



World Bank Administrative Tribunal

2016

Decision No. 544

**DN,
Applicant**

v.

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

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

**DN,
Applicant**

v.

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

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

2. The Application was received on 13 November 2015. The Applicant was represented by Marie Chopra of James & Hoffman, P.C. The International Bank for Reconstruction and Development (IBRD) was represented by David R. Rivero, Director (Institutional Administration), Legal Vice Presidency. The Applicant's request for anonymity was granted on 20 October 2016.

3. The Applicant contests the Human Resources Vice President's (HRVP) finding that he committed misconduct, and opposes the disciplinary measures imposed by the HRVP.

FACTUAL BACKGROUND

4. The Applicant began working at the Bank in 1989 as a consultant. At all times relevant to this Application, his position at the Bank was a Level GF Information Officer in one of the Bank's Vice Presidential Units (VPU). His basic job function was to provide a complete range of Information Technology (IT) support, including the provision of special equipment and special software applications, training staff, diagnosing and correcting software and hardware issues, setting up laptops, establishing remote access, and maintaining the computer equipment inventory.

5. The Applicant also managed computer deployments in various countries. An example of this is the management of the VPU's ED-7 deployment in 2014 at the Bank's Headquarters, where he was tasked with ordering all the computer equipment and participating in the deployment of the equipment to field offices.

6. During the entire period of his employment at the Bank, the Applicant's integrity and professional conduct were never questioned. His most recent Overall Performance Evaluations (OPE) record good performance and commitment to his job. For instance, in his 2012 OPE he received three "Superior" ratings and two in his 2013 OPE. The comment on his 2014 OPE reads: "[the Applicant] has had a very good year, and his teamwork and change management have benefitted greatly from the attention he has paid to these areas [...]. His interpersonal skills are very good and feedback from staff revolved around his friendly and open manner, and his willingness to go the extra mile."

7. The Applicant has a significant interest in photography. He owns a professional camera, a Nikon D7200 with an 18mm to 300mm lens and various accessories, in addition to a smaller Nikon Coolpix L820 and a video camera. He uses software to make and edit videos. The Applicant states that he regularly produces pictures and shows for social events such as soccer tournaments for his children, weddings and birthdays and is known in his social circles as "the photographer."

8. Since 2002, the Applicant has taken pictures and created picture slide shows for several events at the Bank. These events include the annual Regional picnic, the annual Christmas party, and retirement parties for Bank staff members.

EBC's Investigation of the Applicant's Alleged Misconduct

INITIATION OF THE INVESTIGATION

9. On 17 October 2014, the Complainant, a Short Term Consultant (STC) in one of the units supported by the Applicant, contacted the Office of Ethics and Business Conduct (EBC) to report that while assisting her with computer-related issues in his office on 16 October 2014, the Applicant took an inappropriate video image of her on his iPhone without her consent. On the same day of that report, EBC commenced a preliminary inquiry with an interview of the Complainant.

10. In pursuance of the preliminary inquiry, the Vice President and Chief Ethics Officer wrote to the Vice President and WBG Chief Information Officer on 23 October 2014 requesting authorization to retrieve the memory card of the Applicant's iPhone and to access his computer. The request for authorization was approved by the Senior Vice President and General Counsel and a Managing Director on 27 October 2014. On the same date, EBC retrieved the Applicant's iPhone and computer hard drive. Eight video files from the Applicant's iPhone, identified sequentially as 018MOV through 025MOV, were recovered by EBC.

11. On 27 October 2014, a senior investigator sent to the Applicant a Notice of Alleged Misconduct, satisfied that there was sufficient factual basis to proceed with a fact finding investigation. Paragraph 1 of that Notice read:

I am writing to inform you that the Office of Ethics and Business Conduct ("EBC") is currently conducting an investigation into allegations that you have committed misconduct. It is alleged that you may have taken inappropriate photographs and/or recorded inappropriate/improper videos of the female staff member. Specifically, EBC received an allegation that you surreptitiously placed your iPhone 5c device under the skirt of a female staff member in order to take inappropriate/improper photographs and/or record a video of her, without her consent. The incident allegedly occurred at the I Building of the World Bank Group (WBG) headquarters during business hours on October 16, 2014.

12. On 30 October 2014, the investigation continued with an interview of the Applicant by EBC. After this interview, EBC requested an IT Officer to review the Applicant's iPhone and computer hard drive and to analyze the videos taken on 16 October 2014 by the Applicant. The IT Officer reported her findings to EBC on 6 November 2014.

13. On 31 March 2015, EBC again wrote to the IT Officer, raising as a follow-up question whether she would be able to identify the date and time that the deleted videos 018MOV through 025MOV had been placed in the deleted folder. On April 13 2014, she provided EBC with this information.

FACTUAL FINDINGS OF THE INVESTIGATION

14. On October 2014 at 5:00 p.m., the Complainant went to return a Bank laptop computer she had used while she was on a mission. She returned the laptop to the Applicant. She told him that she had bought a new computer and needed to have certain software installed so that she could access the World Bank systems on it. The Applicant told her to come back with the laptop, and he would help her. The Applicant had provided IT services for the Complainant once in 2013 and once in 2014.

15. The next day, the Complainant returned to the Information and Technology Services (ITS) office with her laptop. She did not find the Applicant in the ITS office, and so she went to his personal office. She had not made an appointment with the Applicant. She arrived at his office and told him that she needed help installing the software on her Mac laptop. The Applicant asked Mr. Y, who was more familiar with installing the software on Mac computers, to help the Complainant. The Applicant told the Complainant to come back to his office after Mr. Y completed the work so that he could confirm that everything was satisfactory. According to the Applicant, the first meeting with the Complainant before she went to Mr. Y's office lasted 3-5 minutes.

16. Mr. Y in his interview with EBC stated that it took him 10 minutes to finish the work. However, the Complainant claimed that it took approximately an hour. The Complainant also claimed that the Applicant came in while Mr. Y was helping her and asked her to return to his office after the work was completed. Mr. Y, however, told EBC that the Applicant did not come into his office while he was helping the Complainant.

17. During the same morning, the Applicant recorded seven videos on his iPhone and deleted them after each recording. The Applicant claims he recorded and deleted these videos before the Complainant arrived at his office the first time on 16 October 2014. The Bank claims that these videos were recorded after the Applicant's initial meeting with the Complainant, during the time she was in Mr. Y's office. The following is a description of the seven videos:

- a. The first video, 018 MOV, was taken at 9:58 am. It is 27 seconds long. It shows the Applicant setting up the camera and briefly sitting on a chair that is in the camera frame.

