



World Bank Administrative Tribunal

2015

Decision No. 517

**CX,
Applicant**

v.

**International Finance Corporation,
Respondent**

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

**CX,
Applicant**

v.

**International Finance Corporation,
Respondent**

1. This judgment is rendered by a panel of the Tribunal, established in accordance with Article V(2) of the Tribunal's Statute, and composed of Judges Stephen M. Schwebel (President), Abdul G. Koroma, and Marielle Cohen-Branche.
2. The Application was received on 2 October 2014. The Applicant was represented by Marie Chopra of James & Hoffman, P.C. The International Finance Corporation (IFC) was represented by David R. Rivero, Director (Institutional Administration), Legal Vice Presidency. The Applicant's request for anonymity was granted on 3 November 2015.
3. The Applicant contests his 2013 Performance Evaluation Plan (PEP), 2013 Salary Review Increase (SRI), the associated percentage increase of 1.63%, and the decision to terminate his employment upon expiration of his term contract.

FACTUAL BACKGROUND

4. The Applicant joined the IFC in March 2011 as a Short Term Consultant (STC) on the Investing Across Borders (IAB) project within the Global Indicators Analysis Group (GIA). In March 2012, the Applicant was hired by the IFC as a Level GF Private Sector Development Specialist on a one-year term contract with a one-year probationary period. The position was externally funded and the Applicant's offer letter stated:

[...] since your appointment is a Coterminous Term Appointment under Staff Rule 4.01, you are advised that your appointment may be terminated, after the first year, as decided by the International Finance Corporation, if the source of the funding for the position terminates the funding. In such case, International Finance Corporation will make every effort to give you as much notice of termination as possible.

5. Around the time that the Applicant received his March 2012 coterminous term appointment Ms. X became his Task Team Leader (TTL). Ms. X was at the same grade level as the Applicant.

6. Since the Applicant was hired in March 2012, the 2011–2012 performance evaluation period, running from 1 July 2011 until 30 June 2012, was almost over and he was not scheduled to participate in the formal PEP process for that performance period. Between March 2012 and February 2013 the Applicant received no written criticism of his job performance, skills or capabilities from Ms. X or any other supervisor or manager. The Applicant avers that during that year he was exposed to an increasingly hostile work environment and abuse by Ms. X.

7. On 25 October 2012, the Applicant and Ms. X met to discuss his performance. There is no written record of this meeting. The parties accept that during the conversation Ms. X provided positive feedback on the Applicant's performance and also pointed out areas of possible improvement. According to the Applicant, in addition, she informed him that she got a "negative vibe" from him. When asked what she meant by that comment, the Applicant asserts that "Ms. [X] could not provide any specific incidents or examples; instead, she told him in general terms that he should 'smile more' and should refrain from asking her 'difficult questions' during staff meetings."

8. According to the IFC, Ms. X also explained the "difficult circumstances for the team given their funding insecurity, she asked the Applicant to be more flexible when dealing with changes, especially in process and schedule, and noted that some of the other team members perceived him as being quite negative." The IFC asserts, that consistent with the informal nature of this meeting and the generally positive assessment of the Applicant's work, Ms. X did not provide any written negative feedback to or about the Applicant.

9. On 1 November 2012, the Applicant and Ms. X met to follow up on the 25 October performance review meeting. According to the Applicant, he began by telling Ms. X that he felt their professional relationship was strained for reasons that he did not understand and gave her "concrete examples of apparent hostility and discriminatory treatment." The Applicant expressed his eagerness to have a good, professional and effective working relationship with Ms. X and

suggested they use the mediation services offered by the World Bank Group Conflict Resolution System.

10. According to the Applicant, Ms. X responded angrily and rejected the proposal of mediation, warning him to “be very, very careful” about what he said or did, and, in particular, of taking this matter outside the department. The Applicant asserts that it was concluded that they would try to resolve issues one-on-one and internally.

