary increases from 1 July 2013 through his termination date on 1 July 2015, equal to at least the average awarded to GF level staff who received a 3.2 SRI for fiscal years 2013, 2014, and 2015; b) consequent adjustments to the amounts paid to the Applicant at his termination and as a result of the Tribunal's judgment in *DC*, Decision No. 530 [2016] to reflect this increase in his salary; c) such additional compensation, over and above the \$15,000 awarded by PRS, as the Tribunal deems appropriate for the emotional stress and the terrible damage to his health and professional reputation caused by management's abusive treatment; and d) legal fees and costs in the amount of \$20,537.37. The Applicant states that the Lead Human Resources Specialist promised to provide evidence that the 2.2 SRI had been rescinded from his records; however, he is yet to receive this information.

SUMMARY OF THE MAIN CONTENTIONS OF THE PARTIES

The Applicant's Contention No. 1

The 2013 OPE was arbitrary, discriminatory, improperly motivated, carried out in violation of a fair and reasonable procedure and lacked a reasonable and observable basis

37. The Applicant maintains that the 2013 OPE was both discriminatory and improperly motivated because it was part of Ms. X's "scheme to get rid of the most senior members of her team." The Applicant relies upon the testimony of a Program Analyst during the PRS Hearing who stated that Ms. X had expressed the desire for "staff who have been in the Scholarship Program

for a long time to leave” so that she could “refresh the team.” According to the Applicant, this demonstrated manipulation of the performance evaluation process which is an abuse of process and managerial discretion.

38. The Applicant further contends that the OPE was based on a restructured Results Agreement which compressed five results into three. This was not the Results Agreement which was approved by Ms. Y on 29 January 2013. Therefore, to the Applicant, Ms. X “implemented ‘unilateral amendments to [his] Results Agreement’ and ignored the participatory nature of the OPE process.”

39. The Applicant argues that the OPE was unbalanced and focused exclusively on negative assessments. He further notes that Ms. X, who had “very limited interactions” with him during the OPE period, was in no position to assess his work during the first three-quarters of the OPE period. According to the Applicant, Ms. AA should have drafted either a supplementary OPE or her feedback should have constituted the bulk of the OPE, instead of Ms. X’s since Ms. AA was the Applicant’s supervisor for the majority of the period under review. The Applicant contends that there was no appreciation of extra work he did in 2013 such as taking on tasks usually done by full-time temporary staff and short-term consultants.

40. The Applicant also argues that many of the negative comments concerned issues attributable to others, such as Ms. X herself. As an illustration, the Applicant notes that he was held responsible for the failure to timely deliver on “the selection for the [...] scholarship.” However, he claims that this particular scholarship was a colleague’s responsibility not his. In addition, the scholarship results were presented to the Steering Committee at the same time as previous years, and there were no delays in this respect.

41. The Applicant contends that the unfairness and lack of foundation for the 2013 OPE were illustrated by the extraordinarily “abrupt change” relative to his prior OPEs. The Applicant notes that he was doing the same job he had been doing for several years, for which he was highly rated and the substance of which remained essentially unchanged. The Applicant observes that he suddenly went from being rated “Superior” to “Partially Satisfactory.” To the Applicant, the

comparison of his 2013 OPE with his earlier OPEs confirms that there is at the very least a “degree of inconsistency in the exercise of managerial responsibilities.”

The Bank’s Response

The Applicant’s 2013 OPE had an objective and reasonable basis

42. The Bank contends that the evidence demonstrates that, in conducting the Applicant’s 2013 OPE, the Applicant’s manager dealt with all relevant and significant facts, and balanced positive and negative factors in a manner that was fair to the Applicant. According to the Bank, the negative factors were not arbitrary or manifestly unreasonable. The Bank relies on Ms. X’s testimony during the PRS Panel Hearing in which she stated that the Applicant was unable to carry out his responsibilities successfully. The Bank states for instance that the Applicant “took actions that contradicted the applicable legal framework of the relevant Trust Funds, delivered products late, and failed to make himself familiar with the Program Filemaker Database, which was essential to keep adequate records of the scholarship funds.”