- b. The second video, 019 MOV, was taken at 10:01 am. It is 26 seconds long. It shows the Applicant adjusting the camera and placing it underneath his desk. The video shows the Applicant sitting in his chair before he places the camera on his desk.
- c. The third video, 020 MOV, was taken at 10:05 am. It is 17 seconds long. In this video, the Applicant places the camera across from an empty office chair, so that the chair is visible in the camera frame.
- d. The fourth video, 021 MOV, was taken at 10:16 am and is 19 seconds long. In this video, the Applicant adjusts the camera so that the seat and back of an empty office chair are visible in the camera frame.
- e. The fifth video, 022 MOV, was taken at 10:17 am and is 28 seconds long. In this video, the camera is placed underneath the desk so that the empty office chair is visible in the video.
- f. The sixth video, 023 MOV, was taken at 10:20 am and is 20 seconds long. This video shows the seat, back, and arm of the empty office chair.
- g. The seventh video, 024 MOV, was taken at 10:21 am and is 40 seconds long. In this video, the camera is placed underneath the Applicant's desk and shows the seat and arm of the empty office chair.

18. After Mr. Y had finished helping the Complainant, she returned to the Applicant's office. This second meeting between the Applicant and the Complainant took between 5 and 10 minutes. During this meeting, the Complainant stood in the doorway of the Applicant's office, while he sat at his desk. The Applicant asked to see her computer. He then asked her if she had a cable and a lock for the computer and retrieved a cable and lock from his own desk.

19. The Applicant states that he had to leave soon after the Complainant left his office, and so he attempted to fit his iPhone into a holster on his hip. He states that he was working with the cable and lock at the same time and so was unable to get the iPhone into its holster immediately. The Applicant further states that while he was doing this, he inadvertently turned on the iPhone camera and accidentally recorded a 47-second video, 025 MOV. This video, which was taken at 10:52 am, showed the Complainant's face, and a shot of her skirt and legs. The video also showed glimpses of the Applicant's office, including the ceiling.

20. As she was about to leave the Applicant's office, the Complainant noticed the iPhone and asked whether the Applicant had taken a picture of her. He replied that he had not. She then asked to see his iPhone, and after he deleted the video, he handed the phone to her. The Complainant did not see a picture of herself on the phone. After this exchange, she left the Applicant's office.

21. EBC prepared and sent the Applicant a Draft Report dated 17 April 2015. In the Draft Report, EBC concluded that there was sufficient evidence to substantiate the allegations that

[the Applicant], *inter alia*, recklessly failed to identify, or failed to observe, generally applicable norms of prudent professional conduct by taking an inappropriate video image of a female World Bank Group (WBG) staff member, without her consent, while assisting her with a computer-related issue in his office.

EBC also concluded that it did not find credible the Applicant's testimony that he inadvertently recorded the offending video.

22. The Applicant submitted a response to the EBC Draft Report on 8 May 2015. In his response, the Applicant admitted EBC's conclusion that he did take the offending inappropriate videos. He, however, reaffirmed that he had done so inadvertently and not recklessly, on purpose, with intent, or with planning as the Draft Report concluded.

23. EBC produced its Final Report on 12 May 2015. This Final Report restated the conclusion in the Draft Report that EBC

found sufficient evidence to substantiate the allegations that [the Applicant], *inter alia*, recklessly failed to identify, or failed to observe, generally applicable norms of prudent professional conduct by taking an inappropriate video image of a female World Bank Group (WBG) staff member, without her consent, while assisting her with a computer-related issue in his office.

24. EBC sent its Final Report to the HRVP for a determination of whether misconduct occurred, and if so, the appropriate disciplinary measures.

The HRVP's Decision

25. The HRVP determined that the Applicant took “an inappropriate video image of a female fellow staff member, with premeditation, and without her consent,” and therefore engaged in misconduct pursuant to Staff Rule 3.00, paragraph 6.01(a), (b), (c), and (e). On 23 July 2015, the HRVP issued a letter to the Applicant notifying him that “after consultation with your manager [...] and

[a]fter a careful and thorough review of the Final Report, I have determined that there is sufficient evidence to support a finding that you have engaged in misconduct, as defined under:

- a. Staff Rule 3.00, para. 6.01(a): Unauthorized use of Bank Group computer resources;
- b. Staff Rule 3.00, para. 6.01(b): Reckless failure to identify, or failure to observe, generally applicable norms of prudent professional conduct;
- c. Staff Rule 3.00, para. 6.01(c): Acts or omissions in conflict with the general obligations of staff members set forth in Principle 3 of the Principles of Staff Employment including the requirements that staff avoid situations and activities that might reflect adversely on the Organization’s (Principle 3.1) and conduct themselves at all times in a manner befitting their status as employees of an international organization (Principle 3.1(c));
- d. Staff Rule 3.00, para. 6.01(e): Harassment; contributing to a hostile work environment;
- e. The alleged misconduct may also constitute a violation of Administrative Manual (AMS) 6.20A, para. 6 which strictly prohibits any personal use of the Bank Group information technology for viewing, printing, downloading or otherwise accessing materials that could cause damage to the Bank Group’s reputation or assets.

26. The HRVP determined that the Applicant violated Staff Rules 3.00, paragraph 6.01(b) and (c) and committed misconduct because of “[his] role as IT officer, Client Services, [his] inappropriate and offensive behavior gives rise to concerns with respect to [his] sense of judgment, [his] professionalism and adherence to the standards of conduct which are expected of staff under the Bank Group’s Principles of Employment.” The HRVP determined that the Applicant violated Staff Rule 3.00, paragraph 6.01(e) “due to the effect on the victim and the nature of the action.” The Complainant’s interview with EBC investigators revealed the impact of the traumatic event on her and triggered the World Bank Group’s “duty to ensure for all staff members a work environment free of intimidating, hostile or offensive behavior.”

27. Although the HRVP stated that the Applicant “may” have violated AMS 6.20A, paragraph 6, the Bank emphasizes that he “did not base his decision on this provision.” The HRVP also determined that the Applicant violated Staff Rule 3.00, paragraph 6.01(a), but the Bank notes that “it is not possible to determine from the content of HRVP’s decision letter or from the underlying EBC report, what Bank Group Computer Resources were being referenced.”

28. The HRVP, after consideration of “such factors as the seriousness of the matter, the interests of the Bank group, any extenuating circumstances, the situation of the staff member, and the frequency of the conduct for which disciplinary measures may be imposed,” imposed the following disciplinary measures on the Applicant: (i) termination of employment, effective 1 August 2015; (ii) ineligibility for future employment and contractual opportunities with the World Bank Group; (iii) access to any World Bank Group offices restricted to entry for business needs at the discretion of the HRVP; and (iv) a written censure that would remain in the Applicant’s staff record indefinitely.

29. The Applicant filed the present Application on 13 November 2015. He seeks the following relief: (i) reinstatement to a Level GF Information Officer position, with full benefits and salary; (ii) removal of all records of the imposed disciplinary measures from the Applicant’s personnel files; (iii) back pay, including pension contributions, retroactive salary increases, and other benefits such as health insurance, from 8 August 2015 until the date on which the Applicant is reinstated; and (iv) compensation in an amount deemed by the Tribunal to be just for “the damage to [the Applicant’s] career and reputation, for the violations of due process, and for the terrible stress and effect on his health caused by his termination.” The Applicant also seeks legal fees and costs in the amount of \$14,086.58.