11. After the meeting the Applicant sent Ms. X an email stating:

Thank you for taking time out of your schedule to meet just now. Let’s both work on what we discussed and take things forward smoothly :)
Cheers,
[Applicant]

12. The Applicant received no response.

13. On 28 November 2012, the Applicant requested a meeting to review any work related developments during his Thanksgiving vacation break. Ms. X informed the Applicant that she also had something important to discuss namely that his employment contract would not be renewed due to budgetary reasons. According to the Applicant, Ms. X stated that she had “fought for” an extension of his contract but management had instructed her to replace him with an STC. The Applicant claims that Ms. X also referred to their conversation on 1 November and stated that the decision not to renew his contract had “absolutely nothing to do with our talk on November 1.”

14. On 29 November 2012, the Applicant sent an email to Ms. X’s managers, Ms. AB (Advisor, GIA) and Mr. CD (Director, GIA) requesting an in-person meeting to discuss the non-renewal of his contract. The Applicant wrote:

As I understand it the sole consideration for non-renewal is the budget constraint. I have secured an assurance from the CIC team that I can work with them on a cross-support basis starting next January for at least one year. I estimate that I would be able to bill at least 30% of my time for this cross-support to the CIC. In addition, I would be open to securing other cross-support work that would make me very budget light for the IAB.

[Ms. X] informed me that the IAB intends to hire a consultant (on an STC basis) to complete my indicator and produce several other deliverables. Taking into account my cross-support commitment(s), I believe that there would not be a significant budgetary advantage to replacing me with such a consultant.

As you know, I have developed the Employing Skilled Expatriates Indicator from scratch and I believe I am the best person to continue to lead it. In addition, I have secured a cooperation with [...] to publish a report specifically on my indicator. I also have excellent qualifications, significant professional experience and a strong skill set, including my experience in the private sector and China and my multilingual skills. I believe I have much to contribute and would continue to be an asset to GIA which, as you both have mentioned on several occasions, is looking to retain talent.

15. In late November 2012, the Applicant began communicating with the World Bank Group's Executive Director for the European region about his work situation.

16. On 3 December 2012, the Applicant met with Ms. AB and Mr. CD. There is no record of the conversation. According to the Applicant, it was explained to him that Ms. X had informed management that he had "behavioral problems" which were the reason for the non-renewal of his contract. The Applicant asserts, and the IFC does not dispute, that at this meeting there was no mention of any specific instances of "behavioral problems" nor was there any discussion of budgetary issues.

17. According to the Applicant, once it became known that he had scheduled a meeting with the Executive Director, Mr. CD and Ms. AB, without explanation, reversed their previous position. The Applicant met with Ms. AB who he claims assured him that he would be retained for another year in exchange for not pursuing a formal dispute or further criticisms of Ms. X. Additionally, he claims he was told that he would be reassigned to a different supervisor and his reporting structure would change. According to the IFC, Ms. AB did not give these assurances and management was unaware of the Applicant's meeting with the Executive Director. The IFC asserts that the decision to extend the Applicant's contract was "[i]n order to give [the] Applicant a reasonable chance to find an opportunity to contribute to other projects after the funding for his unit expired."

18. On 6 February 2013, the Applicant received a favorable written evaluation and recommendation for confirmation. Ms. X wrote:

[The Applicant] leads the Employing Skilled Expatriates topic and has done a good job preparing the foundation work for the topic, collecting data in difficult countries, and analyzing it thoroughly. He has also created a positive collaborative relationship with [...] that has helped in the data collection as well as the analysis. He is a valued team member and I recommend his confirmation.

19. On 8 February 2013, the Applicant received his first formal feedback on his performance as part of his mid-year performance review for the 2012–2013 performance review period. Ms. X informed the Applicant that he was making good progress and provided him with positive feedback. While the mid-year review was recorded in the Human Resources (HR) electronic system, the substance of the discussion was not included. According to the IFC, Ms. X “asked [the] Applicant to increase his attention to detail and to continue to work on developing his analytical skills, which needed improvement to deliver a useful topic note.” The Applicant on the other hand contends that he was informed that he had met all of his mid-year objectives, and he was not notified of any performance deficiencies or potential adverse consequences at this meeting.