The Applicant’s Contention No. 2

The Applicant was given insufficient notice of any performance deficiencies and therefore had no opportunity to improve

43. The Applicant notes that it is undisputed, and was accepted by the PRS Panel, that he had no mid-term evaluation during the 2013 OPE period with his managers. The mid-term evaluation would have been the normal time for his supervisors to warn him of any concerns with his performance which might lead to an unsatisfactory OPE. According to the Applicant, his managers’ assertions during the PRS Hearing that he had a history of unsatisfactory work and had received notice of his poor performance are false. He maintains that these assertions are “easily refuted by the repeated and obvious praise [...] heaped on [him] in his earlier OPEs.” The Applicant contends that because his supervisors gave him insufficient notice of their perception of his performance, he was not given any opportunity to improve during the evaluation period.

The Bank's Response

The Applicant was given sufficient notice of performance deficiencies

44. The Bank refers to prior email communications between the Applicant and his former supervisor, Ms. AA, in September and October 2012 as illustrations of criticism of the Applicant's performance deficiencies. In addition, the Bank refers to email correspondence between Ms. AA and Ms. X on 25 July 2013 in which Ms. AA indicated that the Applicant had requested six weeks of annual leave after he purchased his tickets. Though the Operations Manager, Ms. Y, decided that the Applicant could go on annual leave, Ms. AA stated "I am sure that it took a toll on the team." She added: "I would say that this is at the very least a teamwork issue."

45. The Bank also included email correspondence in October and November 2012 which it asserts demonstrates that the Applicant was late in meeting deliverables.

The Applicant's Contention No. 3

The Bank violated due process in its determination of the SRI

46. The Applicant notes that the PRS Panel found that his supervisors had not given him sufficient notice that he might receive a bad SRI. The Applicant contends that since the 2.2 SRI was based on the OPE, it was an abuse of managerial discretion, both because the alleged poor performance was not supported by the record, and because he was given insufficient notice and denied an opportunity to defend himself. He argues that in light of these circumstances, the SRI should be rescinded consistent with the Tribunal's jurisprudence.

47. The Applicant further contends that his supervisors did not comply with the proper process when assigning the SRI and the July OPE discussion was "perfunctory." He notes that it was not until 25 September 2013 that Ms. X had a full discussion with him and showed him the OPE comments for the first time. This took place after the 2.2 SRI had been decided since management met in August and used the OPE ratings to assign SRIs. The Applicant avers that it was only after those decisions had been taken was he given an opportunity to discuss his performance and defend himself. To the Applicant, this is inconsistent with the requirements of due process.

The Bank's Response

The Applicant's 2013 SRI was set fairly and reasonably

48. The Bank contends that the SRI rating was conducted with fairness, in accordance with established process and was consistent with the Applicant's 2013 OPE in the VPU. The Bank maintains that the SRI rating was not based on a flawed OPE and was instead based on a comparative assessment of staff members. The Bank notes that "[g]iven that results areas where Applicant was rated partially successful were core to his work program and taking into consideration the grade 'F' level job requirements, which Applicant did not demonstrate at the required level, Respondent's Management identified Applicant as a bottom performer compared to his peers. As a result, management recommended the SRI rating of 2.2. 'Unsatisfactory Performance.'"

The Applicant's Contention No. 4

The OTI was an abuse of managerial discretion

49. The Applicant contends that the imposition of the OTI was arbitrary and an abuse of managerial discretion. In the first instance, the Applicant argues that because the OTI was based on an abusive and arbitrary OPE and SRI, the Tribunal should set it aside consistent with its jurisprudence. Secondly, the Applicant notes that the decision to place him on an OTI took place on 10 September 2013 – before he had the full OPE discussion with Ms. X or the opportunity to discuss his work with his supervisors in a meaningful way.

50. The Applicant further contends that the OTI itself was abusive and unfair, in violation of Principles 2.1 and 9.1 of the Principles of Staff Employment. According to the Applicant, the OTI was never intended to give him an opportunity to improve and he was "unquestionably set up to fail." He asserts that evidence of this includes the fact that his workload doubled when another staff member left on a developmental assignment. According to the Applicant, "[a]rguing that his work was unsatisfactory on the one hand, and then giving him twice as much to do so he can improve is illogical in the extreme." He notes that some of the tasks assigned to him were usually handled by Ms. X's predecessors and did not form part of his regular work which he was allegedly

performing poorly. In addition, he contends that many of the tasks – such as orientation manuals for scholars and reviewers, preparation of documents for the annual Steering Committee meeting, recruitment of evaluators, and selection of scholars – were traditionally prepared by the whole team based on days of discussion, rather than by one person alone. Finally, he notes that he was given short deadlines for the “heavy tasks” which, given the Thanksgiving, Christmas and New Year’s holidays, was “terribly unfair – and ensured that [he] could not in fact improve.”

