



World Bank Administrative Tribunal

2016

Decision No. 528

**DG,
Applicant**

v.

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

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

**DG,
Applicant**

v.

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

1. This judgment is rendered by the Tribunal in plenary session, with the participation of Judges Stephen M. Schwebel (President), Mónica Pinto (Vice-President), Ahmed El-Koshi, Andrew Burgess, Abdul G. Koroma, Mahnoush H. Arsanjani, and Marielle Cohen-Branche.

2. The Application was received on 20 January 2015. The Applicant was represented by Stephen Schott of Schott Johnson, LLP. The Bank was represented by David R. Rivero, Director (Institutional Administration), Legal Vice Presidency. The Applicant's request for anonymity was granted on 1 April 2016.

3. The Applicant is mainly challenging: (i) her 2013 Overall Performance Evaluation (OPE) and Salary Review Increase (SRI); (ii) the validity of the Institutional Staff Resources Program (ISRP) agreement under which the Applicant would retire on 16 January 2015; (iii) the Bank's alleged breach of the ISRP agreement; and (iv) the termination of her employment despite her placement on Short Term Disability (STD) status.

FACTUAL BACKGROUND

4. The Applicant joined the Bank in 1980. The Applicant worked at the Corporate Secretariat in Board Operations (SECBO) between 1998 and 2007. After a developmental assignment in the Africa Region (AFR) Results and Learning (AFTRL) unit and in the Africa Vice Presidency (AFRVP) between April 2007 and June 2008, the Applicant worked as an Operations Analyst, Level GE, at the Board Secretariat, Policies and Operations, (SECPO) from 2008-2014. The Applicant's duties included, *inter alia*, drafting and research of the official records of Board Meetings of the Executive Directors (EDs) of the Bank/International Development Association (IDA), International Finance Corporation (IFC), and Multilateral Investment Guarantee Agency

(MIGA); managing the organization of Board meetings; and preparation of the Board minutes. As the Applicant's OPEs from 2008 to 2012 show, the Applicant received "Superior" and "Fully Successful" ratings for the execution of her duties.

5. In June 2012, a new Director was appointed for SECPO. He began his new assignment by reviewing the work of his unit and the individual workloads. The Director of SECPO considered that the work program assigned to the Applicant was out of line with the duties of a GE Level staff in the unit which focused mainly on document review.

6. On 6 November 2012, the Director of SECPO sent an e-mail to SECPO staff regarding staff responsibilities, accountabilities, and quality control in connection with ongoing reforms within SECPO. The Applicant's duties were realigned with those of other Level GE Analysts and focused on: (a) preparation of Board minutes; (b) project document review; (c) providing analytical inputs into Board meetings; and (d) preparation of ED farewells.

7. On 25 January 2013, the Director of SECPO and the Applicant had a mid-year OPE meeting. At the meeting, she expressed disappointment with the "high 'clerical' content" of her tasks. In response to the Applicant's concerns, the Director of SECPO relieved the Applicant of her duties preparing the Board minutes and providing logistical support, and her work program was brought into line with that of other GE Level Analysts in the unit.

8. On 24 February 2013, the Applicant sent an e-mail to the Director of SECPO discussing upcoming "President's Memoranda" regarding proposed projects in China, attaching an e-mail which she had sent to inquire about possible Integrity Vice Presidency (INT) investigations in urban or related sectors in these projects. The Director of SECPO responded that her e-mail to INT was very confusing and that she tends to complicate things unnecessarily.

9. On 12 March 2013, the Director of SECPO warned the Applicant of complaints by Operation Policy and Country Services (OPCS) management and by the Peru Team regarding her communications on projects and asked her to be cautious in the future with communications with

Operations. The Applicant responded on 19 March stating that she had followed SECPO's guidelines.

10. Also on 19 March 2013, the Applicant and the Director of SECPO met to discuss his 12 March e-mail. Later that day, she sent him an e-mail of her own account of their conversation. According to her account of the meeting, he had claimed that she reacted emotionally to feedback, that he was "not comfortable with her emotionally," and that her taking notes made him tense. That evening, the Director of SECPO responded to the Applicant's e-mail, summarizing the issues from his perspective. He stated he experienced "very emotional reactions" from her, including her crying, and that former management and other staff members had given him feedback about her with similar concerns. He stated that this type of behavior on her part as well as her taking notes when they speak, made him uncomfortable providing feedback. He advised her to contact Human Resources and seek their advice and guidance in helping her deal with stress in the workplace. He stated that his "only concern was [her] and other staff's wellbeing to the extent it affects the work environment."

11. On 21 March 2013, during an exchange of e-mails, the Applicant discussed with the Director of SECPO the Results Agreement which she had been advised by Human Resources (HR) to finalize in order to have a clear understanding of her deliverables. Responding to the Applicant's question, whether she had "delivered" on the Results Agreement, the Director of SECPO referred to the complaints he had received from other units in relation to her performance regarding "Documents Review" and stated that her performance was not optimal. He said that she was reacting negatively to feedback, thus making it difficult for her to stay on a learning path.

12. On 22 and 25 March 2013, the Director of SECPO received written feedback from two staff members who had worked with the Applicant. While the feedback identified positive aspects in the Applicant's work and personality, it included criticism of the Applicant's performance in relation to her communications with colleagues and clients, her judgment about what was a core or peripheral issue, and her behavior and personal interactions with colleagues.

The 2013 OPE Process

13. On 12 June 2013, the Vice President and Corporate Secretary sent all Corporate Secretariat (SEC) staff members an e-mail regarding the launch of the OPE process. According to a timetable included in the e-mail it was specified, among other things, that staff were to agree on feedback providers with supervisors, initiate OPEs, and seek feedback, by 30 June 2013; that Managers were to review inputs and have initial conversations with staff in July; that Departmental Management Review Meetings were to be scheduled but would occur sometime between 15 July and 30 August 2013; that the deadline for completing performance evaluations was 10 September 2013 and that around that time the Vice-Presidential Unit (VPU) Management Review meetings would be held to discuss all staff members, their performance, and their future prospects; and that OPEs were due to be completed by 30 September 2013. It also indicated that 1 October 2013 would be the effective date of salary increases.

14. The following day, 13 June 2013, the Director of SECPO sent an e-mail to SECPO staff members, instructing them to provide him with a proposed list of feedback providers for his approval amongst SECPO staff and outside the unit and initiate OPEs in the system by 21 June 2013. He also asked that they seek feedback through the OPE system by 30 June 2013. Additionally he requested that for this OPE round the staff enter him “both as a supervising and reviewing manager” and Ms. M, the Applicant’s previous supervisor for the period from June 2012 to January 2013, as feedback provider.

15. On 24 June 2013, the Director of SECPO reminded certain staff members, including the Applicant, who had not sent him a list of feedback providers and initiated the OPE to do so. Thereafter on 19 July and 12 August 2013, the Director of SECPO sent e-mails to the Applicant and other staff who had not submitted their draft OPEs or nominated feedback providers, instructing them to submit them “urgently.”

16. On 21 August 2013, the SECPO Department’s Management meeting regarding staff OPEs took place. On 28 August 2013, SEC held its VPU Management OPE Review Meeting. Because the Applicant had not submitted either her draft OPE or a list of feedback providers by that time, and in order to prepare for the meeting, the Director of SECPO created a hard copy of an evaluation

of the Applicant's performance, which he structured based upon her 2013 Results Agreement. In addition, the Director of SECPO claims that from July to mid-August, he collected verbal feedback about the Applicant from other staff members he had identified based on her Results Agreement and his knowledge of her areas of work.

17. On 13 September 2013, the Director of SECPO sent an e-mail to the Applicant informing her that he had requested HR to forward her 2013 OPE to him because he did not receive it from her, and stated that he remained available for an OPE discussion. The Applicant responded later that day, expressing her disappointment regarding the Director's action in this respect.

18. On 16 September 2013, the Applicant submitted a draft 2013 OPE, based on her Results Agreement for 2013, including feedback providers.

19. On 20 September 2013, the Director of SECPO sent the Applicant the draft OPE through the system, sharing with her the proposed ratings and his detailed comments on her performance. In the Results Assessment, the Director of SECPO rated the Applicant "Fully Successful" for three work program results and "Partially Successful" for one work program result, "Ensuring Best Practices, Simplifying, Modernizing." In the Behavioral Assessment, the Director of SECPO rated the Applicant "Fully Successful" for "Client Orientation" and "Drive for Results" and "Partially Successful" for "Teamwork" and "Learning and Knowledge Sharing." His Overall Comments were extensive, and focused on the need for the Applicant to: (i) have greater efficiency and effectiveness and increase the amount of document reviews; (ii) focus on client communication; (iii) receive, reflect, and act on feedback; and (iv) exercise better judgment in relation to team behavior.

20. On 25 September 2013, the Applicant responded regarding the draft OPE, disagreeing with the majority of the assessment by the Director of SECPO. She expressed concern about the way the Director of SECPO had provided feedback to her in the past.

21. On 1 October 2013, the Director of SECPO and the Applicant had the 2013 OPE discussion. A Senior HR Business Partner and a Staff Association representative attended this

meeting. During the meeting, the Director of SECPO agreed to revise his Overall Comments. At that time, none of the feedback providers designated in the Applicant's OPE had submitted feedback, nor had the Director of SECPO followed up with them requesting that they do so.

22. During the last week of October, the Director of SECPO received some feedback on the Applicant's performance submitted through the OPE system. According to the Director of SECPO, this feedback did not change his mind regarding the evaluation of her performance.

23. On 31 October 2013, the Director of SECPO signed the Applicant's 2013 OPE. He did not change the OPE ratings from his draft version, but shortened his Overall Comments. In the revised comments, the Director of SECPO specified several areas for improvement for the Applicant going forward, including document review; communication with counterparts; receiving, reflecting on, and acting on feedback; and aspects of her overall team behavior. The Director of SECPO also acknowledged that the Applicant was in a period of transition with significant changes in her work program, and expressed appreciation for her work and effort in supporting training efforts for new colleagues regarding the preparation of the minutes.

24. On that same date, the Applicant signed her 2013 OPE, adding her objections and comments.

25. On 1 November 2013, the Director of SECPO signed the OPE as Reviewing Manager.

26. At the end of the performance evaluation process, the Applicant received an SRI rating of 3.1 which, according to the Bank, was consistent with the three "Partially Successful" ratings in the Applicant's OPE.