20. Following the confirmation of his term appointment, the Applicant provided cross-support to one unit for up to 50% of his time, working under the direct supervision of Ms. Y. The remaining 50% of his time was spent still under Ms. X’s immediate supervision as the Applicant continued to fulfill his responsibilities within her team.

21. In April 2013, Ms. AB and Ms. X held a private conversation about IAB team members during which Ms. AB recalls that Ms. X told her the following:

[Ms. X] reported back that [the Applicant] was improving, and taking the feedback he had received seriously. She noted he had awkward interpersonal skills, at times, combative and aloof with others and that his analysis of the data was not to the level of rigor expected for someone in his role. [Ms. X] emphasized, though, that [the Applicant] was taking steps to incorporate the feedback into his work.

22. The funding for the IAB project ended in June 2013 and, according to the IFC, some members of the IAB project team left the IFC. Some were reassigned to different projects within the department, and others left for positions within the World Bank Group.

23. On 12 June 2013, the Applicant received an email from the HR Service Center with the subject line “Mainstreaming Coterminous Appointments.” In the email message the Applicant was informed:

Removal of Coterminous Designation

Our records indicate that you are currently designated as a coterminous staff, meaning that your position is 100 percent funded from sources other than the Bank Group’s administrative budget. Effective 1 July 2013, the coterminous designation will be removed from your appointment type and you will maintain your Term or Open-Ended designation per your current appointment type.

24. In July 2013, the Applicant began providing 50% cross-support to the Benchmarking the Business of Agriculture (BBA) team, where he was assigned to work on the topic of Contract Farming under Ms. JA’s immediate supervision.

25. On 27 August 2013, the Applicant had his first, and only, formal PEP meeting. The meeting was led by Ms. JA with Ms. X also present. The parties dispute the content of this meeting. According to the IFC, Ms. JA relayed feedback on the Applicant’s performance based on the input she had received from his feedback providers, as well as her own observation of his work. The Applicant contends that though the meeting was held for the purpose of discussing his annual performance evaluation, Ms. JA commenced by informing him that his contract would not be renewed after its March 2014 expiration date. The Applicant asserts that when he asked the reason for the decision, he was informed that he was not a “real team player” and that he did not deliver, or only partially delivered, his work. The Applicant claims he asked for specific instances but Ms. JA could not provide any specifics.

26. On 5 September 2013, the Applicant received formal written notice of non-renewal by email from Ms. JA with Ms. X, Ms. AB, and Mr. CD in copy. Ms. JA stated:

As already notified to you during our OPE conversation last August 27th, I would like to remind you that the GIA Department is not planning to extend your contract beyond March 4, 2014.

This complies with the World Bank protocol requirement of 6 months' notice for fixed term contracts non-renewals.

As I mentioned during our meeting, I will be happy to answer any additional questions you may have on this issue. I am also available to discuss with you possible constructive ways to take on board the performance feedback that I received from your OPE feedback providers, if you find this helpful.

27. On 18 October 2013, the Applicant and Ms. JA met to follow up on the 27 August 2013 PEP conversation. There are no records of this meeting and the parties differ in their recollection of the substance of the discussion. According to the Applicant, Ms. JA did not speak further about the upcoming termination of his employment. The Applicant also states she informed the Applicant that he was "overqualified" and "too senior," and that management had asked her to either find someone else within GIA to take over his work or hire an STC. According to the IFC, Ms. JA explained to the Applicant "in detail the additional comments from the feedback providers. She provided advice to him about better managing expectations of co-workers when asked to work on several tasks. She also suggested that he be more open to feedback and gave suggestions on communicating better with the team."

28. On 23 October 2013, the Applicant's SRI rating was made available to him. He received a 3.2 rating which designated a "Satisfactory" performance.