SUMMARY OF THE CONTENTIONS OF THE PARTIES

The Applicant’s Main Contentions

30. The Applicant maintains that a cursory review of the video at issue demonstrates that he did not intentionally record the Complainant. He argues that the EBC Report “makes mistakes of

fact and/or fails to place sufficient weight on exculpatory evidence.” He argues that i) the EBC Report is “deliberately skewed and intended to prove [him] guilty of obscene behavior;” ii) EBC failed to consider his explanation that “the seven earlier videos were beginning experiments for seeing if he could use his iPhone for photo exhibitions and collages;” iii) EBC ignored the timestamps of the seven earlier videos and asserts that these videos were taken before the Complainant came to his office the first time; iv) EBC did not place sufficient emphasis on the fact that investigators did not find any inappropriate content on the Applicant’s phone or computer except for the video at issue; v) EBC ignored the fact that the Applicant routinely followed up on “computer work-related issues;” and vi) “other inaccuracies in the EBC report, when corrected, show that [the Applicant’s] explanations were credible and that he was innocent.”

31. The Applicant also argues that the EBC investigation violated his due process rights because i) the investigation was unjustifiably delayed; ii) the interview of a witness who would present exculpatory testimony was delayed; and iii) the EBC investigator’s search and examination of his personal property was an invasion of his privacy.

32. The Applicant contends that the decision to terminate his employment was a disproportionate sanction for the alleged offense. On this point, the Applicant notes that the HRVP did not consult his direct managers or Team Leader, but rather relied on the statement of his Director who “did not know him or his work, [...] [had] read the EBC report but not [the Applicant’s] response, and approved the termination based solely on the EBC report.” The Applicant also argues that the HRVP did not give appropriate weight to the mitigating factors when determining his sanctions.

The Bank’s Main Contentions

33. The Bank argues that there is no dispute as to the material facts and those facts contradict the Applicant’s contention that the video of the Complainant was a mistake. The Bank also argues that the established facts legally amount to misconduct under the Staff Rules, and the sanctions imposed are provided for in the law of the Bank. The Bank contends that the imposed sanctions are not significantly disproportionate to the offense because the Applicant worked in a client-

facing role in IT, and the Bank could not afford to have a staff member in such a position where he could potentially violate the privacy of other staff members. The Bank also claims that reassignment or demotion were not appropriate under the circumstances because demotion to another IT position would not address the concerns about invasion of privacy, and reassignment would have required the Bank to create a new job for the Applicant outside of IT, which was not a viable option. The Bank argues in addition that the requirements of due process were observed in the EBC investigation.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

34. The scope of the Tribunal's review in disciplinary cases is well-established. In *Koudogbo*, Decision No. 246 [2001], para. 18, the Tribunal stated that this review

is not limited to determining whether there has been an abuse of discretion. When the Tribunal reviews disciplinary cases, it "examines (i) the existence of the facts, (ii) whether they legally amount to misconduct, (iii) whether the sanction imposed is provided for in the law of the Bank, (iv) whether the sanction is not significantly disproportionate to the offence, and (v) whether the requirements of due process were observed."

35. The Tribunal has also held that its review in such cases "is not limited to determining whether there has been an abuse of discretion but encompasses a fuller examination of the issues and the circumstances." (*Cissé*, Decision No. 242 [2001], para. 26, citing *Mustafa*, Decision No. 207 [1999], para. 17, and *Planthara*, Decision No. 143 [1995], para. 24.)

36. It is also well-established, as stated in *Dambita*, Decision No. 243 [2001], para. 21, that:

In disciplinary matters, strict adherence to the Staff Rules is imperative and a conclusion of misconduct has to be proven. The burden of proof of misconduct is on the Respondent. The standard of evidence in disciplinary decisions leading [...] to misconduct and disciplinary sanctions must be higher than a mere balance of probabilities.

37. The Tribunal will consider the present case in accordance with these standards.

THE EXISTENCE OF THE FACTS

38. The undisputed facts on which the disciplinary measures were based occurred on 16 October 2014. On that day, the Applicant had two meetings with the Complainant in his office. During the first meeting, she asked him for help in installing Access software on her laptop. He referred her to a colleague and asked her to come back after his colleague had completed the work. The colleague completed the work for the Complainant, after which she returned to the Applicant's office.

39. During this second meeting, the Applicant checked the Complainant's laptop. While he was assisting the Complainant, a video was recorded on his iPhone at 10:52 am that showed the Complainant's face, skirt, and legs. The video also showed glimpses of the Applicant's face and the ceiling of his office.

40. As she was about to leave the Applicant's office, the Complainant heard a click. She asked the Applicant whether he had taken a picture. He denied having taken a picture. The Complainant asked to see his iPhone. After deleting the video, he showed her the iPhone. She did not find any images of herself on the iPhone.

41. It is also an undisputed fact that, on the same day, either before the Complainant arrived at his office the first time or the second time, the Applicant had recorded and subsequently deleted seven videos on his iPhone. These videos featured an empty office chair in the Applicant's office, and some of them were taken from below the Applicant's desk. These videos were taken between 9:58 am and 10:21 am.

42. A further undisputed fact is that, when EBC examined the Applicant's iPhone and computer hard drive, it found no other inappropriate videos or images.

43. A fact that is in dispute, however, is whether, as the Applicant claims, he took the video inadvertently or whether, as EBC found, he did so knowingly and intentionally. But this disputed fact is not determinative of whether or not the Applicant is guilty of misconduct since the Staff

Rules expressly provide that misconduct does not require proof of malice or guilty purpose. In addition, in *BN*, Decision No. 451 [2001], para. 74, the Tribunal stated that a staff member may have acted without conscious intent to transgress the Staff Rules and yet be guilty of misconduct.

WHETHER THE FACTS LEGALLY AMOUNT TO MISCONDUCT

44. The Tribunal now considers whether the established facts legally amount to the misconduct cited in the HRVP's disciplinary decision letter. In that letter, the HRVP concluded that there was sufficient evidence to support a finding that the Applicant engaged in misconduct under Staff Rule 3.00, paragraph 6.01(a): unauthorized use of Bank computer resources; Staff Rule 3.00, paragraph 6.01(b): reckless failure or failure to observe professional conduct; Staff Rule 3.00, paragraph 6.01(c): acts or omissions in conflict with general obligations of staff members; Staff Rule 3.00, paragraph 6.01(e): harassment, and was in violation of Administrative Manual (AMS) 6.20A, para. 6. The question which now arises for the Tribunal's determination is whether the undisputed facts amount legally to prove any or all of the five instances of alleged misconduct charged by the HRVP.