Institutional Staff Resources Program

27. In the meantime and around August 2013, the Applicant had been discussing the possibility of leaving SECPO with the Ombudsman and her HR Counselor. Following communications with them, and around mid-September 2013, the Applicant met with Mr. L, the Manager of the ISRP

in HR Corporate Operations. During the meeting, the parties discussed the ISRP program and the possibility for the Applicant to enroll in it. According to the HR website for the program:

The ISRP is an institutional program administered by [the Human Resources Vice-Presidency] to accommodate the Bank's need to mobilize a core group from within the considerable body of technical and professional expertise of [Bank] staff.

28. The program accepts three types of eligible candidates:
- A. Last Assignment - Staff whose comparative strengths lie in their technical knowledge and skills, and who will retire or resign at the end of their ISRP assignment.
 - B. Mid-career - Staff who have been identified as candidates for senior management positions, and whose readiness for such positions would be enhanced by an appropriate strategic institutional-wide assignment (for example, leading a corporate-level task force) before their next reassignment or promotion.
 - C. Institutional Hardship Cases - High-performing staff at all grade levels with in-demand skills who have been genuinely displaced during VPU restructurings and budget cutbacks, and for whom an alternative assignment would be available except for budget constraints. In addition, this could apply to staff with a personal mitigating situation requiring their extension of contract for a defined period of time (e.g., serious existing medical course of treatment about to be completed). Candidates in this category will retire or resign at the end of their ISRP assignment.

29. One of the ISRP's terms and conditions states:

A specific commitment by the staff member to retire or resign at the end of the ISRP assignment is required "up front," unless the assignment falls under category (B).

30. In follow-up e-mails to Mr. L after her initial meeting with him the Applicant thanked him and stated: "I am earnestly searching for an ISRP assignment in the hope of being able to contribute to the Bank Group's work for a little while longer."

31. On 11 November and 8 December 2013, the Applicant sent e-mails to the Senior Manager for Independent Evaluation Group (IEG) Corporate Services (IEGCS), Mr. HB, inquiring about the possibility of an ISRP reassignment into IEG. In these communications it is shown that both

the Applicant and Mr. HB understood that the ISRP assignment would be for a year, until December 2014.

32. On 12 December 2013, Mr. HB submitted a request to Mr. L for the Applicant's reassignment to IEG under the ISRP. The memorandum accompanying the request noted that "we would like to make use of [the Applicant's] expertise as soon as possible and, hopefully, no later than January 1, 2014. The ISRP assignment with IEGCS would be for 12 months through December 2014, which would coincide with [the Applicant's] planned retirement."

33. On 6 January 2014, in response to a communication by Mr. HB, the Director of SECPO stated that he supported the 12-month assignment of the Applicant to IEG pointing out that the Applicant "would be a perfect candidate for this assignment."

34. The Applicant points out that she was not copied on any of these communications exchanged between Mr. L, Mr. HB, and the Director of SECPO.

35. The agreement on the Applicant's transfer to IEG under an ISRP was formalized on 10 January 2014. On 16 January 2014, the Applicant signed a memorandum from Mr. L to the Applicant titled "Assignment to Institutional Staff Resources Program" ("ISRP Memorandum").

36. The ISRP Memorandum stated in pertinent part:

2. You will be assigned to the ISRP effective January 15, 2014 as Operations Analyst, Level GE, to undertake an assignment with IEG as detailed in the attached Terms of Reference [TOR]. You will report to [Mr. HB], Senior Manager, IEGCS for this assignment.

3. Your assignment in the ISRP will be for a period of 12 months until January 15, 2015, at which time your retirement from the World Bank, as evidenced by your signature below, will become effective. You may advance the effective date of your retirement to an earlier date with at least 30 days notice, per Staff Rule 7.01, Section 2.

4. You may also, at any time during and before the end of your ISRP assignment, seek and accept reassignment to a Term or Open-Ended position in the Bank Group outside of ISRP. The effective date of any reassignment should be agreed with your

ISRP supervisor, [Mr. HB] and must be on or before January 15, 2015. If you are reassigned out of ISRP, the terms and conditions of this ISRP assignment will lapse. For the duration of your ISRP assignment, your official unit will be PA9SS (the Master Organizational Code for ISRP) and your working unit will be IEGCS.

37. The Applicant signed the agreement and acknowledged that: “I, the undersigned, accept the terms and conditions of this memorandum and hereby retire from the World Bank effective January 16, 2015.”

38. She also acknowledged her understanding that

this decision is irrevocable, except if I advance my retirement date in accordance with Staff Rule.7.01, Section 2, or if I am offered, accept and transfer to an Open-ended or Term position in the Bank Group outside of ISRP on or before January 15, 2015.

39. On 28 January and 5 February 2014, the Applicant wrote to Mr. L expressing her gratitude for the assignment.

40. In completing her 2013-2014 OPE, the Applicant expressed her deep appreciation for having been able to participate in the ISRP and having had “this invaluable experience in which to end [her] fulfilling 34-year World Bank career!”

41. The Applicant states that on 12 September 2014 her supervisor in IEG, Ms. W, advised her to go home and not come to the office effective immediately because the Applicant seemed “stressed out” and “worn out” and should relax over the following months. According to the Applicant, her supervisor also mentioned that the Applicant had trouble pulling together “a flow chart of the work process.” The Applicant claims that Ms. W suggested that she contact the Bank’s Disability Administrator, the Reed Group. In September 2014, the Applicant discussed Ms. W’s suggestion that she apply for STD with her HR Counselor. She mentioned that the Bank’s Health Services Department (HSD) Counselor and Chair wanted her to go on STD, as the Applicant was quite “burned out.”

42. On 20 October 2014, an HR representative, sent the Applicant an application for Short Term Disability encouraging her to contact the Case Manager from the Reed Group to discuss the disability program and how it works with its clients. The Applicant contacted the Case Manager but did not apply formally for STD at the time. Subsequently, the Applicant submitted on 27 January 2015 a form titled "Application for Sick Leave for Absence Over 20 working days." Thereafter the Applicant's application was approved with her first day of absence as of 10 December 2014. Thus, the start of disability was on 10 December 2014.

43. On 6 January 2015, in response to her request for annual leave, the Applicant was informed that she should arrange with Pension Administration and HR Operations about pension and medical insurance and other matters before her retirement. The Applicant responded the next day stating that she had informed HR Operations that her separation from the Bank was under dispute and that any decisions regarding her retirement would need to be held in abeyance. She added that she had been instructed by her psychiatrist to be on medical leave until further notice.

44. The Applicant has produced a note from her psychiatrist dated 9 January 2015 in which the psychiatrist stated that the Applicant had been a long-standing patient whom she had been treating for two medical conditions. The psychiatrist added that in 2013 and the months leading up to October 2013, the Applicant reported being more harassed at work and feeling that she was unduly targeted and being pushed out of her office. In the psychiatrist's opinion, as a result of the negative stress over a prolonged period of time, the Applicant's mental and physical state were affected. She concluded:

Given these conditions, [the Applicant] became increasingly debilitated. It is my opinion that by October 2013, [the Applicant's] mental state was questionable, so much so, that she was not of sufficient sound mind to make rational and informed decisions about her future, i.e., decisions affecting the rest of her life.

45. On 12 January 2015, the Applicant received an e-mail from Mr. L in which he stated that:

Your request for sick leave beyond the earlier agreed last day in office (per ISRP agreement) cannot be approved. Sick leave can be approved only through January 15, 2015. I note that you recently requested and received annual leave and that at

the time, I advised you to prepare for the end of your employment with WBG and related issues to take care of.

From the WBG perspective, the end of your employment is not “in dispute” and the Bank intends to stand by its agreement with you, as it has done all along. You have benefited from the ISRP for the duration agreed upon, and at the time you entered into the ISRP with the Bank, you agreed to its terms, including your retirement at the expiration of your assignment under the program on January 15, 2015.

46. He also stated:

You are welcome to submit a Short Term Disability claim with Reed which can assess if your health situation is one which qualifies to benefit from the STD Insurance. In case this is justified by your health situation, STD benefits may continue after your separation from the WBG. If that would be the case, you may wish to consider whether it is beneficial for you to defer the start of your pension (in case you had intended to use your pension benefits). The WBG would continue to contribute to the [Staff Retirement Plan (SRP)], without a need from your side to continue contributing towards the SRP. You would also be covered by medical Insurance without having to pay your Insurance premium for the duration of the STD.

47. In the meantime, on 5 March 2014, the Applicant filed a Request for Review with Peer Review Services (PRS) of her 2013 OPE. In its report issued on 3 July 2014, the PRS panel recommended that the Applicant’s request for relief be denied. On 10 July 2014, the Corporate Secretary and President’s Special Envoy accepted the PRS recommendation.

48. After requesting an extension on 24 November 2014, the Applicant filed an Application with the Tribunal on 20 January 2015. In her Application and her Reply, the Applicant requests that: (i) her FY13 OPE be struck down and the ratings be voided; (ii) her SRI be struck down and the Applicant receive a salary award in not less than the mid-range of her salary category; (iii) the ISRP agreement of 16 January 2014 be struck down as null and void and that she be reinstated to a position commensurate with her demonstrated competencies; (iv) her right to be paid 100% of her net salary while on disability be confirmed; (v) her right to return to active service when her disability is resolved and she is found “fit for duty” also be affirmed; (vi) she be awarded monetary compensation in a range of six to twelve months’ salary, for abuse of the OPE process; and (vii) she be awarded moral damages of not less than one year’s salary for the Bank’s unethical conduct

and abuse of its Staff Rules on Ending Employment. She also requests attorney's fees and costs in an amount of \$86,401.

49. On 18 February 2015, the Bank filed a Preliminary Objection to the Application. Following an exchange of pleadings on the Preliminary Objection, the President of the Tribunal decided on 4 August 2015 that the Preliminary Objection shall be joined to the merits. Thereafter an exchange of pleadings on the Preliminary Objection and the merits followed.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

Preliminary Objection regarding the 2013 OPE

50. In this case, the Bank raised a Preliminary Objection pursuant to Rule 8 of the Tribunal's Rules claiming that the Application is inadmissible *ratione temporis* in relation to the Applicant's challenge to her 2013 OPE.

51. Regarding the Applicant's challenge to her 2013 OPE, the Bank states that it is inadmissible because the Applicant did not file her Application within 120 days from the date she received the decision of the Corporate Secretary and President's Special Envoy to accept the PRS recommendations denying the Applicant the relief requested. The Bank claims that the Applicant received management's decision to accept the PRS Panel's recommendations on 10 July 2014, or at the latest, on 16 July 2014. It adds that pursuant to Article II, Section 2(ii)(b), the Applicant had 120 days thereafter to file her Application with the Tribunal. Instead, it points out, the Applicant filed a request for extension to file her Application on 25 November 2014, 18 or 12 days past the deadline to file her Application, which was granted that same day.