51. The Applicant maintains that he is not challenging the termination of his employment due to having signed an MOU which the Tribunal upheld. He nevertheless maintains that “it should not be forgotten that his departure from the Bank – whether through the MOU or otherwise – was caused exclusively by the OTI which should never have been given to him.”

The Bank’s Response

The OTI was not an abuse of managerial discretion

52. The Bank argues that placement of the Applicant on an OTI should not be seen as a negative measure against the Applicant; “rather it is the mechanism envisioned by the Staff Rules to inform staff of performance shortcomings. It enables staff to take measures to overcome these shortcomings.”

53. According to the Bank, the Applicant’s allegations that its compliance with the Staff Rules amounts to unfair treatment is “squarely at odds with a manager’s obligation and authority to manage her own staff.” The Bank maintains that the Applicant had different shortcomings to overcome, making his placement on an OTI not only fair to him but also necessary. To the Bank, the Applicant fails to substantiate how placing a staff member with partially successful ratings, “who needed additional support and monitoring,” on an OTI was an act of arbitrariness or unfairness.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

54. The Tribunal's assessment of performance evaluations is limited to determining whether the decision in question was arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure. *See BY*, Decision No. 471 [2013], para. 33 and *Prudencio*, Decision No. 377 [2007], para. 73. The principal issues in this case are whether the Applicant's 2013 OPE and SRI were conducted fairly and in accordance with the Staff Rules. The Tribunal will also assess whether the Applicant was given sufficient notice of any performance deficiencies or denied the opportunity to defend himself. Finally, the Tribunal will review the managerial decision to place the Applicant on an OTI.

The 2013 OPE Process

55. The Applicant's main contention in this regard is that his supervisor, Ms. X, improperly manipulated the OPE process to achieve her "scheme to get rid of the most senior members of her team," and "refresh the team." To that end, according to the Applicant, Ms. X wrongfully restructured his approved Results Agreement and prepared an unbalanced OPE which focused exclusively on negative assessments. To the Applicant, the OPE demonstrated an abrupt shift from his previously fully successful performance evaluations. Finally, the Applicant contends that Ms. X was not in the position to solely evaluate his performance and Ms. AA should have prepared a supplemental evaluation in accordance with Staff Rule 5.03, paragraph 2.01(d).

56. With respect to the unilateral amendment of the Applicant's Results Agreement, the record shows that on 29 January 2013, the Applicant's Results Agreement was signed by his Operations Manager, Ms. Y. This document noted 5 "results" for which the Applicant was accountable. They were:

1. Ensure the delivery of scholarship benefits to [...] at least 100 [...] scholars studying in [...], and at least 40 in [...] partnership universities. [...]
2. Manage the [...] Fellowship Program and the Trust fund linked to it. [...]
3. Manage and monitor the 3 Trust Funds for which I am designated TTL [...]
4. Support the overall administration of the Scholarship Program [...]

5. I will also participate in the mid-term reviews of [...] Partnership Programs.
[...]

57. These “results” were consistent with those listed in the Applicant’s 2010, 2011 and 2012 OPE Results Agreements. However, at the end of the 2013 OPE review period, Ms. X changed the Applicant’s Results Agreement by consolidating the five “results” into three. Consequently, the Applicant’s work was to be assessed on the following categories:

1. Trust Fund Management
2. Partnership and Client Relations
3. General Support to [the VPU’s] Daily Operation

58. It is the Applicant’s contention that this modified Results Agreement gave Ms. X the foundation to present two “Partially Successful” ratings which would justify the subsequent adverse managerial decisions. While the record does not contain evidence of Ms. X’s alleged ulterior motives, the Bank has not offered any explanation for the changes to the Applicant’s Results Agreement. The Tribunal notes that Ms. X failed to provide the Applicant with a reasonable basis for the unilateral decision to amend his Results Agreement at such a late stage in the OPE process. Additionally, the Tribunal finds persuasive the testimony of a Human Resources Business Partner before the PRS Panel that any changes to the Results Agreement must be clearly communicated to the staff member for it to comply with the proper procedures. As was held in *AM*, Decision No. 410 [2009], para. 53 “by implementing unilateral amendments to the Applicant’s Results Agreement, [the manager] ignored the participatory and inclusive nature of the OPE process.” The Tribunal finds here that the Applicant suffered a detriment by the failure to follow the proper process concerning his Results Agreement.