45. Staff Rule 3.00, paragraphs 6.01(a), 6.01(b), 6.01(c), and 6.01(e) provide in relevant part:

6.01 Misconduct does not require malice or guilty purpose, and it includes failure to observe the Principles of Staff Employment, Staff Rules, Administrative Manual, Code of Conduct, other Bank policies, and other duties of employment, including the following acts and omissions:

- a. The unauthorized use of Bank Group offices, equipment, computer resources or staff;
- b. Reckless failure to identify, or failure to observe, generally applicable norms of prudent professional conduct;
- c. Acts or omissions in conflict with the general obligations of staff members set forth in Principle 3 of the Principles of Staff Employment and Staff Rules 3.01 through 3.06;
[...]
- e. Harassment; contributing to a hostile work environment.

46. AMS 6.20A, paragraph 6 states:

Information Users are accountable for all activities performed under their accounts and on the systems provided to them. Any personal use of Bank Group information technology for commercial purposes or for viewing, printing, downloading, or otherwise accessing materials that could cause damage to the Bank Group's reputation or assets is strictly prohibited.

Unauthorized Use of Bank Group Computer Resources and Violation of AMS 6.20A

47. First, the HRVP's letter to the Applicant expressly stated that the HRVP had found sufficient evidence that the Applicant "engaged in misconduct as defined under Staff Rule 3.00, paragraph 6.01(a): "Unauthorized use of Bank Group computer resources." As regards this charge, only two pertinent facts have been established. These are that the personal iPhone of the Applicant was used to record the offending video of the Complainant, and that the Applicant had software installed on his iPhone that allowed him to access the World Bank system.

48. The Tribunal finds that these facts by themselves cannot amount to unauthorized use of Bank Group computer resources under Staff Rule 3.00, paragraph 6.01(a). That Rule does not provide any clear definition of what constitutes "unauthorized use of Bank Group computer resources" where a staff member uses non-WBG applications on personal smart phones that also have WBG applications. Therefore, following the firmly established jurisprudence of the Tribunal in instances where there is an absence of provision in the Staff Rules, the clause "unauthorized use of Bank Group computer resources" in Staff Rule 3.00, paragraph 6.01(a) must be interpreted to give it its natural, ordinary meaning.

49. Interpreted in this way, the burden of proof which rested on the Bank in this case was to show that the software installed on the Applicant's iPhone that allowed him to access the Bank system, the only relevant Bank Group computer resources that could have been used by the Applicant, was used by him in an unauthorized manner. Logically, to legally amount to unauthorized use of Bank Group computer resources, the facts established by the Bank would have to show that the WBG applications installed on the Applicant's iPhone impacted the video-

recording function on his iPhone in the recording of the offending video. The facts established by the Bank do not so show.

50. Further, the Tribunal notes that the Bank has laid out its policy regarding “staff, contractors and consultants who use the Bank provisioned and installed applications on smart phones or tablets to access the World Bank Group (WBG) network resources” in AMS 12.35. This policy, in paragraph 3, refers to the “WBG Smartphones and Tablets Corporate Connectivity Terms and Conditions,” which lists certain terms and conditions that staff members are required to accept before they connect their mobile computing device to WBG email and applications. These terms and conditions address security of the phones and the information contained on the phones, as well as backing up non-email data on the mobile devices. The terms and conditions do not address non-WBG applications or files on personal smart phones, nor do they determine whether the Bank has control over how staff members use non-WBG data on personal smart phones.

51. AMS 12.35, paragraph 3 also refers to the “Mobile Device Standards.” These standards address information security and password security. One of the standards is that all mobile devices with WBG provisioned and installed applications must access WBG network services only through specific WBG configured software. There are multiple standards relating to password security and the physical security of mobile devices. However, these standards do not address what staff members are allowed to do with non-WBG applications and files on mobile devices on which they have installed WBG applications. This means that the Bank’s primary smart phone policy does not contain any specific standards as to what constitutes unauthorized use of Bank Group computer resources where a staff member uses non-WBG applications on personal smart phones that have WBG applications as well.

52. The Tribunal has in its jurisprudence established that, in disciplinary matters, there must be proof of violation of the provisions of the Staff Rules and the associated documents in question in reaching a conclusion of misconduct. Here, there is a lacuna in the Bank’s primary smart phone policy of specific standards as to what constitutes unauthorized use of Bank Group computer resources where a staff member uses non-WBG applications on personal smart phones that have

WBG applications. It is therefore not possible for the Bank to establish that the facts amount to unauthorized use of WBG computer resources by the Applicant in violation of AMS 12.35.

53. Similarly, the Bank has not proved that the established facts legally amount to misconduct under AMS 6.20A, paragraph 6, which states:

Information Users are accountable for all activities performed under their accounts and on the systems provided to them. Any personal use of Bank Group information technology for commercial purposes or for viewing, printing, downloading, or otherwise accessing materials that could cause damage to the Bank Group's reputation or assets is strictly prohibited.

54. This provision addresses "personal use of Bank Group information technology." In the guidance provided by the Bank under the policies outlined above, it is not clear that a staff member's personal smart phone that contains Bank Group applications or files is considered "Bank Group information technology," especially when the personal use that is prohibited occurs through the use of non-Bank Group related applications. In *Zwaga*, Decision No. 225 [2000], para. 53, this Tribunal held that, where the Staff Rules and associated documents provide less than clear rules, principles of due process require that the staff member should be given the benefit of the doubt.

55. The Tribunal observes that, if the Bank wants to have greater control over the way that staff members use personal devices that contain Bank Group applications, it should provide clear guidance in its policies. No such guidance is available in the Bank's present policies relating to personal smart phones. In the absence of any such guidance in AMS 6.20A, it would be inconsistent with the principles of due process to find that the facts established by the Bank in this case legally amount to misconduct on the part of the Applicant.

Reckless Failure to Identify, or Failure to Observe, Generally Applicable Norms of Prudent Professional Conduct

56. Second, the HRVP found sufficient evidence that the Applicant violated Staff Rule 3.00, paragraph 6.01(b) and was guilty of misconduct in that his act in making a video of the Complainant constituted a reckless failure or failure to observe generally applicable norms of

professional conduct. The Applicant denies that the facts established by the Bank amount to a violation of this Staff Rule because those facts do not show that he recorded the offending video intentionally and with malice or guilty purpose.

57. Staff Rule 6.01 states that: “Misconduct does not require malice or guilty purpose.” In *Kim (No. 1 and No. 2)*, Decision No. 448, [2011], at para. 51, the Tribunal held that, the Staff Rule then in force, and which is *in pari materia* with Staff Rule 6.01, meant that malice or guilty purpose was not required in misconduct. Also, in *BN*, Decision No. 451, [2001], at para. 74, the Tribunal determined that even where a staff member has acted without conscious intent, he or she may still be held to have transgressed the Staff Rules on misconduct.

58. Accordingly, the Tribunal holds that, even if the Applicant did not intentionally record the video of the Complainant, his lack of intent does not change the legal character of his admitted actions in recording the video as misconduct. Therefore, the Tribunal upholds the HRVP’s finding and deems it unnecessary to consider the Applicant’s extensive arguments as to his lack of intent in recording the offending video in determining his misconduct under Staff Rule 3.00, paragraph 6.01.