29. On 30 October 2013, the Applicant received his written PEP summary, which was signed by Ms. X on 26 September, by Ms. JA on 15 October, and by Ms. AB on 30 October. Ms. X is noted as the Appraising Supervisor. In her comments she notes:

[The Applicant] has worked with several teams in the department over the last year. His willingness to work in different areas is appreciated, but he would benefit from a greater attention to detail and more proactive attitude to ensure on-time delivery of requested products.

30. On 31 October 2013, Ms. JA contacted the Applicant and requested that he sign the PEP. The Applicant did not do so.

31. On 21 November 2013, the Applicant sent an email to Mr. CD and Ms. AB stating:

At my OPE meeting on 27 August 2013 [Ms. JA] informed me that my contract would not be renewed due to “deficiencies” in my performance. I would like to request a meeting with you at your earliest convenience to discuss both the non-renewal of my contract as well as these so-called deficiencies.

As you may also know last week the WBG ombudsman, [...], reached out to [Ms. X] regarding this. [Ms. X] informed the Ombudsman that she does not want to discuss or mediate these matters and advises me to use the WBG peer-review services. I would like to meet to see whether we could resolve these issues.

32. Ms. AB responded stating she would meet with the Applicant and clarified that: “I have been following the conversation with the Ombudsman closely and would like to correct your characterization below. The department’s decision was not to mediate. We have had many conversations and will continue to as long as needed and productive.”

33. On 27 November 2013, the Applicant and Ms. AB discussed management’s annual review of the Applicant’s performance. Both the Applicant and the IFC agree that the conversation focused on the Applicant’s performance, and his expression of shock at the review he received. According to the IFC, Ms. AB was “surprised to hear of his surprise,” since she had seen the Summary of Staff Feedback from colleagues about the Applicant’s work and knew that the PEP Summary conveyed the gist of that feedback in a balanced manner.

34. On 23 December 2013, the Applicant filed a Request for Review with Peer Review Services (PRS), in which he challenged (a) his 2013 PEP; (b) his 2013 SRI rating of 3.2 and corresponding salary increase of 1.63%; and (c) the IFC’s decision not to extend his one-year term contract.

35. On 8 May 2014, the PRS Panel submitted its report and recommendations to the Senior Vice President and Chief Economist, Development Economics. The PRS Panel found that the IFC

acted consistently with the Applicant's contract and terms of appointment and recommended that his requests for relief be denied. Regarding the PEP, the Panel concluded that the entirety of the PEP appropriately balanced the Applicant's positive contributions and reflected feedback provided to management as well as management's own direct observations of the Applicant's performance. The Panel found that management followed the applicable procedures in completing the Applicant's 2013 PEP, and the evidence supported the conclusion that Ms. X acted in good faith in assessing the Applicant's performance.

36. The Panel also concluded that the 3.2 SRI was reasonable and supported by the evidence, noting that management provided a reasonable and observable basis for the PEP and the SRI of 3.2 was broadly consistent with the PEP. The Panel found that management followed the applicable procedures in setting the Applicant's SRI and corresponding salary increase. Finally, the Panel concluded that "taking the totality of the circumstances into consideration, management had a reasonable and observable basis not to extend [the Applicant's] Term appointment beyond March 4, 2014." The Panel "noted that it was understandable that [the Applicant] may have been confused regarding the reasons for the non-extension decision because he was informed of the decision during the PEP discussion." It also observed that "[the Applicant's] confirmation in February 2013, only six months before the non-extension decision, supported management's position that performance was not the reason for the decision."

37. On 4 June 2014, the Senior Vice President and Chief Economist, Development Economics, informed the Applicant of his decision to accept the recommendations of the Panel.

38. On 2 October 2014, the Applicant submitted this Application to the Tribunal. The Applicant contests the non-renewal of his term contract, the 2013 PEP, SRI and associated salary increase of 1.63%. The Applicant seeks rescission of the 2013 PEP and the award of a new term contract for at least 2 years, or monetary compensation of the value of such a contract including any and all benefits. He also requests specific performance in the form of letters of recommendation by the IFC that are to his satisfaction. In terms of compensation, the Applicant seeks a retroactive salary increase of at least an additional 2%, and such additional monetary compensation as the Tribunal deems fair and just for lost wages and damages for: (i) harm caused

to his career; (ii) harm to his reputation; (iii) career mismanagement; (iv) personal stress and mental trauma; (v) costs of his PRS Request for Review; and (vi) other intangible damages. The Applicant also requests attorney's fees in the amount of \$23,217.91.