59. The Tribunal will now turn to the assessment of the Applicant’s performance. It is well established that the performance assessment of a staff member is an exercise of managerial discretion. *See Prudencio*, para. 73. Nevertheless, this assessment must take into account all relevant and significant facts that existed for that period of review (*Romain (No. 2)*, Decision No. 164 [1997], para. 19) in order to ensure a reasonable basis for the OPE ratings and comments (*Prasad*, Decision No. 338 [2005], para. 28). Though the Applicant raises his prior excellent OPE ratings as evidence of lack of a reasonable basis for the current ratings, the Tribunal has previously

confirmed that “a change in the assessment of a staff member by his supervisors cannot, in and of itself, be regarded as an abuse of discretion.” *See Malekpour*, Decision No. 322 [2004], para. 21. A staff member is “entitled to a fair and proper performance evaluation every year, but there is no rational basis for supposing that a high performance rating in one year gives rise to a presumption that the same rating would carry over to the next or subsequent years.” *Id.*

60. At the same time, as was held in *Marshall*, Decision No. 226 [2000], para. 24, an abrupt change in a staff member’s performance evaluation after many years of consistently high ratings “suggests a disturbing degree of inconsistency in the exercise of managerial responsibilities” if this change is “unaccompanied by any descriptive statement explaining the perceived slippage in the quality of the Applicant’s performance.” *Id.*

61. It is the Applicant’s contention that Ms. AA’s failure to complete a supplemental performance review amounts to a procedural irregularity. During the 2012 – 2013 OPE cycle, Ms. AA was the Applicant’s immediate supervisor for seven months between 1 July 2012 and 2 February 2013, while Ms. X was the Applicant’s supervisor for three months prior to the initiation of the OPE process which led to the negative review. Pursuant to Staff Rule 5.03, paragraph 2.01(d):

If during the review period the staff member has reported to more than one Supervisor for a period of three months or more, the staff member, the Manager or the Designated Supervisor may request the other supervisor(s) to provide supplemental written performance evaluations to the staff member.

62. The provisions of this Staff Rule were reviewed in *CX*, Decision No. 517 [2015], para. 83, where the Tribunal held that the rule did not “state that supplemental written performance evaluations are mandatory.” The Applicant could have requested that Ms. AA complete a supplemental evaluation, as opposed to giving feedback as a feedback provider. *See Mpooy (No. 8)*, Decision No. 480 [2013], para. 33. As a result there were no procedural irregularities in this regard.

63. However, the Tribunal notes that the Applicant was awarded two “Partially Successful” ratings for “Trust Fund Management” and “General Support to [the VPU’s] Daily Operation.” Central to the Tribunal’s review is an assessment of whether the OPE embodied a fair and balanced

appraisal of his performance. While the use of a supplemental OPE is not mandatory, the Applicant's situation is the precise circumstance where such a supplemental OPE would have been preferable, and would have enabled a balanced and fair review of his performance. For instance, though Ms. AA was the Applicant's supervisor for the majority of the period under review, not all of Ms. AA's feedback concerning the Applicant's performance was included in the OPE. In November 2013, Ms. AA sent Ms. X some more positive comments which were in her "original OPE feedback" for the Applicant which could be "included to give a more well-rounded overview of [the Applicant's] work with the Scholarships Program." These comments included a statement that:

[The Applicant] continued to assume a more prominent role in the relationships with the universities and scholars in the portfolio. He successfully arranged two visits of the [...] ED's Office representatives to the African Partnership programs in [...] and [...]. Additionally, [the Applicant] successfully contacted scholars and universities and acquired academic records and copies of thesis papers in response to a special, urgent query from the Government of [...].