52. The Tribunal's Statute Article II(2) prescribes in pertinent part:

No ... application shall be admissible, except under exceptional circumstances as decided by the Tribunal, unless:

- (i) the applicant has exhausted all other remedies available within the Bank Group, except if the applicant and the respondent institution have agreed to submit the application directly to the Tribunal; and

(ii) the application is filed within one hundred and twenty days after the latest of the following:

- (a) the occurrence of the event giving rise to the application;
- (b) receipt of notice, after the applicant has exhausted all other remedies available within the Bank Group, that the relief asked for or recommended will not be granted.

53. With regard to the challenge to her 2013 OPE, the Tribunal notes that as the Applicant has admitted in a statement before the Tribunal, she received the PRS report along with the management's decision on the PRS recommendation on 16 July 2014. She states that she then "cursorily read through the documents," scanned them and sent them to her e-mail account on 28 July 2014. Believing that she had received the documents on 28 July 2014, the Applicant then asked for an extension of time to file her Application with the Tribunal on 24 November 2014 which was, in her mind, within the 120-day time limit required under the Tribunal's Statute for the timely filing of her Application after receiving notice of the decision of the Corporate Secretary and President's Special Envoy. The Applicant states that at the time she made the request for extension it was after her manager in IEG had asked her in September 2014 to "stay home" and "relax" and had encouraged her to apply for STD because she was "worn out." She also states that at that time she was in a state of extreme distress due to a death in the family because of which she was out of town. The Applicant claims that exceptional circumstances including medical reasons, such as various forms of physical and mental disability, existed in her case.

54. The Bank points to the Applicant's admission that she received the PRS documents on 16 July 2014 and states that therefore the Applicant was late in filing her Application at least by 12 days. The Bank asserts that this delay was due to the Applicant's carelessness and inattentiveness. It adds that the Applicant has not presented contemporaneous proof of any exceptional circumstances particularly in the form of a serious medical incapacity justifying her failure to file her Application in a timely manner.

55. The Tribunal finds that the Applicant, indeed by her own admission, was late in filing her Application as she confused the date from which the 120-day time limit to file her Application started running (i.e., *dies a quo*). The Tribunal has in many cases underscored the importance of the timely filing of applications and respect for time limits prescribed by Article II of the Statute

“for a smooth functioning of both the Bank and the Tribunal.” Under the terms of Article II the specified time limits may be disregarded only when the Tribunal finds that exceptional circumstances exist. (*See e.g. Agerschou*, Decision No. 114 [1992], para. 42; *Yousufzi*, Decision No. 151 [1996], paras. 25-26.)

56. At the same time, the Tribunal has recognized in the past that health issues may constitute exceptional circumstances justifying assumption of jurisdiction over an application that has not been filed in a timely manner if they are of a serious nature and are supported by reliable contemporaneous proof. (*See e.g. Mustafa*, Decision No. 195 [1998], paras. 6-10 and *Mahmoudi (No. 3)*, Decision No. 236 [2000], para. 27.)

57. In the current case, the Tribunal notes that the Applicant has shown the existence of medical conditions during both the time when she first received the PRS documents in July 2014 as well as when she asked for an extension of time to file her Application with the Tribunal in November 2014.

58. First, the Tribunal notes that of record are minutes of meetings that she had with a Psychiatrist/Counselor at HSD which show that during July, August, and September 2014, the Applicant was overwhelmed, exhausted, stressed out, and emotional. This Counselor had referred the Applicant to the HSD Chair. Notes by the HSD Chair from a meeting with the Applicant on 21 August 2014 show that the Applicant had described the fact that she was “exhausted” and “burned out” and that he had apparently recommended that she take sick leave and apply for STD until her retirement date. These contemporaneous notes by HSD experts corroborate that the Applicant’s health issues, as described by her in July and August 2014 and around the time that she received the PRS documents, existed and that they were apparently serious enough for a recommendation for sick leave and application for STD to be made.

59. Second, the Tribunal notes that the record includes a note dated 10 December 2014 from the Applicant’s psychiatrist certifying that the Applicant was unable to work due to medical illness and recommending that she stop working and take leave for disability. As discussed further below, the Applicant undertook an Independent Medical Evaluation thereafter and was indeed approved

for Short Term Disability with a start date of 10 December 2014, as the first day of absence. This date was only a few days after she had requested an extension from the Tribunal's Secretariat on 24 November 2014 to file her Application.

60. Third, of record are two notes from the Applicant's psychiatrist: one of 9 January 2015 discussing the Applicant's increased stress and anxiety affecting her overall mental and physical state "in 2013 and the months leading to October 2013" and another of 16 December 2015 attesting to her "decompensated" psychological state particularly "since she was told ... to stay home and hand over her work program." These documents are not contemporaneous to her medical condition and therefore the Tribunal cannot attribute to them significant weight; they can only be viewed as reliable to the extent that they corroborate that the medical condition described in the contemporaneous documents indeed existed.

61. The contemporaneous records listed further above show that the Applicant's mental state during the months that she received the PRS documents up until the time she requested an extension to file her Application was such as to justify her misconception as to the starting date of the time limit to file her Application and the final day as to which she could request an extension to file such Application in November 2014. The Tribunal is satisfied that the delay in filing in relation to the challenge of the OPE and SRI claims was not attributed to a lax handling on her part of the time limits, but that indeed exceptional circumstances existed which excused such late filing. The Tribunal will examine this claim on the merits further below.

62. In this respect, and as the Applicant has raised the claim that staff are not warned of their rights within the grievance system in the letter informing them of the management's decision on the PRS recommendations, and particularly of the 120-day time limit to file an application, the Tribunal would like to recall its jurisprudence according to which "the Bank has no obligation to apprise an applicant of his or her rights or to offer him or her any assistance in contesting the decision to terminate his or her employment." (*See Dey*, Decision No. 279 [2002], para. 17; and also *Islam*, Decision No 280 [2002], para. 14.) The Tribunal however has also observed in its jurisprudence and finds applicable in the current case as well its ruling in *Dey*, para. 18 and *Islam*, para. 18 that:

Although there is no obligation on the part of the Bank to notify staff members affected by adverse employment decisions of their rights within the grievance system, it is, however, desirable that information be contemporaneously provided concerning various available options and the accompanying time limits. This is particularly true of staff members employed in Country Offices.

Preliminary Objection to the validity of the ISRP claim

63. The Bank has raised an objection to the admissibility of the Applicant's challenge to the ISRP agreement because it was not filed in a timely manner, i.e., more than 120 days after the date it was signed.

64. The Bank states that the Applicant signed the ISRP agreement on 16 January 2014 agreeing that she would be separated from the Bank on 16 January 2015. The Bank adds that the Applicant benefitted from the agreement by being transferred to a different unit doing a different type of work than what she had been doing at the Secretariat and that the Bank benefitted from the Applicant's agreement to her exit. The Bank also adds that legal obligations were created on both sides on 16 January 2014. The Bank asserts that it performed its obligations with the Applicant's knowledge and approval; the agreement, therefore, was consummated on 16 January 2014, with the statute of limitations starting to run at that point in time notwithstanding the Applicant's subsequent intent to renege on it. The Bank points out that the ISRP agreement was self-executing and that no further action was necessary to trigger the Applicant's cause of action. The Bank further claims that the Applicant did not prove her claim of diminished mental capacity or undue psychological pressure at the time she signed the ISRP agreement.

65. In her Application, the Applicant contests "the decision of the Bank to enforce the ISRP agreement according to which the Applicant would retire on 16 January 2015." Consequently, the Applicant states that the time to contest the ISRP agreement started running in January 2015 when she tried to rescind the terms of the agreement and was told by Mr. L on 12 January 2015 that the agreement would be enforced and her employment would terminate as had been previously agreed to on 15 January 2015. She therefore filed her Application challenging the Bank's decision to enforce the agreement in a timely manner on 20 January 2015. The Applicant claims, among other things, that, contrary to what the Bank states, the ISRP agreement was not "consummated" on 16

January 2014. It was signed on that date and performance, which was mutual, was prospective. The Applicant has challenged the validity of the agreement on a number of grounds.

66. The Tribunal recalls its well-established as well as recent jurisprudence, according to which the *dies a quo* for challenging the validity of a Memorandum of Understanding, a settlement agreement, or separation agreement is the date that the agreement was signed. (*DE*, Decision No. 527 [2015], paras 31-33.) Additionally, the Tribunal has found that to the extent that such agreement provides for the termination of the employment of the staff member the *dies a quo* for challenging such termination is again the date of the signing of such agreement because it is through such agreement that an applicant is put on notice of the impending termination (*See DE*, at paras. 40-41).

67. The Tribunal notes that a review of the language of the ISRP agreement shows that it stated in pertinent part:

Your assignment in the ISRP will be for a period of 12 months until January 15, 2015, at which time your retirement from the World Bank, as evidenced by your signature below, will become effective. You may advance the effective date of your retirement to an earlier date with at least 30 days notice, per Staff Rule 7.01, Section 2.

68. The agreement also stated that:

You may also, at any time during and before the end of your ISRP assignment, seek and accept reassignment to a Term or Open-Ended position in the Bank Group outside of ISRP. [...] If you are reassigned out of ISRP, the terms and conditions of this ISRP assignment will lapse.

69. The Applicant indeed signed at the bottom of the agreement clearly stating that: “I, the undersigned, accept the terms and conditions of this memorandum and hereby retire from the World Bank effective January 16, 2015.”

70. She also acknowledged her understanding that, “this decision is irrevocable, except if I advance my retirement date in accordance with Staff Rule 7.01, Section 2, or if I am offered, accept

and transfer to an Open-Ended or Term position in the Bank Group outside of ISRP on or before January 15, 2015.”

71. The Tribunal notes that the clear language of the terms of the agreement does not support the Applicant’s claims that “[t]he claimed performance from the Applicant on the agreement was, as stated, due on 16 January 2015 through voluntary retirement.” After the signing of the agreement, the Applicant’s separation on the ground of retirement was no longer voluntary but, indeed, mandatory with effect on a particular date, i.e., 16 January 2015, provided that certain conditions were met, i.e., the Applicant did not elect to retire sooner than the date indicated in the agreement and that she did not seek and accept reassignment outside of IEG during and before the end of her ISRP assignment. It was only in that latter case that the terms and conditions of the ISRP agreement would lapse. The agreement was therefore self-executing and no further action was needed and certainly not, as the Applicant alleges, an additional confirmation by Mr. L that the agreement would be enforced. It was in effect a form of a mutually agreed separation agreement according to which the Applicant agreed to separate on the ground of retirement from the employ of the Bank in exchange for working in IEG for one additional year. It is clear therefore that, if the Applicant disagreed with the terms of the agreement and particularly her separation and questioned its validity, she had 120 days to challenge it from the time of its signature. The Applicant did not do so.