*Acts or Omissions in Conflict with the General Obligations of Staff Members set forth in
Principle 3.1 of the Principles of Staff Employment*

59. Third, the HRVP’s letter to the Applicant expressly stated that the HRVP had found sufficient facts that the Applicant committed acts or omissions in conflict with the general obligations of staff members set forth in Principle 3.1 of the Principles of Staff Employment. The Applicant denies that the facts establish this.

60. Principle 3.1 of the Principles of Staff Employment states in relevant part:

3.1 [A]s employees of international organizations, staff members have a special responsibility to avoid situations and activities that might reflect adversely on the Organizations, compromise their operations, or lead to real or apparent conflicts of interest. Therefore, staff members shall: [...]

c. conduct themselves at all times in a manner befitting their status as employees of an international organization. They shall not engage in any activity that is incompatible with the proper discharge of their duties with the Organizations.

61. In *CJ*, Decision No. 497 [2014], para. 96, the Tribunal stated:

The Tribunal considers that these categories of misconduct refer to conduct that diminishes the trust and confidence the public places in the Bank and its staff. In other words, they are intended to sanction conduct that could reasonably be seen by the public to seriously undermine a staff member's honesty and integrity and/or to be seriously discreditable or offensive.

62. Furthermore, in *AJ*, Decision No. 389 [2009], para. 46, the Tribunal stated:

Principle 3 of the Principles of Staff Employment requires staff members to serve the Bank with a high degree of integrity and loyalty. Every staff member has a special obligation to avoid situations and activities that might (i) reflect adversely on the Bank; (ii) compromise operations of the Bank [...]. The obligation is broad; its objectives are prohibitive as well as preventive [...]. This is why the scope of Principle 3 is very broad. It prohibits not only conduct that is clearly wrongful but also conduct that leads to a possible appearance of impropriety.

63. The Tribunal has scrutinized the video at issue. Shots of the walls and ceiling of the Applicant's office are shown. In the 47 second video there are fleeting glimpses of the head, torso and skirt of the staff member in question. The facts establish that this video was recorded without the consent of the staff member. The Tribunal holds that even an inadvertent video by a professional in a role such as that of the Applicant could undermine confidence of staff members in the Bank and reflect adversely on it. The Tribunal upholds the HRVP's finding that the Applicant committed acts or omissions in conflict with the general obligations of staff members set forth in Principle 3.1 of the Principles of Staff Employment.

Harassment; Contributing to a Hostile Work Environment

64. Fourth, the HRVP had found sufficient facts that the Applicant violated Staff Rule 3.00, paragraph 6.01(e), "harassment; contributing to a hostile work environment." The Applicant denies that the facts support this finding because they do not show that he acted with intent.

65. The Tribunal observes that the Bank's Code of Conduct defines harassment as: "Any unwelcome verbal or physical behavior that interferes with work or creates an intimidating, hostile or offensive work environment." In *CW*, Decision No. 516 [2015], para. 78, the Tribunal held that "impact – not intent – is the essential element in assessing whether conduct can reasonably be considered harassment" and in *CB*, Decision No. 476 [2013], para. 39, the Tribunal explained that that definition of harassment "does not require conduct to be hostile or abusive."

66. As to what conduct constitutes harassment, the Tribunal's prior jurisprudence emphasizes that the conduct in question must be unwelcome. The Tribunal has also emphasized that the conduct in question must interfere with work or create an intimidating, hostile, or offensive work environment. At the same time, the Tribunal in *CK*, para. 77 (quoting *P*, Decision No. 366 [2007], para. 68), held that the determination of whether certain conduct constitutes harassment cannot "rest solely 'on the basis of mere assertions that there was conduct which the Complainant perceived as harassment.'" Furthermore, it is important to determine whether the Applicant knew, or should have known that the conduct was unwelcome. This element of knowledge is key in determining whether certain conduct constitutes harassment when assessing isolated incidents.

67. Here, it is a fact that the Applicant recorded a video of the Complainant without her consent and that she considered that conduct unwelcome. That the conduct was unwelcome is evidenced by the fact that she reported the Applicant's behavior to EBC on the day following the incident. She also stated this as a fact in her interview with EBC. The Applicant does not dispute any of this. The Applicant's attempt to delete the video and his lie to her about having taken the recording supports the inference that the Applicant knew his conduct would be perceived as unwelcome if discovered.

68. However, the facts do not establish that the conduct in question has interfered with work or created an intimidating, hostile, or offensive work environment. The Tribunal is not satisfied that the recording of the video by the Applicant, in the particular circumstances of this case, is of a nature which could reasonably be expected to have caused interference with work or create an intimidating, hostile or offensive work environment.

WHETHER THE SANCTIONS IMPOSED ARE PROVIDED FOR IN THE LAW OF THE BANK

69. The Tribunal now considers the third requirement of the *Koudogbo* test, namely, whether the sanctions imposed by the HRVP in his disciplinary decision letter are provided for in the law of the Bank. In that letter, the HRVP imposed the following disciplinary measures on the Applicant: (i) termination of employment; (ii) ineligibility for future employment and contractual opportunities with the Bank Group; (iii) access to any World Bank Group offices restricted to entry for business needs at the discretion of the HRVP or his delegate; and (iv) written censure to remain in the Applicant's staff record indefinitely.

70. Staff Rule 3.00, paragraph 10.06 provides authorization for certain disciplinary measures in relevant part:

- a. Oral or written censure;
- c. Restrictions on access to the Bank's premises;
- k. Termination of appointment;
- l. Loss of future employment and contractual opportunities with the Bank Group.

71. The Tribunal therefore finds that all of the sanctions that were imposed on the Applicant are provided for in Staff Rule 3.00, paragraph 10.06.

WHETHER THE SANCTIONS ARE PROPORTIONATE

72. The next question which must be considered by the Tribunal is whether the sanctions imposed by the HRVP are proportionate. On this, the Applicant argues that even if he had committed misconduct, the decision of the HRVP to terminate his employment was a disproportionate sanction. The Tribunal notes that, even though the Applicant also makes an argument that the particular combination of disciplinary measures that was imposed on him is "the highest possible," the major focus of his disputation is with the sanction of termination.

73. There can be no doubt that the Tribunal has the authority to determine whether the sanction imposed by the Bank upon the Applicant is significantly disproportionate to the staff member's

offense. As the Tribunal stated in *Gregorio*, Decision No. 14 [1983], para. 47, “if the Bank were so to act, its action would properly be deemed arbitrary or discriminatory.”

74. In *S*, Decision No. 373 [2007], para. 50 the Tribunal stated the factors that must be taken into consideration in a determination of whether a sanction imposed by the Bank is proportionate as follows:

Consistently with *Mustafa*, paragraph 3.01 [of Staff Rule 8.01] states that “[a]ny decision on disciplinary measures will take into account such factors as the seriousness of the matter, any extenuating circumstances, the situation of the staff member, the interests of the Bank Group, and the frequency of conduct for which disciplinary measures may be imposed.” It appears these factors were intended to guide the HRSVP in the exercise of his discretion concerning what disciplinary measures to impose. Thus if paragraph 3 is read in its full context, it is reasonable to conclude that in exercising his discretion under paragraph 3.02, the HRSVP should consider the factors listed in paragraph 3.01.