64. Ms. AA also stated that "[t]he clarification of reporting requirements that [the Applicant] introduced to the letters of award last year improved compliance with the [...] Fellowship guidelines and helped the relationship between the fellows and the program." Finally, it is worth noting that Ms. AA also suggested that Ms. X add the following review to the OPE:

In providing oversight of the [...] Program, [the Applicant] took the initiative to follow up with one of the [...] Fellows who had withdrawn from the program after receiving his first payment (50% of the full award). This involved a considerable amount of effort and follow up, especially since the Fellow's bank was very slow in responding.

65. It is clear from the record that the Applicant received positive feedback from other feedback providers, including his former supervisor, which were not included in the Applicant's OPE. Some of these feedback comments countered specific negative comments made in the OPE, reinforcing the view that the OPE did not take into account all relevant and significant facts that existed for that period of review. For example, the supervisor's comments noted that the timely delivery of major tasks suffered due to the Applicant's alleged failure to "demonstrate adequate capacity and proactivity in project and time management." Yet, one feedback provider stated that the Applicant

was “very committed to ensuring that scholars are provided with their adequate benefits in a timely manner, and that internal portfolio matters are followed-up accordingly.” Another praised the Applicant as knowledgeable in “SAP” which lends to “effective monitoring of commitments and [Trust Fund] issues.” Further positive feedback included comments that the Applicant “was a solid team-player, stepped up to the plate and provided his understanding of policies and their application to scholar cases, and continued his relationship-management with universities.” In addition, it was stated that “we were always clear on who was doing what and on next steps thanks to [the Applicant].”

66. The Tribunal finds that on balance the Applicant’s 2013 OPE does not reflect a fair review of his performance during that OPE cycle. The Tribunal is also not persuaded that a reasonable basis existed for the “Partially Successful” ratings. Though the Applicant’s managers maintain that they regularly gave him feedback over the years on his perceived poor performance, this feedback was not reflected in prior OPEs in which the Applicant received “Superior” and “Fully Successful” ratings after an initial partially successful performance in 2009. Nor is this feedback adequately reflected in the evidence submitted by the Bank. The fact that the Applicant’s managers recorded significant improvement in the Applicant’s performance in his prior OPEs and in email exchanges with him does not correspond with the assertions, now being made, that the Applicant consistently performed poorly.

Violation of the Applicant’s Due Process Rights

67. The Applicant asserts that his due process rights were violated, primarily by the failure to provide him with advance notice of any performance deficiencies, and the denial of an opportunity to defend himself and improve. To rebut the Applicant’s contention, the Bank refers to email communications between the Applicant and his former supervisor, Ms. AA, in September and October 2012. The Bank presents these messages as evidence of regular feedback to the Applicant of underperformance. The Bank further asserts that Ms. AA, Ms. X and to a certain extent Mr. AB, provided the Applicant with regular feedback and the majority of the feedback indicated that the Applicant was not fulfilling his responsibilities as a Program Officer.

68. The Tribunal recalls that basic guarantees of due process include that the “staff member affected be adequately informed with all possible anticipation of any problems concerning his career prospects, skills or other relevant aspects of his work.” *Garcia-Mujica*, Decision No. 192 [1998], para. 19. Additionally, the staff member must be given “adequate warning about criticism of his performance or any deficiencies in his work that might result in an adverse decision being ultimately reached [and] adequate opportunities to defend himself.” *Samuel-Thambiah*, Decision No. 133 [1993], para. 32; *see also B*, Decision No. 247 [2001], para. 21. The staff member must also be provided with the opportunity to correct said performance deficiencies. *See Prasad*, para. 30.

69. The record contains volumes of email messages which the Bank provided to support its contention that the Applicant was provided with abundant notice of his alleged poor performance. One such volume is titled “Communications demonstrating Manager’s good faith efforts to help Applicant to improve his performance.” This file contains email exchanges between Ms. X and the Applicant, and Ms. AA and the Applicant between July 2012 and June 2013. The Tribunal observes that there is nothing contained therein which would indicate that the Applicant’s supervisors: 1) perceived that the Applicant was performing poorly; 2) communicated this perception to the Applicant; and 3) took steps to assist him to improve. On the contrary, this volume contains email messages in which Ms. X and Ms. AA praised the Applicant for his good work. In one such email, Ms. X informed the Applicant that she “appreciated [him] being proactive [...]” In yet another, Ms. AA complimented an email message the Applicant had sent to an external party.