72. The next question to be asked then would be whether there were exceptional circumstances or other reasons extant that would excuse the filing of a challenge to the validity of the agreement beyond 120 days following its signing by the Applicant on 16 January 2014. The Applicant has challenged the validity of the agreement on the basis of a number of reasons and especially on the ground of the Applicant’s alleged incapacity at the relevant time to make decisions about her future. She adds that it was obvious that the document she signed was an agreement to be reassigned to another department for specific and defined work purposes albeit with a condition that she never assented to because she did not understand its implications. She further suggests that her mental state at the time might have been the reason for not challenging the validity of the agreement in a timely manner on the grounds that she now presents in her Application: that she was “corralled” into signing an agreement where the termination clause was added at the last

minute; that she was mobbed in an effort to accept retirement; that the contract was coercive in itself; that this was a case of unequal bargaining powers; and that the contract was unconscionable.

73. The Tribunal recalls its jurisprudence above according to which for health issues to constitute exceptional circumstances they must be of a serious nature and must be supported by contemporaneous medical records that are reliable. (*See e.g. Mustafa*, Decision No. 195 [1998], paras. 6-10; and *Mahmoudi (No. 3)*, Decision No. 236 [2000], para. 27.) The only records that the Applicant provides to show the state of her mental health when signing the agreement are medical opinions by her psychiatrist. These, however, were not issued at the time that she signed the agreement. Indeed the agreement was signed on 16 January 2014, but the medical opinions were issued much later on 9 January and 16 December 2015 and cannot serve to verify her state of mind at the time that she signed the agreement. On the contrary, contemporaneous communications of record at the pertinent time show that the Applicant was fully aware that she was going to retire at the end of her ISRP assignment and that she was very appreciative of the assignment. These communications included the following:

- (i) An e-mail to Mr. L of 23 September 2013, thanking him for their meeting and stating that she “remain[ed] most interested in an ISRP should one work out”;
- (ii) An e-mail to Mr. L dated 1 October 2013 in which, after thanking him for their meeting of 20 September 2013 and for introducing her to other contacts in HR, she stated that she was “earnestly searching for an ISRP assignment in the hope of being able to contribute to the Bank Group’s work ‘for a little while longer,’” and stating that she was “crossing [her] fingers that [she] can make it happen”;
- (iii) An e-mail to Mr. HB dated 11 November 2013 according to which the Applicant appeared to be eagerly seeking an assignment with IEG by stating that she “would like very much to support and contribute to IEG’s program via an ISRP assignment (until Dec 2014, if possible)” and eloquently presenting her very long and relevant experience in the Bank and her recent tasks which would contribute to her success in the new position.

74. Furthermore in her comments on her 2013-2014 OPE which the Applicant signed on 5 September 2014, the Applicant stated:

I am deeply honored to have qualified as a candidate in HR's Institutional Staff Resources Program (ISRP), which made this final assignment possible. It has been and continues to be an invaluable experience - if only I could have joined five or more years earlier! IEGCS/IEG staff is stimulating and warm, an extraordinary group of professionals setting the highest of standards. What I observed in January still holds, "I have died and gone to heaven"! An excited response that nevertheless expresses how much it meant to me to have had this invaluable experience in which to end my fulfilling 34-year World Bank career!; They welcomed me with open arms and minds, so much so that I cannot but be reminded continuously what a difference it has made in my life to have had the opportunity to work in such an enriching environment *during this final year at the Bank*. I am grateful to all who have made this wonderful opportunity possible; Thank you all. (Emphasis added.)

75. In addition, the notes of the HSD Counselor in her meetings with the Applicant show that the Applicant had discussed on numerous occasions her agreement and intent to leave the Bank on 15 January 2015. For example, in the meeting on 7 July 2014, the Counselor's notes reflect that the Applicant acknowledged that: "[s]he agreed to sign for a special assignment for 12 months until January 15, [2015] and leave the Bank if not hired; she has not been hired and assumes that it is related to the alleged harassment from her superior. She has been 33 years and is eligible for her pension according to the [rule] of 85. Feels sad to leave the Bank, but can come back after a cooling period." On 15 July 2014, the Applicant again expressed her desire to "complete some tasks before leaving [the Bank.]" On 25 August 2014, the minutes of the meeting again reflect her understanding that she has "signed to leave the Bank at the end of the contract."

76. The Tribunal notes that all of the above communications show that at the time before and some time after signing the agreement the Applicant was well aware that the ISRP assignment would last for one year, after which she would have to retire and that her year in IEG would be her "final year" at the Bank and that she was grateful to have this assignment. Her enthusiastic communications at the time of signing the agreement show no confusion or hesitation or uncertainty much less sadness or stress regarding her signing of the agreement. Nor are there any additional contemporaneous communications showing that she was unable at the time to understand what she was signing.

77. Furthermore, the Applicant's claim of diminished capacity is undermined by the Applicant's other actions during the relevant time period (September 2013-January 2014) which

show that she had actively participated in the OPE discussions and engaged in discussions with the Staff Association and the Ombuds Office, seeking advice on how to handle her performance review.

78. The Tribunal finds that the Applicant has not proved the existence of any exceptional circumstances on account of medical problems or other reasons that would have prevented her from challenging the validity of the agreement in a timely manner. The Applicant therefore should have challenged the validity of the agreement and the termination of her employment indicated therein within 120 days after her signing of the agreement. It is also during that time that the Applicant should have raised in a timely manner any claims that would justify the annulment of the agreement, such as that she was trapped into signing it as the termination clause was added at the last minute; that the contract was coercive in itself; that this was a case of unequal bargaining powers; and that the contract was unconscionable. She therefore cannot raise these claims now. Accordingly, her challenge to the validity of the ISRP agreement is inadmissible.

Alleged breach of ISRP agreement

79. The Applicant also claims that it is not just the validity of the agreement that is at issue, it is also whether the Bank observed its obligations under the agreement. The Applicant claims that, in fact, the Bank breached the agreement by not giving her a full year of work, by leading her into a dead end and denying her any opportunity to locate an alternative assignment, by not assisting her to find a new assignment, and instead attempting to free up a position by shunting her into disability despite the fact she was 100% budgeted.

80. Regarding the admissibility of this claim, the Tribunal notes that pursuant to Staff Rule 9.03, paragraph 6.04(e), the Applicant elected to bypass the peer review process and filed her Application concerning the matter directly with the Tribunal. The Tribunal has found in its jurisprudence that the *dies a quo* for challenging an alleged non-compliance with the terms of the agreement is the date of the discovery of the alleged non-compliance. (*See e.g. Hitch*, Decision No. 344 [2005], para. 35; *Malik*, Decision No. 333 [2005], paras. 18, 21.)

81. The Applicant claims that the Bank breached the agreement when the Applicant was asked by her supervisor on 12 September 2014 to leave the office and relax for the remainder of the ISRP assignment. The Tribunal notes that as the discovery of the alleged breach by the Applicant took place on 12 September 2014 and thereafter the Applicant filed a request for extension to file her Application on 24 November 2014 and her Application on 20 January 2015, her claim is admissible and the Tribunal will review it on the merits.

Preliminary Objection as to the Applicant's Short Term Disability claims

82. Regarding the Applicant's disability claims, the Bank states that to the extent that the Applicant is challenging how the determination of her disability has been made or how the STD benefits are being administered, this claim is not yet ripe for the Tribunal's review as the Applicant has not exhausted internal remedies as provided in Staff Rule 6.22 "Disability Insurance Program."

83. The Tribunal notes, however, that, contrary to the Bank's claims, the Applicant is not challenging the manner in which the determination of her Short Term Disability was made or the administration of the STD benefits to her. Here, rather, the Applicant contests the termination of her employment under the ISRP. She claims that once she was approved for STD under Staff Rule 6.22 with a starting date preceding the termination of her employment and while utilizing her accumulated sick leave, she was no longer in retirement and that, at the very least, the ISRP was suspended until she could be found fit for duty and returned to service even for one day and then be separated on medical or other legitimate grounds.

84. The Tribunal finds that to the extent that her disability claim is related to the challenge of the termination of her employment, the Applicant can elect, pursuant to Staff Rule 9.03, paragraph 6.03, to bypass the peer review process and file an application concerning the matter directly with the Tribunal. The Applicant's claim in this respect is admissible and is examined on the merits further below.

Merits

Scope of Tribunal's review of decisions on performance evaluation

85. The Tribunal stated in *Malekpour*, Decision No. 322 [2004], para. 15, that:

The evaluation of staff performance is an essentially discretionary act entailing the exercise of judgment by management, which is presumed to possess the requisite familiarity with the work of all departmental staff members and to have made many comparative qualitative judgments. ... The task of the Tribunal is not to “substitute its own judgment for that of the management” (*Polak*, Decision No. 17 [1984], para. 43) ... The proper task of the Tribunal is, rather, to determine whether or not management’s acts and decisions in connection therewith constituted, or were attended by, an abuse of discretion.

86. The Tribunal in *Desthuis-Francis*, Decision No. 315 [2004], para. 23, held that [the Respondent must be] able to adduce ... a reasonable and objective basis for ... adverse judgment on a staff member’s performance. ... The Tribunal considers that failure on the part of the Respondent to submit a reasonable basis for adverse evaluation and performance ratings is evidence of arbitrariness in the making of such an evaluation and rating. Lack of a demonstrable basis commonly means that the discretionary act was done capriciously and arbitrarily.

87. Furthermore, the Tribunal has held that it will also examine whether a performance evaluation dealt with all relevant and significant facts and balanced positive and negative factors in a manner fair to the staff member. “Positive aspects need to be given weight, and the weight given to factors must not be arbitrary or manifestly unreasonable.” (*See Lysy*, Decision No. 211 [1999], para. 68 citing *Romain (No. 2)*, Decision No. 164 [1997], paras. 19 and 20.)

The Applicant’s OPE

88. The Tribunal will review the decision on the Applicant’s performance in the context of the above principles.

89. The record shows that during the 2012-13 OPE period, the Applicant had two supervisors. Her former supervisor, Ms. M, from July 2012 until January 2013 and the Director of SECPO thereafter. The Director of SECPO had decided to align the Applicant’s duties and work program to that of other GE Level Analysts in the unit. In March 2013, he had a discussion with the Applicant on her work program and Results Agreement. This latter document formed the basis for her 2013 OPE.