SUMMARY OF THE MAIN CONTENTIONS OF THE PARTIES

The Applicant's Contention No. 1

The PEP issued to the Applicant was improper and procedurally flawed

39. The Applicant contends that the PEP summary was unfair and improper because it: a) failed to balance positive and negative feedback in a way that was fair to the Applicant; b) failed to reflect the actual distribution of the Applicant's workload during the evaluation period; and c) was based in part on matters that took place outside the evaluation period.

40. According to the Applicant, the following indicate procedural irregularities in the conduct of his performance evaluation during his term appointment at the IFC: a) he received no feedback during his probation year; b) he received no advance warning of his alleged performance deficiencies and no opportunity to defend himself; c) that Ms. X served as primary supervisor when it should have been the Applicant's then department/manager – Ms. JA, or at a higher departmental level, Mr. CD or his designee; and d) that Ms. Y was listed as one of the Applicant's colleagues giving him feedback instead of providing a supplemental performance evaluation.

41. The Applicant further argues that the IFC violated Staff Rule 4.02, paragraph 2.02(b) which requires managers to give staff feedback during the probationary period. He contends that the IFC also violated Staff Principles 2.1 and 9.1 which require the IFC to treat staff members fairly and impartially. The Applicant contends that the IFC was fully aware of the difficult relationship he had with Ms. X and despite reassuring him that he would no longer report to her, the IFC nevertheless permitted Ms. X to lead the Applicant's PEP process and relied heavily on her input for their assessment of his performance and abilities.

The IFC's Response

The Applicant received accurate and adequate formal and informal feedback on his performance

42. The IFC contends that the Applicant received informal comments and feedback from his supervisor throughout the year and refers to examples in the annexes supplied by the Applicant. The IFC further argues that the Applicant received formal feedback from his supervisor in the following instances: 1) a discussion with Ms. X in October 2012, even though the Applicant was not part of the 2011-2012 formal evaluation cycle; and 2) the formal mid-year performance assessment from Ms. X in February 2013. According to the IFC, the Applicant received more than the required formal feedback on his performance throughout the year and had sufficient notice of the performance deficiencies.

43. The IFC contends that the commentary in the Applicant's PEP summary was fair, balanced and reflected the mixed feedback the Applicant received. The IFC argues that the formal feedback for the Applicant "provided as part of the 2013 PEP process was consistent with his supervisor's comments about his work throughout his performance – noting some positive accomplishments and traits, and providing some suggestions on areas where his performance was relatively weaker."

The Applicant's Contention No. 2

The Applicant's salary increase was improper

44. The Applicant argues that the salary increase he was awarded was contrary to Staff Principles 2.1 and 9.1, and contrary to the IFC's Salary Increase Matrix. According to the Applicant, the salary increase of 1.63% was inconsistent with his "Fully Satisfactory" rating of 3.2. He contends that he should have received, based on the IFC's own matrix, a salary increase of at least 2.05%.

45. The Applicant argues further that, contrary to the IFC procedures and Tribunal jurisprudence, the SRI was awarded prior to the completion of the performance evaluation. The Applicant notes that the SRI was finalized at least by 7 October 2013. However, it was not until 30 October 2013, that Ms. AB signed off as reviewing manager and released it to the Applicant.

The IFC's Response

The Applicant's satisfactory SRI of 3.2, and the resulting salary increase, were fair and based on his performance

46. The IFC argues that there was no abuse of discretion in assigning the Applicant a 3.2 rating and the Applicant was not given a poor or negative performance rating. The IFC further argues that the Applicant's SRI rating and the salary increase were determined in accordance with all the applicable procedures and practices.