75. With specific reference to termination, the Tribunal in *CT*, Decision No. 512 [2015], para. 45, stated:

The Tribunal considers the termination of a staff member’s employment a most serious disciplinary sanction, and even in cases of misconduct for which the Staff Rules provide for mandatory termination, the Tribunal will still review such cases to determine whether the imposition of such a sanction was a proper exercise of discretion. *See e.g. Z*, Decision No. 380 [2008].

76. In underscoring the kinds of conduct that reach the level of seriousness to merit the disciplinary sanction of termination, the Tribunal in *CT*, para. 46, stated:

The Tribunal reviewed the comparative data on the use of termination as a disciplinary measure in the years between 2011 and 2014 which was provided by the Bank. The Tribunal observes that in this period termination was imposed as a sanction in approximately twenty cases, excluding the present case and that of Mr. AB. These cases concerned fraud, theft, willful misrepresentation, conflict of interest, misuse of Bank assets, solicitation and receipt of personal loans from Bank clients, and abuse of position in procurement. Those whose sanctions mirrored the Applicant’s (i.e. termination, ineligibility for future employment and letter to remain on HR record) had engaged in acts involving the falsification of receipts and invoices for financial gain, abuse of authority in a sexual relationship with a subordinate, misrepresentation and theft. In these cases the aggravating factors

included: actions which caused serious bodily harm to a third party; lack of remorse; failure to cooperate during the investigations; and repeated willful misrepresentations.

77. The Applicant argues that the offense for which he was sanctioned was not of the kind identified in *CT* as being sufficiently serious to warrant termination. According to him, this was so because EBC failed to establish that he acted with guilty or conscious intent in taking the inappropriate video of the Complainant. He argues that, on the contrary, the evidence strongly suggests that the video was taken as a result of an innocent mistake and the fact that he had not acted with guilty or conscious intent significantly attenuated the seriousness of his conduct.

78. The Applicant further argues that the HRVP did not give appropriate weight to certain mitigating circumstances, including that the Applicant worked for the Bank for 25 years without any prior history of discipline, that EBC did not find any other inappropriate images on the Applicant's phone or his computer, that the Applicant cooperated with EBC during the investigation, and that he apologized repeatedly.

79. In furtherance of his claim that the HRVP did not give appropriate weight to certain mitigating circumstances, the Applicant argues that the HRVP did not consult the Applicant's manager as required by Staff Rule 3.00, paragraph 10.11. Instead, according to the Applicant, the HRVP consulted the Applicant's Director, who was not the Applicant's direct manager and did not know the Applicant's work. The Applicant also notes that it was not the HRVP who consulted the Director, but rather the Lead Human Resources Specialist who did.

80. The Bank concedes that the sanction of termination is to be reserved for very serious offenses. However, the Bank contends that the Applicant intentionally took the offending video of the Complainant. The Bank points to the seven videos, 018MOV to 024MOV, recorded on the Applicant's iPhone after his initial meeting with the Complainant, during the time she was in Mr. Y's office, and which were immediately deleted, as evidence of the Applicant's premeditation in committing the offense. According to the Bank, it is this premeditation which elevates the seriousness of the Applicant's transgression to the kind identified in *CT*.

81. The Bank argues that, given the nature of the Applicant's offense, the decision to terminate the Applicant's employment was based on the fact that he worked in "a client-facing role in information technology," and that the Bank could not afford to have a staff member "who had exhibited such completely unacceptable conduct in a role where he could violate the privacy of fellow staff members." The Bank also contends that it had considered other disciplinary measures, such as demotion or reassignment. According to the Bank, demotion would not have addressed the concerns about invasion of privacy, as the Applicant would still be in an information technology role, and reassignment was not a viable option because the Bank would have been required to create a new job for the Applicant "at a time when the Bank was under financial pressure to reduce staff." The Bank states that, in sum, the determination of the disciplinary measure of termination was based on the Applicant having spent time before the Complainant's visit making the other videos, the inappropriateness of his conduct, and the unviability of any other sanction.

82. The Bank also argues that the manager that the HRVP consulted was "in a sufficient position to provide the relevant managerial information and perspective on the Applicant." In addition, the Bank contends that the Lead Human Resources Specialist had the delegated authority to consult with the Applicant's Director on behalf of the HRVP, and the HRVP alone made the final determination on the disciplinary measures to be imposed.

83. In assessing the proportionality of the imposed disciplinary measures in this case, the Tribunal recalls that in *Kim (No.1 and No. 2)*, Decision No. 448, para. 51 [2001], it was held that even though malice or guilty purpose is not required in misconduct, "HRSVP must, however, necessarily take into account the intent of the staff member, when he or she committed the act of misconduct, when determining the gravity of the sanction to be imposed." This notwithstanding, the Tribunal notes that intentional misconduct alone is not determinative of proportionality. The mitigating factors present in each case must be considered.

84. In approaching the relevance of mitigating factors in the assessment of proportionality where the disciplinary sanction imposed is termination, the Tribunal recalls its decision in *CT*. In that case, the sanctions of (i) termination of the applicant's employment; (ii) ineligibility for future employment with the World Bank; and (iii) indefinite placement of the disciplinary letter on the

applicant's personnel record were imposed on the applicant. *CT*, para. 29. The misconduct at issue in *CT* was that the applicant intentionally sent offensive and derogatory emails about her manager which the manager discovered. The Applicant was found by the HRVP to have violated Staff Rule 3.00, paragraphs 6.01(a), 6.01(b), 6.01(c), and 6.01(e), as well as AMS 12.10, para. 10 on the "display or transmission of sexually-explicit images, messages or cartoons, or any transmission that contains ethnic slurs, racial epithets, or anything that may be construed as harassment or disparagement of others." *Id.*, para. 26. In *CT*, para. 48, the Tribunal reduced the sanctions and stated:

The Tribunal considers that the following are relevant to an assessment of proportionality in the present case and should serve to mitigate the sanctions imposed: (a) the fact that this was the first instance of misconduct in an otherwise unblemished career of over nineteen years at the World Bank; (b) the fact that the Applicant showed remorse and took the initiative to apologize to Ms. X as soon as she became aware of the transmission of the email messages to Ms. X; and (c) the fact that the Applicant cooperated with the investigation.