90. In her 2013 OPE, the Director of SECPO rated the Applicant “Fully Successful” for three work program results, namely “Preparing High Quality Board records which are factually correct

and reflect Board deliberations accurately”; “Supporting Efficient Meetings and Effective Decision-Making”; and “Contributing to High Quality Board Documentation” and “Partially Successful” for one work program result, “Ensuring Best Practices, Simplifying, Modernizing.”

91. In the Behavioral Assessment, the Director of SECPO rated the Applicant “Fully Successful” for “Client Orientation” and “Drive for Results” and “Partially Successful” for “Teamwork” and “Learning and Knowledge Sharing.” The Director of SECPO states that he based his ratings in the Applicant’s OPE as well as his Overall Comments on his own assessment of the Applicant’s performance through his interactions with her and review of her work during the period that he was her immediate supervisor as well as on oral and written feedback that he received from the Applicant’s colleagues during the year, and oral feedback that he sought during the OPE process. As the record shows, the Director of SECPO did not take into account the feedback provided by the designated feedback providers in the Applicant’s OPE before setting the ratings and before writing his comments on her OPE because the Applicant did not submit her OPE until much later during the OPE process and after the Departmental and VPU Management Review meetings had taken place. The designated feedback providers did not provide feedback in the Applicant’s OPE until after she had the OPE discussion with him on 1 October 2013. It was only during the last week of October that the Director of SECPO received some feedback from the designated feedback providers in the Applicant’s OPE. According to the Director of SECPO, this feedback did not change his mind regarding the evaluation of the Applicant’s performance.

92. This formal feedback in the Applicant’s OPE was provided to the Tribunal during these proceedings. Of record is also feedback given by two colleagues of the Applicant in March 2013 in relation to the Applicant’s performance.

93. The Tribunal notes first that the feedback given by the designated feedback providers in the Applicant’s OPE is positive. Indeed it appears to support the “Fully Successful” ratings given to the Applicant regarding three of her tasks in the Results Assessment and the two “Fully Successful” ratings given to her in relation to the two Core Competencies of “Client Orientation” and “Drive for Results.” Although the feedback providers have not provided feedback with regard to all the tasks and competencies, the feedback given would also seem to support a “Fully

Successful” rating in relation to the other two competencies of “Teamwork” and “Learning and Knowledge Sharing” as well as the task of “Ensuring Best Practices, Simplifying, Modernizing” as it relates to the Applicant’s training activities on the overview of the Board Minutes production process.

94. Of record however is also feedback from two of the Applicant’s colleagues in SECPO given in March 2013 which, although very positive in certain aspects, appears to highlight the fact that the Applicant might have had issues with her transitioning in her new duties, as well as behavioral issues particularly regarding her communication and judgment skills that might have affected her ratings in “Teamwork” as well as in “Learning and Knowledge Sharing,” and the rating for the task of “Ensuring Best Practices, Simplifying, Modernizing.” One feedback provider mentioned that while the Applicant was “very diligent and has worked hard to familiarize herself with the policies and procedures required to review the documents,” in her “assessment of the documents she often focuses in great detail on small, non-essential points while missing the broader context of what we are trying to achieve by the reviews.” It was also mentioned that “[i]n addition, her research could be more thorough; she seems to rely on past practice and may not be as informed about current procedural updates.” This it was stated “can, and has, caused confusion and frustration with the client about how to proceed, as they seem to feel that they are receiving mixed messages from the Secretariat.” Comments regarding the Applicant’s behavior included her being “very defensive,” “argumentative,” “disruptive” in meetings. It was also mentioned that “[i]t is very difficult to have a constructive discussion with her, as she frequently changes the subject in mid-sentence and I frequently can’t follow her reasoning or understand her meaning.”

95. The other feedback provider while praising the Applicant’s “[diligence and promptness] in the production of minutes” and her “meticulousness to her review of ... documents” and “careful attention to details,” pointed as an area of growth “her capacity to make judgments regarding what is a core issue and what is peripheral.” It was mentioned that her inability to focus on the “core issues” could impact “client service offering” as clients were “asked to engage [in] minor issues in less than clear language.” With regard to the Applicant’s interpersonal skills, this feedback provider mentioned that an issue of proper judgment on her part was evident. The feedback mentioned that the Applicant “has not always been able to gauge accurately people’s behavior,

with the result that she perceives people's behavior in worse terms than it is," and "her perception of people's behavior to her" could leave her "isolated by colleagues who avoid her."

96. This feedback by the two feedback providers seems to be consistent with the comments that the Director of SECPO had given the Applicant in e-mails during February and March 2013. In e-mails to the Applicant during that period, the Director of SECPO had stressed the need for her to maintain cooperative relations with others so they successfully provide training and guidance to her; contributing to a team environment; the need to exercise better judgment with regard to the area of communications, in choosing with whom to communicate; and the advice not to send mass e-mails. He had pointed out in these e-mails that she asked overly detailed, technical questions of outside counterparts that were outside her purview thus creating additional work for everyone involved. He had also informed the Applicant that when he received complaints from the outside counterparts and pointed these issues out to her, the Applicant would become emotional and defensive, making feedback difficult.

97. These concerns of the Applicant's supervisor were also reflected in his Overall Comments in the Applicant's OPE as areas for improvement of her performance in the future. The remaining areas of his Overall Comments discussed her work program in the beginning of the OPE period and the change in the Applicant's work program as SECPO had undertaken "a thorough review of distribution of tasks in the unit and also simplified the preparation of Minutes." In his Overall Comments, the Director of SECPO had also described his appreciation of the Applicant's "hard work and efforts in helping the unit where she could, for example, the training effort to support new colleagues on the Minutes." He also acknowledged the period of the Applicant's "transitioning to the new work program."

98. The Tribunal notes that the negative feedback of record from two of the Applicant's colleagues on her performance along with the Director of SECPO's view of the areas in which her performance needed improvement appear to balance the other more positive formal feedback in the Applicant's OPE and provide the basis for the three "Partially Successful" ratings. The Tribunal also notes that the final Overall Comments of the Director of SECPO as modified after the OPE discussion are supported by the record before the Tribunal.

99. The Applicant also has made the argument that the Director of SECPO was the supervisor of the Applicant for only part of the year and that therefore he should have sought the comments from Ms. M who was the Applicant's supervisor for the biggest part of the year.

100. In this respect, Staff Rule 5.03 "Performance Management Process" prescribes at 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.

101. The Tribunal found in *Romain (No. 2)*, Decision No. 164 [1997], para. 19 that

it is the obligation of the Respondent, when assessing the performance of staff members for a given period of review, to take into account all relevant and significant facts that existed for that period of review.

102. The Tribunal concluded in that case that the failure of the Bank to take into account a relevant fact which goes to the root of the assessment of the applicant constituted an abuse of discretion.

103. In this case, even though a supplemental evaluation was not sought, the Applicant had named Ms. M as one of the feedback providers in her OPE, as the Director of SECPO had so requested in his e-mail to his staff announcing the OPE process. Although other feedback providers designated in the Applicant's OPE provided their feedback even at a later stage, the feedback from Ms. M appears nowhere in the record. With the exception of the contentions of the parties on the matter, the only reference to her evaluation of the Applicant's performance appears in the PRS report. There, Ms. M had testified that "while [the Applicant] is eager to share information and has an inquisitive mind, her thoughts 'go in many directions' and she can share too much knowledge for the Board Operations Officers to absorb in a short time frame."

104. The Tribunal notes that Ms. M's evaluation of the Applicant's performance during the first six months of the period under review was a significant and relevant factor which the Director of

SECPO should have taken into account when evaluating the Applicant. Since she did not provide her written evaluation as a feedback provider in the OPE, despite the Applicant designating her as such, the Director of SECPO could have made more efforts to seek such evaluation in writing from her at the time he received the feedback from the other designated feedback providers or, even earlier in the process. This is so particularly as the Director knew that Ms. M was not just a colleague of the Applicant providing feedback in the OPE but the manager who had supervised the Applicant for half of the year and that for this reason he had asked the Applicant to include her as a feedback provider in the OPE. At the same time, the Tribunal notes that Ms. M was certainly expected to provide such evaluation, particularly as she had been designated as a feedback provider in the Applicant's OPE and as she was the Applicant's supervisor for such a long period of time during the period under review.

105. Even though the requirement of getting a written assessment from Ms. M in the Applicant's OPE was not respected in this case, the Tribunal finds that this did not affect the ratings and comments in the Applicant's OPE. In fact, all the duties that the Applicant had been performing under Ms. M which were also described in her first three tasks in her OPE were rated as "Fully Successful." Notably, the "Partially Successful" rating regarding the competence of "Learning and Knowledge Sharing" may also reflect Ms. M's comment before PRS that the Applicant "can share too much knowledge for the Board Operations Officers to absorb in a short time frame." The Applicant's previous work under Ms. M is also recognized in the Overall Comments of the Director of SECPO in the Applicant's OPE. Therefore the Tribunal notes that even though it would have been preferable for Ms. M's evaluation to have been put in writing in the OPE, not reflecting her views in this manner did not ultimately affect the evaluation of the Applicant's performance and the Applicant was thus not seriously prejudiced.

106. The Applicant has made an additional claim that because the Director of SECPO could guess that the Applicant had made negative comments regarding him in his "360 evaluation," he retaliated against her when preparing her 2013 OPE. Taking into account its previous jurisprudence, the Tribunal does not find that the Applicant has made a *prima facie* case that there was a direct link between the Applicant's alleged negative comments in the Director of SECPO's

“360 evaluation” and the Applicant’s ratings and comments in her 2013 OPE. (*BI*, Decision No. 439 [2010], paras. 47-48; *Malekpour*, para. 29; *AH*, Decision No. 401 [2009], para. 36.)

107. In sum, the ratings and comments in the Applicant’s OPE have been shown to be based on the views of the feedback providers and her manager’s personal observations all of which are supported by the record. Even though the Director of SECPO could have made more efforts to seek feedback from the Applicant’s feedback providers designated in her OPE in writing at an earlier stage in the process, including a written assessment by Ms. M, their views on the Applicant’s performance were in the end reflected in the OPE. There is evidence that the Director of SECPO balanced the negative with the positive factors when setting the ratings, something that was also reflected in his shorter Overall Comments. On the basis of the above analysis, the Tribunal finds that the Applicant’s performance evaluation had a reasonable and demonstrable basis and balanced her positive contributions with her weaknesses.

The OPE process

108. The Applicant claims, among other things, that the Director of SECPO did not give her constructive feedback throughout the year to help her improve her performance. She also adds that the Director of SECPO short-circuited a proper performance evaluation process by failing to launch it through a performance discussion with the Applicant in which the parties would have been able to set out the parameters for the review and agree on feedback to be provided.