70. In another volume entitled “Communications showing Applicant’s performance shortcomings during FY2013,” the Bank submitted a draft of a Review Manual with revisions and annotations, purportedly as proof of the Applicant’s poor drafting skills. However, the Bank failed to respond to the Applicant’s contention that he did not draft this document.

71. The Bank also submitted email messages exchanged in October and November 2012 which it asserts demonstrate that there were delays in paying recipients of the fellowship the balance of their awards. The Bank submits these email messages as proof of the Applicant’s failure to fulfil

his tasks on time. However, the Bank has failed to rebut the Applicant's explanations concerning these email messages, such as the explanation that it was Ms. AA who decided not to reimburse the medical claims for one of the scholars.

72. Having reviewed the totality of the record, the Tribunal is not persuaded that the Applicant received advance notice of the possibility of two "Partially Successful" ratings in the "Trust Fund Management" and "General Support to [the VPU's] Daily Operation" categories. In particular, the correspondence relied upon by the Bank does not conclusively support the view that the Applicant's performance was unsatisfactory in the manner noted in para. 18 above. Without this advance warning, the Applicant was effectively denied an opportunity to defend himself and improve upon the perceived performance deficiencies.

The 2013 SRI

73. It is well established that SRI ratings must have a reasonable and observable basis. The Tribunal has recognized that "[t]here is obviously a link between [the OPE] and an SRI," *see BG*, Decision No. 434 [2010], para. 57, and that the OPE on which the SRI is based must conform to proper procedures. SRI ratings which are based on arbitrary OPE processes will be set aside. *BY*, Decision No. 471 [2013], para. 31. Having found that the 2013 OPE was unfair and unbalanced, the Tribunal finds that the Applicant's 2.2 SRI was not detached from the flawed OPE and was materially and adversely affected by the procedural irregularities described above.

74. In tandem, the Tribunal also finds that the manner in which the Applicant's SRI was set did not comply with proper process. The Tribunal has repeatedly held that "there is an established order of things in the Bank's procedures and requirements concerning a staff member's career development, beginning with a proper performance evaluation embodied in an OPE [...] followed by performance ratings and an SRI assignment which, although not identical to the OPE evaluation, must not be inconsistent with it unless there is a very satisfactory explanation for such a departure." *Prasad*, para. 57.

75. The record shows that the Applicant's SRI rating was set at a VPU-wide meeting on 10 September 2013, prior to the Applicant's detailed OPE meeting with Ms. X on 25 September 2013 at which she gave him a copy of the written OPE. The Applicant's spirited defense of his performance in the email message of 10 October 2013 had no bearing on the SRI rating which was assigned based on the "Partially Successful" ratings and the written OPE which he had neither seen nor discussed at the July 2013 meeting with Ms. X.

76. The Tribunal notes that the Applicant has been compensated for the SRI rating but not for the procedural irregularity. The PRS Panel found that "[b]ecause of the lack of formal feedback throughout the review period to support an award of a 2.2 SRI, [...] the Bank did not act consistently with the [Applicant's] contract of employment and terms of appointment." It is noted that in addition to monetary compensation, the Panel recommended that the 2.2 SRI be rescinded from his records, a recommendation which the Bank accepted. However, the Tribunal observes that when the Applicant requested confirmation that "all records of the SRI" have been removed from his personnel files, he received no response from the Bank.

77. The Bank is called upon to fully implement the recommendations of the PRS Panel concerning the rescission of the Applicant's 2013 SRI rating.

The OTI Decision

78. The Applicant's final contention is that the OTI decision was arbitrary and an abuse of managerial discretion. In addition, it is the Applicant's argument that the OTI was based on a flawed OPE process. For its part, the Bank avers that placement on an OTI was not a negative measure against the Applicant; "rather it is the mechanism envisioned by the Staff Rules to inform staff of performance shortcomings. It enables staff to take measures to overcome these shortcomings."