85. The Tribunal also recalls its decision in *CK* where disciplinary sanctions other than termination were imposed. In that case, the misconduct at issue was a male supervisor inappropriately touching a subordinate female employee in a way that made her uncomfortable. The supervisor was found by the HRVP to have violated Staff Rule 3.00, paragraphs 6.01(a), 6.01(b), 6.01(c), and 6.01(e). *CK*, para. 66. The disciplinary measures imposed on the supervisor were the following: (i) demotion; (ii) ineligibility for a Salary Review Increase for a year; and (iii) a written censure to remain in his record indefinitely. *Id.*, para. 32. The Tribunal held that those disciplinary measures of demotion and ineligibility for a salary review for a year were not disproportionate to the conduct because "[t]he Applicant's conduct was aggravated by the disparity between the senior position he occupied and the very junior position held by the Complainant, as well as the differences in age and years of professional experience." *Id.*, para. 88. However, the Tribunal found that the sanction of a written censure to remain in the applicant's record indefinitely was disproportionate and reduced the amount of time the censure would remain in his record to three years. *Id.*, para. 89. In doing so, the Tribunal referred to "the [a]pplicant's stellar professional record and the fact that this is his first instance of misconduct in almost twenty years of service to the Bank," as well as "the [a]pplicant's apology and cooperation with the investigation." *Id.*

86. The Tribunal notes that the mitigating factors listed in the EBC Final Report in this case are as follows:

[The Applicant] does not have a prior record of disciplinary actions;
[The Applicant] was cooperative with the EBC investigation;
EBC did not identify any other inappropriate images on other IT devices assigned to [the Applicant];
[The Applicant] expressed remorse for taking the video footage of [the Complainant].

87. The Tribunal considers that those mitigating factors are similar to the mitigating factors in *CT* and *CK*. In *CT*, the Tribunal held that those mitigating factors in that case justified a reduction of the disciplinary sanction of termination imposed there. Similarly, in *CT*, the Tribunal held that those mitigating factors rendered the sanction of a written censure to remain in the Applicant's record indefinitely disproportionate to his misconduct of sexual harassment and reduced the amount of time the censure would remain in his record to three years.

88. The Tribunal finds that while the Applicant should be sanctioned, the combined sanctions imposed by the HRVP are significantly disproportionate in light of the mitigating factors and the Tribunal's jurisprudence. Accordingly, the Tribunal holds that, consistent with its jurisprudence, the sanction of termination is not justified.

WHETHER THE REQUIREMENTS OF DUE PROCESS WERE OBSERVED

89. The next issue for the Tribunal to address in its examination of this case is whether the requirements of due process were observed. In approaching this issue, the Tribunal recalls that in *Rendall-Speranza*, Decision No. 197 [1998], para. 57, the Tribunal stated:

In order to assess whether the investigation was carried out fairly, it is necessary to appreciate the nature of the investigation and its role within the context of disciplinary proceedings. After a complaint of misconduct is filed, an investigation is to be undertaken in order to develop a factual record on which the Bank might choose to implement disciplinary measures. The investigation is of an administrative, and not an adjudicatory, nature. It is part of the grievance system internal to the Bank. The purpose is to gather information, and to establish and find facts, so that the Bank can decide whether to impose disciplinary measures or to

take any other action pursuant to the Staff Rules. The concerns for due process in such a context relate to the development of a fair and full record of facts, and to the conduct of the investigation in a fair and impartial manner. They do not necessarily require conformity to all the technicalities of judicial proceedings.

90. In *Kwakwa*, Decision No. 300 [2003], para. 29, the Tribunal emphasized that

the due process requirements for framing investigations of misconduct in the context of the World Bank Group's relations with its staff members are specific and may be summarized as follows: affected staff members must be appraised of the charges being investigated with reasonable clarity; they must be given a reasonably full account of the allegations and evidence brought against them; and they must be given a reasonable opportunity to respond and explain.

91. Here, the Applicant complains that EBC's conduct of its investigation violated his due process rights because (i) the investigation was significantly delayed in that EBC took several months to complete its investigation; (ii) EBC did not interview Mr. Y, the colleague who performed the IT work for the Complainant, until April 2015, six months after the incident; and (iii) EBC did not properly evaluate the exculpatory nature of Mr. Y's testimony. The Applicant also argues that EBC invaded his privacy when it searched his personal iPhone, which was not Bank property, in his absence.

92. In response to (i), the Bank contends that the EBC investigation was thorough and was conducted in a timely manner, and the Applicant did not show that any prejudice to him resulted from the duration of the investigation. In response to (ii) and (iii), the Bank maintains that the finding of misconduct did not rely only on the testimony of Mr. Y, and that in any case, his testimony was not stale and did not contain any exculpatory evidence. Finally, in response to the Applicant's claim of invasion of his privacy, the Bank counters that EBC had reasonable grounds to review the Applicant's phone, and that he willingly provided his phone for examination. The Bank also claims that the Applicant has not shown any prejudice arising from the examination of his phone, as EBC investigators did not access any of his personal files.

93. The Tribunal will now consider each of the Applicant's complaints and the Bank's responses thereto *seriatim*.

Complaint of Undue Delay

94. With respect to this complaint, the Tribunal notes that the *Guide to EBC's Investigative Process* (Guide) contains guidelines on the length of an EBC investigation. Namely, that an investigation, which begins when EBC serves a Notice of Alleged Misconduct, “may take up to three months under normal circumstances,” and that “[a]t the closing stage one month is allowed to draft the investigative report and compile the supporting documents.”

95. The evidence before the Tribunal in this case is that the Applicant was served the Notice of Alleged Misconduct on 27 October 2014 and interviewed on 30 October 2014. Two months later, on 16 December 2014, the Applicant asked for an update on the investigation and was informed that EBC was then working on the draft report and that he could expect it “within the next week.” Two months later, on 18 February 2015, EBC emailed the Applicant stating that “[w]e are in the process of preparing a draft report for your review [...]” On 19 March 2015, one month after, EBC again emailed the Applicant explaining that there had been a delay in providing the draft report because of “a back log of matters.” Finally, on 17 April 2015, the Applicant was provided the EBC Draft Report. The Bank argues that “the investigation was thorough and was concluded in a timely manner.”

96. The Tribunal observes that, from as early as 16 December 2014, EBC promised the Applicant that he could expect the draft report “within the next week” and that three months later, on 19 March 2015, sought to explain the delay by “a backlog of matters” in EBC. In *CG*, Decision No. 487 [2014], para. 86, the Tribunal stated in respect of INT, another independent investigative unit within the Bank Group:

Even though the argument about the competing priorities is to be taken seriously, it is to be expected [...] that INT should have enough resources to carry out its work in a timely manner.

97. The Tribunal finds that the Bank has not established that there was anything in this case to displace the “normal circumstances” timeline. The draft report should therefore have been

prepared in four months. However, given the circumstance of this case, the Tribunal finds that this breach is not sufficiently egregious to warrant compensation as claimed by the Applicant.