109. The Bank states that the Director of SECPO endeavored to ensure the OPE process had been followed vis-à-vis the Applicant, despite the Applicant’s blatant disregard for the imposed institutional timelines and the OPE process established by SEC for all its staff.

110. Staff Rule 5.03 provides at paragraph 2.02(c):

The Manager or Designated Supervisor, in consultation with the staff member, shall establish in writing the development priorities for and the results to be achieved by the staff member during the upcoming review period.

The Tribunal has often noted the Bank’s discretion to decide upon a staff member’s work program and its obligation to guide actively staff members in the design of a clear work program. In the

current case, while the Applicant had a work program for her FY13 OPE when Ms. M was her supervisor, the Applicant's work program changed when the Director of SECPO became her supervisor and decided to realign her duties with those of other GE Level Analysts in the unit. There is evidence that a Results Agreement was finalized in March 2013 and that the Director of SECPO and the Applicant discussed that Results Agreement. This Results Agreement set the basis for her 2013 OPE which included her realigned tasks.

111. Regarding the feedback received on performance criticisms, the Tribunal has stressed in many cases the importance of respecting the requirements of due process in relation to evaluation of performance.

112. In *K. Singh*, Decision No. 188 [1998] the Tribunal held in para. 21:

Two basic guarantees are essential to the observance of due process in this connection. First, the staff member must be given adequate warning about criticism of his performance or any deficiencies in his work that might result in an adverse decision being ultimately reached. Second the staff member must be given adequate opportunities to defend himself.

113. Furthermore, the Tribunal held in *Prasad*, Decision No. 338 [2005], paras. 25 and 30:

[D]iscussion of performance does not replace the need for ongoing feedback throughout the year in question, which should be provided so that the staff member "should be able to anticipate the nature of this year-end discussion and resultant ratings on the OPE."

[T]he obligation [is on] the Respondent to fully respect due process rights and conduct a fair and reasonable process of performance evaluation and accordingly to provide an opportunity to correct the mistakes that any staff member has made.

114. As the Tribunal has also found, informal feedback sessions should serve to enable a staff member to anticipate the nature of the year-end formal discussion and resultant ratings on the OPE. In this case it is well documented that the Applicant had several conversations with her manager either through meetings or through e-mail exchanges where it is shown that her manager raised with her complaints about her performance either from clients or from her peers as soon as he received them and advised her on the manner that she could address them. For example, there is

evidence of e-mails from the Director of SECPO dated 24 February, 12, 19, and 21 March 2013 as well as of the mid-year review of 25 January 2013 and of a meeting of 5 May 2013.

115. Even though the Applicant was unhappy with the way the Director of SECPO provided feedback, and communications of criticism of her performance, the Tribunal notes that she had the opportunity to present her views, defend herself, and express her disagreement to her manager's feedback during these meetings and exchange of communications. These communications provided sufficient indication to her as to the areas where her performance needed to improve in the immediate future.

116. The warnings related to the Applicant's execution of her realigned tasks during the transition period, the exercise of better judgment and better communications in her work with her colleagues and clients as well as in her interactions with them when sharing her knowledge. Notably, it was in relation to these areas of performance that the Applicant received the "Partially Successful" ratings in her OPE and it was these areas that were mentioned in her Supervisor's Overall Comments as areas where the Applicant was expected to show improvement during the following year.

117. The Tribunal therefore finds that the Applicant was provided with ongoing feedback on criticisms of certain areas of her performance, an opportunity to respond to them as well as to improve her performance in these areas in the remainder of the year.

118. The Tribunal, however, finds that the OPE process was not completely followed thereafter, as discussed below.

119. The timeline of events with respect to the OPE process has been presented further above. A review of this timeline shows that, while the steps of the OPE process were followed, they were not followed in a timely manner and this would have affected the Applicant's due process rights. The ultimate question however is to what extent the delays in the process were of her own making.

120. Indeed, the record shows that it was the Applicant who failed to initiate the OPE process by sending her draft OPE to her manager and designating feedback providers in a timely manner before a discussion with him took place.

121. Staff Rule 5.03, paragraph 2.01(a) states in pertinent part:

At least once in a twelve month period, the Manager or Designated Supervisor and the staff member shall meet and discuss the staff member's performance, achievements, strengths, areas for improvement, and future development needs.

122. The Tribunal has interpreted this Rule and has recognized that the OPE should be a process marked by "dialogue" (*Yoon (No. 6 and No. 7)*, Decision No. 390 [2009], para. 92); that "[d]iscussions of a general nature, or those held before the actual OPE process" are not sufficient to meet the requirements of the Staff Rules (*Prasad*, Decision No. 338 [2005], para. 27); and has distinguished between "informal feedback sessions" during the year and "the year-end formal discussion." (*Yoon (No. 5)*, Decision No. 332 [2005], para. 67.) (*See also Mpoy-Kamulayi (No. 4)*, Decision No. 462 [2012], para. 46.)

123. In this case, the discussions with the Director of SECPO earlier in the year mentioned above would not have been sufficient to replace the performance discussion required by Staff Rule 5.03. This end-of-year discussion would have been important because it would have given the Applicant the opportunity to properly defend herself or to explain issues relevant to her appraisal during the OPE stage and before OPE and SRI ratings were formally discussed. However, for this objective to have been achieved the discussion should have taken place in a timely manner. As the Tribunal notes, this discussion took place but at a much later stage and after the Departmental and VPU Management Review meetings had taken place. The record shows that the Director of SECPO participated in the Departmental and VPU Management Review meetings in August 2013 where the OPE and SRI ratings for staff were discussed without having a discussion on the Applicant's performance with her, first, during which he would have announced his preliminary ratings on the Applicant's performance and without the Applicant having had the opportunity to present her views on his assessment and defend herself.

124. Normally, this would have been a significant flaw in the process because her due process rights would have been violated. In this case however the Tribunal notes that it was the Applicant who created the delay for this discussion to take place. The Tribunal notes that, as earlier noted in its jurisprudence regarding the OPE discussion, the key issue is “whether the staff member has been given the opportunity to defend himself against the criticisms of his superiors and has been granted fair treatment.” (*Mpoy-Kamulayi (No. 4)*, Decision No. 462 [2012], para. 54.)

125. The record shows that the Applicant was indeed given a number of opportunities as the Director of SECPO sent her several reminders on 13 June, 24 June, 19 July, and 12 August 2013 asking the Applicant to submit her draft OPE and to list the feedback providers. In addition, the Applicant would have been expected to know through the Vice President’s e-mail of 12 June 2013 that, following her initiation of the OPE process and the designation of the feedback providers on her part, the manager would review the staff member’s and the feedback providers’ inputs and thereafter the discussion would follow sometime in July in preparation for the Departmental and VPU Management Review meetings.

126. The Applicant however did not take advantage of these opportunities to initiate the process despite the reminders by the Director of SECPO. She has explained that this was due to her heavy workload. While this may be true, the Tribunal notes that there is a reason that time limits are set and this is in order to respect proper process. The Applicant should not have disregarded the established procedures. As the Tribunal has found in the past, the Bank would be ungovernable if every staff member decided which rules to comply with and which to ignore. (*See Yoon (No. 6 and No. 7)*, Decision No. 390 [2009], para. 78; *AD*, Decision No. 388 [2008], para. 61; and *K*, Decision No. 352 [2006], para. 40.)

127. In addition, an e-mail sent from the Applicant to her HR Counselor on 13 August 2013 shows that the Director of SECPO had asked his assistant to set up “one-on-one” OPE discussions that week and the following week. The Applicant asked the HR Counselor whether it would be possible to delay the discussion until 9 September 2013 when she would return from annual leave and when the Staff Association representative who would also attend the meeting would have

returned from vacation. She had also stated that since she had not submitted her OPE yet, “requesting to wait until September [was] not unreasonable.”

128. This communication from the Applicant shows that she was treating the requirements for a timely submission of the OPEs and of the annual discussion in a rather casual manner.

129. Even though one could argue that the Director of SECPO could have been more persistent in getting the Applicant to initiate her OPE and receive the formal feedback at an earlier time and also to have a discussion with her, even through a telephone conversation, it would still have been up to her to initiate the process and to respond promptly to his written notices and have the OPE process steps completed in a timely manner.

130. The Tribunal finds that even though the Applicant was given the opportunity to have the annual OPE discussion, she failed to take this opportunity in a timely manner. The adverse consequences of her failure can be attributed to her. As a result, the OPE and SRI ratings were discussed at the Departmental and VPU Management Review Team meetings without the required OPE discussion having taken place first.

131. It is also notable that because of the Applicant’s failure to send her draft OPE with the designated feedback providers on time, the Applicant’s supervisor was unable not only to take the Applicant’s response to her performance assessment into consideration when setting the preliminary ratings but also the feedback by the providers designated in her OPE and balance it with any other feedback he had already received at the time or to discuss such feedback with her and let her respond to it. While he claims he approached some feedback providers on the basis of what he could gather from her Results Agreement, it is not clear if and how this was done. In any case, it was the Applicant’s obligation to have designated the feedback providers in her OPE at a much earlier time.

132. Subsequently and before the OPE process had closed completely, the record shows that the Applicant did have an opportunity to address the Director of SECPO’s comments and ratings in her OPE and she also had an opportunity to discuss the evaluation of her performance and present

her arguments in the presence of third parties when the annual OPE discussion took place. Even though the Director of SECPO did not change the ratings in her OPE he did amend his comments and shortened them. The Tribunal notes that the official record of the OPE included only the shorter comments from both the Director of SECPO and the Applicant.

133. In the end, the feedback providers did provide feedback on the Applicant's OPE before the OPE process had been finalized. The Director of SECPO did not change his OPE ratings and it has been discussed above that his ratings and comments did reflect their contribution to her OPE. Therefore lack of timely feedback mainly affected the opportunity to take their views into account before setting the preliminary ratings which had an effect on the SRI ratings. Again, any delay in the provision of such comments was attributed to the Applicant's failure to initiate the OPE process in time.

134. In this respect, the Applicant claims another violation of procedure because the Director of SECPO who was the immediate supervisor of the Applicant also assumed the role of the Reviewing Manager, in violation of Staff Rule 5.03.

135. As Staff Rule 5.03, paragraph 2.02(g) prescribes, "[t]he Reviewing Manager shall review and sign the performance evaluation and any supplemental evaluations."