47. The IFC argues that the Applicant fails to take into consideration that there were many factors which needed to be reconciled and his proposed salary increase was not feasible. According to the IFC, the Applicant's "unit likely had a unique distribution of SRI ratings, and also, like other units, had a limited budget from which all salary increases could be paid. These factors need to be reconciled. If everyone in the unit received a 3.2 SRI rating, for example, it probably would not be possible to award equal salary increases to all those staff members in the amount of 'at least 2.05%' and still remain within the budget."

The Applicant's Contention No. 3

Management failed to follow the proper procedure for termination regarding either of its justifications for the non-renewal of his term appointment

48. The Applicant argues that the IFC provided two conflicting justifications for the non-renewal of his contract. In the first instance, the Applicant claims he was informed that his contract would not be renewed due to performance deficiencies. However, during the PRS process IFC management revealed that his contract was not renewed due to a "business needs rationale." According to the Applicant these conflicting reasons exacerbate the improprieties.

49. The Applicant argues that assuming the truth of the proffered "business needs rationale," the IFC failed to comply with Staff Rules prescribing management's obligations and staff members' rights in situations where a staff member's original employment becomes unnecessary or "redundant" due to budget constraints or operational changes. The Applicant contends that

contrary to the applicable Staff Rule management failed to: a) provide a written six-month notice of redundancy; b) consider payment in lieu of some or all of the notice period; c) provide the Applicant with the prescribed reassignment or retraining assistance, including opportunities for placement in vacant posts even at a lower level; and d) give him the required severance payment upon termination of his employment.

50. The Applicant further contends that assuming the accuracy of the PEP commentary and the alleged oral statements that his contract was terminated due to “performance deficiencies,” the IFC failed to comply with Staff Rules 5.03 paragraphs 3.02 – 3.03, and Staff Rule 7.01, paragraph 11.

The IFC’s Response

The IFC’s decision not to offer the Applicant an additional extension of his term contract was properly made, and motivated only by valid business reasons

51. The IFC asserts that the Applicant’s offer letter explicitly stated that his contract was for a fixed duration and that he had no legal entitlement to an extension or an additional term. According to the IFC, that loss of funding for the Applicant’s unit was the legitimate business reason not to extend his contract. The IFC observes that there is no dispute that the program for which the Applicant was hired ran out of funding in 2013. According to the IFC, management made more than reasonable efforts to allow the Applicant to find other funded work, and even provided him an additional one-year term, until 5 March 2014, “in order to make a good faith effort to find a task that fit his skill mix and experience.”

52. The IFC maintains that the non-renewal decision was not related to his performance. The IFC concedes that the Applicant was indeed provided the news that his contract would not be extended at the same time as his 2013 PEP meeting. The IFC elaborates that this decision to relay the news in such a manner was made in consultation with HR to provide the Applicant with six months’ notice.

53. The IFC contests the Applicant's allegation that he was given different reasons for the non-extension of his contract, and avers that there is no documentary evidence that such oral comments were ever made in the way the Applicant recalls. The IFC concludes that if there had been sufficient funding, the Applicant could have received a term extension.

54. Finally, the IFC adds that the decision to allow the Applicant's term to expire was not a redundancy decision, and the staff rules on redundancy do not apply.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

The 2013 PEP

55. The Applicant's principal claim is that the 2013 PEP was arbitrary, unfair and unbalanced, particularly with respect to his supervisor's comments. According to the Applicant, Ms. X failed to balance the positive and negative comments received from his feedback providers.

56. The Tribunal notes that the Applicant's performance was evaluated as "Satisfactory" which according to the IFC's Guidelines means the staff member "[p]erforms in a satisfactory manner. Meets behavioral and productivity expectations as compared to peers at same grade level."

57. The Tribunal has held that its assessment of performance evaluations centers on the determination of whether the evaluation was arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure. *See Prudencio*, Decision No. 377 [2007], para. 73. As held in *Desthuis-Francis*, Decision No. 315 [2004], para. 19 "[w]hat constitutes satisfactory performance is to be determined by management [...] and management's appraisal in this respect is final absent an abuse of discretion." *See also BI*, Decision No. 439 [2010], para. 22.