Complaint Regarding Mr. Y's Testimony

98. First, the Tribunal considers the Applicant's argument that he suffered a due process violation because EBC did not interview Mr. Y until over five months after the incident in question. As discussed above, the EBC service standards recommend that EBC conduct its investigation in three months. Here, EBC did not interview Mr. Y until 7 April 2015, about six months after the incident in question. While this does not comply with the Guide, the Applicant has not demonstrated how this delay, and the circumstances in the present case, adversely affected the accuracy or impact of Mr. Y's testimony when it was provided to EBC. In this regard, the Tribunal next turns to the Applicant's claim that EBC did not fairly evaluate the exculpatory nature of Mr. Y's interview, especially his statements that his work with the Complainant took approximately ten minutes and that the Applicant had a habit of following up on the work that was performed.

99. In his testimony before EBC, Mr. Y did state that the work with the Complainant took approximately ten minutes, and that the Applicant typically followed up on cases. Mr. Y also stated that there was no procedure in ITS that required anyone to check the work of specific ITS personnel. He also said that he did not see a purpose for the Complaint to go back to the Applicant's office after the work was completed.

100. In its Final Report, EBC based its conclusion, that it did not find the Applicant's testimony that he inadvertently recorded the video of the Complainant credible, on the following factors: (i) the Applicant demonstrated an understanding of how his iPhone works; (ii) the Applicant made seven other videos "immediately prior to his meeting with [the Complainant];" and (iii) the absence of a procedure in ITS that required the Applicant to check the work of ITS personnel.

101. The mitigating and exculpatory factors in the EBC Final Report did not include any of the information that EBC learned during the interview with Mr. Y. Furthermore, EBC did not base its conclusion entirely on the information provided by Mr. Y. EBC took into account his testimony in

evaluating whether the Applicant was required to check his work according to ITS policies. Mr. Y's testimony to EBC was not determinative on the question of whether the Applicant should have had the second meeting with the Complainant. Rather, Mr. Y stated that while the Applicant typically followed up, there was no procedure requiring him to do so. Therefore, it appears that EBC did not ignore exculpatory factors in Mr. Y's testimony regarding the Applicant's second meeting with the Complainant.

102. EBC also created a timeline of the events that was based on its interviews and the information it discovered when it examined the Applicant's iPhone. EBC learned after examining the iPhone that the seven videos were recorded and deleted between 9:58 am and 10:21 am. It was also discovered that the video of the Complainant was recorded at 10:52 am. On the basis of this information and the interviews it conducted, it put together a time frame under which the Applicant recorded the videos "immediately prior to his meeting with [the Complainant]." Mr. Y's testimony was also not determinative on this point. He stated that the work with the Complainant took approximately ten minutes. However, the Complainant stated that the work took approximately one hour. EBC evaluated both of these interviews and the evidence it discovered after examining the iPhone and established its time frame in the Final Report.

103. In light of the foregoing, the Tribunal holds that, while there is undoubtedly an obligation on EBC to explore and consider exculpatory evidence concerning misconduct allegations, EBC was not in breach of this obligation in this case. EBC evaluated all the evidence, including that of Mr. Y, and did not unduly rely on or ignore his testimony.

Claim that EBC Invaded the Applicant's Privacy

104. Finally, the Tribunal considers the Applicant's claim that EBC invaded his privacy when it searched through his personal iPhone and the Bank's answer to that claim (that EBC had reasonable grounds to review his phone, and that he willingly provided EBC his phone).

105. EBC's request for "[a]uthorization to retrieve and examine the memory card of a Staff Member's iPhone" states the following:

In accordance with Administrative Manual Statement 6.20A, paragraphs 11 and 14, EBC requests that the Office of Information Technology (ITS) provide to EBC access to the contents of the photographic and video files contained in the staff member's iPhone and Computer Hard Drive for the purposes of assisting with EBC's initial review of the allegation.

106. AMS 6.20A, paragraphs 11 and 14 state:

The World Bank Group reserves the right to, but will not screen, monitor or examine the content of computer files, electronic mail messages, voice mail messages, telephone records, or similar stored electronic activities, or the record of usage of such electronic activities of Information Users with access to such facilities unless there is a genuine business justification or there is a reasonable basis to suspect a violation of World Bank Group policy, a criminal act, or other misconduct.

Misconduct Investigations: In the event that there is a reasonable basis to suspect a violation of Bank Group policy, a criminal act, or other misconduct, then all instances of staff activity screening or monitoring must be preapproved by (1) the senior manager responsible for the investigation, (2) a Managing Director, and (3) the Vice President and General Counsel. Such staff activity screening or monitoring must be stopped as soon as the investigation is complete. The senior manager responsible for the investigation must ensure that screening or monitoring facilities are not abused and that only necessary information has been captured.

107. Furthermore, in order to invoke AMS 6.20A, there must be preapproval by "(1) the senior manager responsible for the investigation, (2) a Managing Director, and (3) the 'Vice President and General Counsel.'" The Applicant includes in Annex I-2 of his Application EBC's memorandum which requests authorization for the "retrieval and examination" of the Applicant's iPhone memory card and computer hard drive. The memorandum also provides justification for the request. The Senior Vice President and General Counsel and the Managing Director signed the memorandum under the section marked "Approved."

108. In *Kim (No. 1 and No. 2)*, Decision No. 448, para. 70, the Tribunal stated that the Bank may not conduct "unduly expansive" searches of an Applicant's electronic files and "stress[ed] the need for the Bank to undertake targeted searches so that it carefully balances its interest in electronic files as an employer and property owner with the staff members' interests in a reasonable measure of privacy." In this case, the Tribunal finds that the record does not demonstrate that EBC

investigators conducted an overly expansive search of the Applicant's personal electronic files unrelated to the videos at issue.

109. The Tribunal finds that the Applicant's claim that EBC invaded his privacy when it searched through his personal iPhone is unsubstantiated. The Applicant admitted that "he consented to EBC's confiscation of his personal property" and willfully surrendered his iPhone to EBC.

Concluding Remarks

110. The Tribunal is satisfied that the Applicant's misconduct has been established. However, in light of the circumstances of the case, the mitigating factors and the Tribunal's precedents, the Tribunal finds that the disciplinary sanction of termination was significantly disproportionate. The Tribunal finds that the HRVP may impose any, or a combination, of the other disciplinary measures contained in Staff Rule 3.00, paragraph 10.06, short of termination.

DECISION

- (1) The sanction of termination is rescinded;
- (2) The Bank shall reinstate the Applicant to his position at the time of the termination of his employment subject to the condition that the Bank may impose any disciplinary measure, or a combination of disciplinary measures, contained in Staff Rule 3.00, paragraph 10.06, short of termination. The duration of those disciplinary measures shall be within the discretion of the HRVP;
- (3) The Bank shall pay the Applicant the salary and benefits he would have received had his employment not been terminated, including pension contributions, retroactive salary increases, and other benefits such as health insurance, for the period from 8 August until the date on which the Applicant is reinstated;
- (4) The Bank shall pay the Applicant's attorney's fees in the amount of \$14,086.58; and
- (5) All other pleas are dismissed.

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

/S/Olufemi Elias
Olufemi Elias
Executive Secretary

At Washington, D.C., 4 November 2016