136. The Tribunal had the opportunity to interpret this Staff Rule in its jurisprudence. As the Tribunal stated in *Yoon (No. 5)*, Decision No. 332 [2005], para. 65, and confirmed in *BY*, Decision No. 471 [2013], para. 30, "under both the Staff Rule and the OPE Guidelines the role of the Reviewing Manager is simply to review the performance evaluation of a staff member and not to establish ratings or to participate in the formal OPE discussion." In fact, the Staff Rule supports this interpretation as it allows the Reviewing Manager to agree or disagree with the assessment of the staff member's performance which is given by the staff member's supervisors in the main or supplemental performance evaluations and in cases of disagreement he is required to provide reasons for such disagreement. It is clear therefore that the assessment of the Reviewing Manager is seen as an additional step in the OPE process that guarantees an independent oversight of such process.

137. In the present case, the record shows that the Director of SECPO had asked all staff in SECPO, including the Applicant, to name him as Reviewing Manager. Thereafter he proceeded to set the ratings in the Applicant's OPE and participate in the formal OPE discussion. Moreover he provided comments in the OPE both as a Supervisor and as a Reviewing Manager. The Tribunal finds that the assumption by the Director of SECPO of the roles both of Supervisor and Reviewing Manager in the OPE process in relation to the Applicant's OPE did not conform with the Staff Rule or principles of proper process as described in the Tribunal's jurisprudence. The Tribunal however finds that, in the circumstances of the case, this defect in the process was not sufficiently serious to invalidate the Applicant's OPE.

The Applicant's SRI

138. The Applicant claims that her SRI was arbitrary and based on a flawed OPE process. The Bank responds that her SRI was within the realm of satisfactory performance and reflected her "Partially Successful" ratings.

139. As the Tribunal has found in its jurisprudence, the determination of a staff member's SRI rating belongs to the discretion of management. The Tribunal will not overrule the exercise of that discretion unless it lacks a reasonable basis. (*See Desthuis-Francis*, paras. 19, 23, 32 and 34; *Mpoy-Kamulayi (No. 8)*, Decision No. 480 [2013], para. 37.)

140. The Tribunal has also found that under the Bank's guidelines, an SRI rating is reasonable if it is "broadly consistent" with the OPE and management took "into account the individual's performance compared to that of peers at the same level of responsibility and at the same grade." (*Mpoy-Kamulayi (No. 8)*, Decision No. 480 [2013], para. 39.) As the Tribunal has also noted in its jurisprudence, "SRI ratings of 3 and above denote good performance or a satisfactory level of performance." (*Id.* at para. 36.)

141. It is true that in the present case the Applicant's SRI assessment could not have taken into account the preliminary ratings in the Applicant's OPE, because at the time of the Departmental and VPU Management Review meetings when the SRIs were discussed, the Applicant's supervisor had neither discussed the Applicant's OPE and his proposed ratings with her nor received the feedback by the designated providers in the Applicant's OPE which might have affected such

proposed ratings. Without a doubt, therefore, the decision on the Applicant's SRI was made on the basis of incomplete information and lack of proper process. While this would have amounted to a violation of the OPE and SRI process, the Tribunal notes that, as discussed above, the reason for such flaws in the process were of the Applicant's own making. Her lack of cooperation and delayed response resulted in her SRI rating having been set before the proper procedural steps had been taken and for this reason the Applicant's complaint cannot be sustained.

142. Moreover, it does not appear to the Tribunal that the Applicant has suffered any prejudice in this case as her SRI, even though belonging in the lower sub-category of category 3 of the SRI matrix, still denoted a level of satisfactory performance. In substance, it reflected not only the "Fully Successful" ratings set in the Applicant's OPE but also the "Partially Successful" ratings which, as found above, were based on a reasonable and demonstrable basis.

The issue of the breach of the ISRP agreement

143. Regarding the merits of the Applicant's challenge to the non-performance of the ISRP agreement by the Bank, the Tribunal notes that the agreement provided that the Applicant would be assigned to the ISRP effective 15 January 2014 as Operations Analyst, Level GE, to undertake an assignment with IEG for a period of 12 months until 15 January 2015, at which time her retirement from the Bank would become effective. The record shows that the Applicant indeed executed her tasks successfully under her TOR. This is as also evidenced by her OPE for that year. According to the Applicant, her manager, Ms. W, asked her to stay home from 15 September 2014 onwards and relax for the remainder of the ISRP assignment. She also encouraged her to apply for disability. She believes that the reason was so that her manager could use the position for someone else. The Bank rejects the Applicant's account of the facts.

144. The Tribunal does not find support in the record of the Applicant's claim that "her manager attempt[ed] to free up [her] position by shunting her into disability despite the fact she was 100% budgeted."

145. However, the record also shows, as discussed above, that the Applicant had been found to be "burned out" and "exhausted" and under significant stress and that, as a result, even the HSD

Chair had recommended on 21 August 2014 that she take sick leave and also apply for disability. The Tribunal notes that it was the Applicant's psychiatrist who certified her for disability as of 10 December 2014 and eventually the Applicant was approved for STD with that day considered as her first day of absence. Notwithstanding the Applicant's claim to the contrary, it would appear that the Applicant's health situation was a reason that her assignment with IEG according to the ISRP could not be completed as originally planned. The Tribunal cannot find breach of the agreement in this respect.

146. The Tribunal also notes the Applicant's claim that the Bank should have asked that a "fitness for duty" evaluation be conducted in that case. First, the Tribunal notes that Staff Rule 6.07 "Health Program and Services" does not create an obligation on the Bank to do so. Second, paragraph 3.03 of the Staff Rule prescribes that a "fitness for duty" exam may be requested when a manager believes that performance problems are health-related. The Applicant's consent would have been required for such evaluation to take place. It appears therefore that recommending that the Applicant apply for STD would have achieved the same objective. As the record shows, ultimately, the Applicant did indeed apply for disability.

147. The Applicant also claims that the Bank breached its obligations under the ISRP agreement because it led her to a dead end, denied her any opportunity to locate an alternative assignment, and did not assist her in finding a new assignment. A review of the terms of the agreement shows that the agreement clearly stated that it was up to the Applicant at any time during and before the end of her ISRP assignment to seek and accept reassignment to a Term or Open-Ended position in the Bank Group outside of ISRP and that the effective date of any reassignment should be agreed with her ISRP supervisor. While the Applicant was free to seek and find another position while in the ISRP, the Bank did not have an obligation either to offer her such a position or to assist her in finding one. No breach of the agreement on the part of the Bank existed in this respect.

The issue of the termination of the Applicant's employment on the basis of retirement and her approval for STD

148. The record shows that the Applicant's employment was terminated on 15 January 2015. The Applicant had not officially applied for STD at the time of the termination of her appointment

but she did so on 27 January 2015. She was thereafter approved for STD “to cover [her] absence from work for more than twenty days” with her first day of absence being 10 December 2014, a date preceding the termination of her employment.

149. The Applicant claims that Staff Rule 6.22 “Disability Insurance Program” suggests that STD is only available to staff members who are still in service. Therefore, she states, since she has been approved for STD benefits before the termination of her appointment, she has not been separated from service. She claims that the ISRP agreement has been suspended as of 10 December 2014 which was the start of the disability and that she cannot be separated for the duration of the STD period which can be up to 24 months under Staff Rule 6.22. She adds that the ISRP agreement cannot be enforced until her STD status ends and she is either cleared for return to work, separated on Long Term Disability or separated on reasons of ill health pursuant to Staff Rule 7.01, paragraph 7.02. She also claims that while on STD status and pursuant to Staff Rule 6.22, paragraph 3.04, she is required to exhaust her accrued sick leave and be paid 100% of her net salary and only thereafter she will receive 70% of her net salary in disability pay for the remainder of the STD period. The Applicant points out that she has an enormous sick leave balance equivalent to about 1.5 years. The Applicant claims that by paying her only 70% of her net salary in disability pay the Bank is, in effect, seeking unlawfully to deprive the Applicant of her right to 100% salary during STD.

150. The Bank states that its disability policy provides that staff whose disability had begun prior to their separation from the Bank will continue on disability after their separation; however, the separation is not reversed or postponed because of the disability. It refers to Staff Rule 6.22, paragraph 3.07 “Expiration of Term Appointment While on STD” which provides:

A staff member on disability status as of the date of expiration of his/her term appointment will be separated from service unless the appointment is extended according to Staff Rule 04.01 Appointment, Section 06 Extensions, and will not be eligible to use any accrued sick leave balances beyond the date of separation. However, said staff member will continue to receive Disability Pay as defined in Section 5 of this Rule for up to 24 months of short term disability provided the Disability Administrator has approved said disability benefits. The staff member will also be eligible for long term disability provided the Disability Administrator

has determined that the staff member is disabled pursuant to Paragraph 4.02 of this Rule.

151. The Bank explains that while the Staff Rule refers to separation of staff members due to the expiration of their Term appointments, the same rule applies to separations due to redundancies, or mutually agreed upon separations, similar to the one agreed to by the Applicant.

152. The Bank further states that while on STD status and despite separation from the Bank, a staff member continues to be eligible for STD and to receive disability pay at 70% of the final net salary, but is no longer able to use the accrued sick leave to increase the salary up to 100%. The Bank points to Staff Rule 6.06, "Leave," paragraph 3.06 which states that: "Unused sick leave may be carried over without limit to subsequent leave years until the time of separation from service, when it lapses without any payment being made." The Bank states that the Applicant was separated from the Bank on 16 January 2015 according to the ISRP agreement. Therefore, the Bank states, pursuant to Staff Rule 6.06, upon her separation, the Applicant's accrued sick leave has lapsed.

153. The main question therefore before the Tribunal is whether the Applicant's approval for STD retroactively with her first day of absence being 10 December 2014, and after the termination of her employment under the terms of the ISRP, suspended the effect of the termination and reinstated the Applicant to active employment status thus allowing her under the Staff Rules to use her accrued sick leave while on STD and be paid 100% of her net salary instead of the 70% of her net salary in disability pay.

154. In interpreting the applicable rules, the Tribunal looks to the plain and ordinary meaning of the relevant rule (*Mould*, Decision No. 210 [1999], para. 13). In addition to the text itself, the Tribunal may have regard to the object and purpose of the rule (*Cissé*, Decision No. 242 [2001], para. 23). The Tribunal has also held that, where there is ambiguity, an applicant should receive the benefit of the doubt (*Cissé*, para. 31).

155. A review of the Staff Rule, the arguments of the parties, and the facts of the case does not support the Bank's position. While the Bank has referred to many provisions of the Staff Rule, it is clear that the specific situation of the Applicant and of similarly situated staff is not governed

by Staff Rule 6.22. Indeed the Staff Rule in the manner that it is currently written supports the Applicant's view that staff while on Short Term Disability remain in the employ of the Bank for the duration of the STD period with the exception of staff members holding Term appointments for, *inter alia*, the following reasons.