58. Furthermore, in *Lysy*, Decision No. 211 [1999], para. 68, the Tribunal articulated that:

A performance evaluation should deal with all relevant and significant facts, and should balance positive and negative factors in a manner which is fair to the person

concerned. Positive aspects need to be given weight, and the weight given to factors must not be arbitrary or manifestly unreasonable.

59. The Tribunal observes that the Applicant received mixed feedback on his performance during the period under review. The record shows that under the subheading “Client Focus,” the Applicant received comments from three feedback providers specifically on his ability to “develop or nurture client relationships; anticipate client business needs; demonstrate a sense of urgency in responding to client needs; and tailor innovative solutions to exceed client expectations.” One colleague stated that the Applicant’s “output was of high technical quality from a legal analytic perspective,” and while the Applicant successfully met clients’ needs, he “could be more innovative in addressing client needs.” This colleague added that: “Sometimes [the Applicant’s] initial reaction would focus on the previous direction that we had been taking, and wonder how we could fit that previous direction into the new request.”

60. Another colleague stated: “In my opinion, [the Applicant] did not take this work with the right sense of urgency. He was consistently late in delivering his assignments even after numerous being told how urgent and time-sensitive these assignments were. [The Applicant’s] deliverables were characterized by low quality and frequent errors.” Yet another colleague stated: “He proposed a few interesting initiatives (such as the preparation of a joint report with [...], on the Employing Skilled Expatriates topic). He was pro-active during the team meetings and, to my knowledge, always delivered on time. His ideas were valuable and constructive, and he helped us improving the project and our indicators.”

61. The record shows that the supervisor’s comments briefly noted that the Applicant “managed the relationship he developed with [...] in a very professional manner. He also dealt efficiently with specific requests from external and internal clients.” She then incorporated the bulk of the text of the second feedback provider changing the word “Sometimes” to “Often”:

One area for potential improvement would be that [the Applicant] could be more innovative and flexible in addressing client needs. In many circumstances throughout the past year, the focus of our deliverables was shifted. These were challenging circumstances which required us to quickly embrace change and think about how our data and analysis could be reframed or repackaged to meet the new demands. Often [the Applicant’s] initial reaction would focus on the previous

direction that we had been taking, and wonder how we could fit that previous direction into the new request instead of thinking innovatively and positively about how to respond to such changing requests. [The Applicant] could also better meet client needs by seeking more guidance on the expected quality and urgency of his deliverables.

62. Under the sub-heading “Teamwork & Communications” the Applicant received feedback from five colleagues on his ability to “deliver what was promised; share and synthesize information appropriately for different audiences; give and receive constructive feedback, manage and resolve conflicts; mentor or coach others within own unit or across other departments.” One colleague stated that the Applicant met the deliverables requested of him, and his tendency was to “focus his time and that of his interns/consultants on his own work stream. This focus helped him meet the deliverables that were requested of him.” The colleague further added that “[b]eing a lawyer, [the Applicant’s] experience with quantitative analysis was relatively limited. As such, he received feedback numerous times about how he could address these requests for quantitative analysis. He received this feedback very well.”

63. Another colleague stated that the Applicant “has always shown a cooperative and constructive attitude,” and regarding managing and resolving conflict the Applicant “has shown that he is able to be flexible and to keep a positive attitude.” A third colleague who worked with the Applicant on a project stated that the Applicant did not show “much of a team spirit. He kept focusing on finding excuses about not delivering rather than going the extra mile for the sake of the team and our committed clients.” Another colleague who also worked with the Applicant on the same project stated that the Applicant was not “proactive in seeking guidance,” and “[s]ometimes he seemed not to be aware of the urgency and timing of the tasks, which led to delays in deliverables.” The fifth colleague stated that “[c]ommunication was an issue while [the Applicant] was providing cross support to the subnational team [...]” This colleague added that the Applicant overlooked some of the detailed comments which were provided on his draft and, when prompted stated that “he had too much work with ‘investing across borders’ and did not have the time necessary to do a good job.”