79. Staff Rule 5.03, paragraph 3.02 provides for the institution of an OTI "[i]f a Manager or Designated Supervisor determines that a staff member's performance (which includes professional and work-place behavior) is not satisfactory." The Tribunal first observes that, on its own, an OTI

is not an appropriate mechanism to inform staff of performance shortcomings. As required by the Staff Rules on performance management, and upheld in the Tribunal's jurisprudence, it is imperative that staff members are provided with advance notice of performance concerns and given an adequate opportunity to improve. The institution of an OTI is generally considered the final step in assisting the improvement of poor performance since, as the Applicant was informed, failure to successfully complete the OTI "could result in the termination of [his] employment" for unsatisfactory performance.

80. The Tribunal further observes that the institution of an OTI is based on the performance ratings and assessments completed during the OPE cycle. Having found that the 2013 OPE lacked a reasonable and observable basis, and that the Applicant was not provided with advance notice of the adverse performance review, the Tribunal finds that the decision to institute an OTI was equally flawed.

81. Finally, the Tribunal is concerned that the Bank failed to address the Applicant's contention that the decision to place him on an OTI was taken on 10 September 2013 prior to his OPE discussion with Ms. X and Ms. Y and the opportunity to defend himself. Such a charge is of considerable significance, as it demonstrates the failure to comply with the requisite procedures. Furthermore, the record shows that the decision to place the Applicant on an OTI coincided with the departure of a fellow staff member on a Developmental Assignment. This staff member's tasks were assigned to the Applicant and added to the assignments he was performing under the scrutiny of the OTI, thereby increasing his workload. The record shows that the Applicant raised concerns about taking on this colleague's portfolio; however, he was informed by Ms. X that "[he] would need to support the normal workflow of the program as we adjust to [the colleague's] departure." A decision to place a staff member on an OTI is not one to be taken lightly. It is a serious measure with potentially grave consequences for a staff member's employment. *See Mahmoudi (No. 2)*, Decision No. 227 [2000], para. 40. As a result, when instituting an OTI a staff member must be given a genuine chance to succeed, which was lacking in the present case.

Concluding Remarks

82. In calculating the compensation to award the Applicant, the Tribunal has taken into account the sum awarded to the Applicant for the flawed SRI rating. The Tribunal also recalls that the decision that the OTI was unsuccessful, a decision distinct from the one to place him on an OTI, led to the decision to terminate the Applicant's employment contract for unsatisfactory performance. The termination of the Applicant's contract was ultimately settled through an MOU, the validity of which was upheld in *DC* (Preliminary Objection), Decision No. 525 [2015], para. 66. In lieu of exercising his right to challenge the termination of his contract, the Applicant was compensated under the terms of the MOU. As a result, the Tribunal's award of compensation in this case does not address the termination of the Applicant's contract.

83. The award in the present case is solely designated to compensate the Applicant for: 1) the varied procedural irregularities in setting his OPE and SRI, including the failure to provide him with an opportunity to defend himself prior to the implementation of the adverse decisions; 2) the lack of a reasonable basis for the Applicant's "Partially Successful" OPE; 3) the flawed decision to place him on an OTI which has had irreversible consequences; and 4) the failure to give the Applicant a genuine opportunity to succeed on the OTI. The record is devoid of any evidence that the Applicant's supervisors made reasonable efforts to assist him during this program. On the contrary, the Applicant was given additional work which increased his workload. As with *AI* (*No. 2*), Decision No. 437 [2010], the record indicates "undue haste in the steps taken" to place the Applicant on an OTI. The Tribunal reiterates that, in light of the consequences an OTI may have on a staff member's employment, the decision to institute one must have a reasonable and observable foundation. Lastly, the Tribunal is cognizant of the fact that these managerial decisions have equally amounted to a failure to treat the Applicant fairly pursuant to the Principles 2.1 and 9.1 of the Principles of Staff Employment, and have had an impact on the Applicant's wellbeing. The Applicant should be duly compensated.

DECISION

- (1) The Bank shall pay the Applicant compensation in the amount of three years' net salary based on his salary at the time of the contested decisions.
- (2) The Bank shall rescind and remove all records of the 2013 OPE and OTI from the Applicant's personnel records.
- (3) The Bank is called upon to fully implement the recommendations of the PRS Panel with respect to the rescission of the Applicant's 2013 SRI rating.
- (4) The Bank shall pay the Applicant's legal fees and costs in the amount of \$20,537.37.
- (5) 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., 21 April 2017