156. First, the Staff Rule describes explicitly the conditions under which a staff member is approved for Short Term Disability as when "due to illness or injury, the staff member is unable to perform the material duties of his/her regular job." The inability of a staff member to perform the material duties of his/her regular job presupposes that the staff member is employed by the Bank at the time of the approval of the Short Term Disability.

157. Second, under paragraphs 3.08-3.11 "End of STD benefits" the Staff Rule provides for the specific ways that the STD benefits and placement on STD status end. These ways are (i) "return to work," when a determination that the staff member is able to perform the material duties of his/her regular job is made; (ii) termination of employment on reasons of ill health pursuant to Staff Rule 7.01, Section 7, "Ending Employment as a Consequence of Ill Health" paragraph 7.02 when a staff member is not able to return to work because the staff member has not recovered "sufficiently to permit resumption of the material duties of his/her regular job on a full time basis"; and (iii) determination after 20 months on STD that the staff member is eligible for Long Term Disability and approval for LTD benefits. In that latter case, the staff member is separated from the Bank Group's employment under Staff Rule 7.01 Section 7, paragraph 7.03, and starts receiving LTD benefits. Therefore the Staff Rule indicates that a person on STD remains in the employ of the Bank throughout the STD period until either s/he returns to work or is separated on grounds of ill health. Application of these provisions would not be feasible if a staff member had separated from the Bank and continued to receive STD benefits as it would not give the staff member the option of "Return to Work." As the provisions of Staff Rule 6.22, Section 7 "Return to Work," show, return to work presupposes employment with the Bank as it discusses requests for annual leave or leave without pay to cover absences from work as well as "appropriate work accommodations."

158. Third, paragraph 5.01 which discusses “Disability Pay” provides that “Disability Pay is calculated at the rate of 70% of Net Salary during STD.” By contrast, the provision specifies that “Disability Pay after termination of employment from the Bank Group and during LTD is calculated at the rate of 70% of Final Net Salary.” It is notable that the last provision refers to disability pay after termination from the Bank in connection with LTD and not STD. This latter provision also seems to indicate that the reason that payment of disability pay during STD is based on a “Net Salary” and not on a “Final Net Salary” is because staff on STD remain in the employ of the Bank.

159. Fourth, paragraph 8.02 of the Rule discusses the provision of “Salary Relief” while a staff member is on STD to the disabled staff member’s organizational unit, consisting of 70% of Net Salary from the 91st working day following the Start of Disability “until the staff member either returns to work pursuant to paragraph 7.01 of this Rule or ends employment.” This provision also lends support to the view that staff while on STD remain in the employ of the Bank.

160. While the above review of the different provisions of Staff Rule 6.22 leads to the conclusion that a staff member while on STD remains in the employ of the Bank, the Bank maintains that its Staff Rules provide that the staff member can continue receiving STD benefits and transition to LTD after two years on STD even though the staff member’s employment with the Bank has terminated. It points to paragraph 3.07 of Staff Rule 6.22 “Expiration of Term Appointment While on STD” quoted above.

161. The Tribunal notes that this is the only provision in the Staff Rule which governs administration of STD payments following termination of an appointment and while the staff member is still on STD status. Notably, while Staff Rule 6.22 is applicable to staff holding Regular, Local Staff Regular, Open-Ended, Term, and Advisor to Executive Director appointments, paragraph 3.07 is applicable only to holders of Term appointments whose appointments expire on their own terms while they are on STD and are not extended. The question therefore arises: if that provision was meant to be applicable to staff members holding the other types of appointments governed by Staff Rule 6.22, why did the Staff Rule not include similar provisions regarding the termination of the employment of such staff members while on STD status? A reasonable

interpretation according to an *a contrario* argument is that since this provision was included with the intent to govern the expiration of Term appointments of staff while on STD status, the drafter of the Rule wanted to create a particular exception to the Staff Rule that would apply only to the holders of Term appointments and particularly to those whose employment would terminate on the ground of appointment expiration and not for other reasons. Consequently, as the Applicant correctly points out, it is only these staff members that would not be able to use their unused sick leave balances beyond the date of their separation, as at that time such sick leave lapses without any payment being made pursuant to Staff Rule 6.06, paragraph 3.06.

162. Staff Rule 6.22, paragraph 3.07 “Expiration of Term Appointment While on STD,” however, is not applicable to the Applicant as she was not a staff member on STD status “as of the date of expiration of [her] term appointment.” The Applicant held a Regular appointment, not a Term one. Her appointment had not “expired.” On the effective date of the approval of her STD, she was still in the employ of the Bank and expected to retire pursuant to the terms of the ISRP on 16 January 2015. The Bank therefore incorrectly applied this provision to her.

163. Furthermore, the Tribunal notes that by treating the Applicant as a staff member whose appointment had expired but who was still entitled to STD benefits, the Bank provided her with disability pay at the rate of 70% of her final net salary and a number of benefits and allowances. These consisted of continued participation in the Staff Retirement Plan while the Bank paid her contributions in this respect at 100% of Final Net Salary; participation in the Retiree Medical Insurance Plan, while covering the full cost of her premium contributions; participation in the Retiree Group Life Insurance Plan while the Bank again covered her contributions. The Bank admits that for purposes of life and medical insurance and retirement benefits, a separated staff member on Short Term Disability is treated as if she were on Long Term Disability, in accordance with Staff Rule 6.22, paragraphs 5.12-5.14.

164. The Tribunal notes, that, indeed, paragraph 5.01 which discusses disability pay at the rate of 70% of the “[f]inal net salary,” as well as paragraphs 5.12-5.14, are clearly applied to staff members on LTD. This is also evident from the title of these latter provisions which states: “Coordination of Bank Group Benefits & Allowances With Disability Pay Under LTD.” The

Applicant, however, was not a staff member that was either eligible or approved for LTD benefits. When providing the benefits described in these provisions to the Applicant, the Bank appears to be applying the wrong provisions of the Staff Rule to her. In addition, as the Bank is at the same time applying to her the provisions of the Staff Rule applicable to staff members on STD status, the Bank is clearly conflating procedures. Consequently, the peculiar treatment of the Applicant's situation results in many inconsistencies, one example of which is that the Applicant is apparently treated at the same time as a former staff member on STD whose employment has been terminated on the basis of retirement under the ISRP and as a former staff member on LTD who enjoys disability payments while having deferred retirement. This treatment of the Applicant is evidently caused by misapplication of the provisions in the Rule and conflation of procedures. The main reason for that anomalous situation is that the Applicant's treatment is not founded on a proper legal basis.

165. The Tribunal in the past has required the observance and correct application of applicable provisions of Staff Rules. As it found in *K. Singh*, Decision No. 188 [1998], para. 21:

Staff rules are not written for the sake of formality but precisely to secure an orderly process that will be fair and ensure that the staff member affected can feel that his or her case has been properly considered.

166. The Tribunal has consistently required transparency from the Bank in relation to the publication of its policies and procedures and in its treatment of its staff. For example, in *Moussavi*, Decision No. 360 [2007], para. 47, the Tribunal encouraged the Bank to “consider establishing a more transparent and consistent approach to” salary reviews.

167. As the Tribunal has found in *Sisler*, Decision No. 491 [2014], para. 87:

The importance of transparency in the relationship between the Bank and its staff cannot be overstated The Bank is required, by virtue of Staff Principle 2.1, to follow proper process in its relations with staff members and such a process includes transparency.

See also CO (Nos. 1 and 2), Decision No. 504 [2015], para. 101.

168. Because the Bank does not appear at the moment to have rules applicable to the Applicant's specific situation, it has created a special legal regime for her according to which she is being treated as if she is on LTD when she is not and as if she is a Term employee whose appointment has expired, when she is not. This treatment has important consequences, one of the most important being that the Applicant, by virtue of the incorrect application of the Staff Rule to her, is in effect deprived of pay to which she would have otherwise been entitled.

169. As the Applicant is on STD status with a starting day preceding that of the effective termination of her employment under the ISRP agreement and according to the above interpretation of the current version of Staff Rule 6.22 such staff remain in the employ of the Bank and are governed by the relevant provisions of the Staff Rule, the Applicant has presented her status correctly. She should remain on STD at 100% of her net salary while using her accrued sick leave and she cannot be separated from her employment, i.e., the ISRP agreement of 15 January 2014 cannot be enforced until, under Staff Rule 6.22, she is cleared for return to work, separated on Long Term Disability, or separated on reasons of ill-health pursuant to Staff Rule 7.01, paragraph 7.02. The Tribunal notes that in case the Applicant recovers and is allowed to return to work, the provisions of the ISRP are still applicable to her and she will remain at work for the remainder of the days under the ISRP after the effective date of the start of her disability with first day of absence as of 10 December 2014 until the date of her separation under the ISRP (i.e., 37 calendar days).

170. Therefore the Tribunal finds that the Bank shall reinstate the Applicant to its employ and treat her as a staff member on STD whose start of disability or "first day of absence due to illness or injury which leads to disability" is 10 December 2014. While on STD, the Bank shall allow the Applicant prospectively to exhaust her accrued sick leave at 100% of her net salary before becoming eligible to receive disability pay at 70% of her net salary. In addition, for the period that the Applicant has been on STD after her separation from the Bank, the Bank shall pay her the difference between the pay under her accrued sick leave at 100% of her net salary and the disability pay that she has been receiving since then at 70% of her net salary, namely the 30% of her net salary. The Bank shall include any applicable annual adjustments pursuant to paragraph 5.01 of

Staff Rule 6.22. To the extent that the Applicant had been paid her net salary in full until her the termination of her employment on 15 January 2015, the Bank shall make no additional payments.

171. Taking into account the rationale offered by the Bank for its policy on staff members on STD whose employment terminates for other reasons, the Tribunal calls upon the Bank to adopt specific rules and procedures governing the treatment of staff members on all types of appointments on STD who must be terminated while on STD for reasons other than the ones provided at Section 3 of Staff Rule 6.22.

DECISION

- (1) The Applicant's claim regarding the validity of the ISRP agreement is inadmissible.
- (2) The Bank shall reinstate the Applicant and treat her as a staff member on STD as described at paragraph 170 above.
- (3) The Bank shall allow the Applicant prospectively while on STD to exhaust her accrued sick leave at 100% of her net salary before becoming eligible to receive disability pay and will pay her retroactively the remaining 30% of her monthly net salary since her separation from the Bank with applicable annual adjustments.
- (4) The Bank shall contribute to the Applicant's attorney's fees in the amount of \$35,000.
- (5) All other pleas are dismissed.

/S/ Stephen M. Schwebel

Stephen M. Schwebel

President

/S/ Zakir Hafez

Zakir Hafez

Acting Executive Secretary