64. Ms. X's supervisor's comments noted that the Applicant

managed 4 interns over the course of the last year. In terms of his communication skills, [the Applicant] has improved his delivery in the past year, after receiving feedback on this. He has tried to be more collaborative and positive. This being said, [the Applicant] could also improve his attitude by being more open to feedback and by seeking feed-back. [The Applicant] could also improve his written skills by paying more attention to details and delivering a more polished finished product.

65. Finally, under the subheading "Areas of Improvement," of the five colleagues who provided feedback, two colleagues expressly stated that the Applicant should work on his "attitude." The need to improve on communication was a recurrent theme, and it was also recommended that the Applicant improve his writing skills, pay attention to comments received from his colleagues, and be "more proactive in seeking help from them to improve his writing."

66. Ms. X's supervisor's comments noted that the Applicant:

Could benefit from showing a more positive and flexible attitude in the light of challenging and changing circumstances for the team. In terms of his work, a closer attention to deadlines, and details would greatly improve the quality of his deliverables. [The Applicant] needs to be open to feed-back and try to incorporate the suggestions he receives in his daily work.

67. The Tribunal is satisfied that the supervisor's comments adequately reflect the positive and negative feedback on the Applicant's performance. While Ms. X could have included more positive comments in her summary of the Applicant's performance under "Client Focus," overall the record shows that the Applicant received a mixed review of his performance from the feedback providers, and this is accurately reflected in the supervisor's comments. The Tribunal is not persuaded that her comments were arbitrary, discriminatory or improperly motivated.

Alleged procedural irregularities

68. A basic guarantee of due process is "that the staff member affected be adequately informed with all possible anticipation of any problems concerning his career prospects, skills or other relevant aspects of his work." *Garcia-Mujica*, Decision No. 192 [1998], para. 19. In the context of

performance evaluations, the staff member must be given “adequate warning about criticism of his performance or any deficiencies in his work that might result in an adverse decision being ultimately reached ... [and] adequate opportunities to defend himself.” *Samuel-Thambiah*, Decision No. 133 [1993], para. 32. *See also B*, Decision No. 247 [2001], para. 21. Therefore, “[l]apses in performance should be identified when they occur and addressed expressly and promptly. They should not be held in reserve only to be disclosed at the end of the review period.” *O*, Decision No. 337 [2005], para. 54. Performance evaluations must be conducted in a fair and reasonable manner providing the staff member an opportunity to correct any mistakes and the staff member should receive ongoing feedback which would enable him or her to “anticipate the nature of [the] year-end discussion and resultant ratings on the OPE.” *Prasad*, Decision No. 338 [2005], para. 25.

69. The Applicant’s main assertions in this regard are that: a) he received no written feedback during his probation year; b) he received no advance warning of his alleged performance deficiencies and no opportunity to defend himself; c) that Ms. X served as primary supervisor when it should have been the Applicant’s then department/manager – Ms. JA, or at a higher departmental level, GIA Director CD or his designee; and d) that Ms. Y was listed as one of the Applicant’s colleagues giving him feedback instead of providing a supplemental performance evaluation.

Feedback during probation

70. Staff Rule 4.02, paragraph 2.02(b) governs the evaluation of the performance of staff members during the probationary period. It provides that:

During the probationary period, the Manager or Designated Supervisor shall:

[...]

b. provide the staff member feedback on the staff member’s suitability and progress based on achievement of the work program, technical qualifications and professional behaviors.

71. The record shows that the Applicant and Ms. X met on 25 October 2012, during his probationary period, to review his performance. His contract was subsequently confirmed in writing. The Tribunal is satisfied that the IFC met its obligations under Staff Rule 4.02, paragraph 2.02(b).

Advance warning and opportunity to improve

72. The Applicant further argues that he was not provided with advance warning of the criticisms of his performance and was denied the opportunity to improve and defend himself. According to the Applicant, he first heard of the alleged deficiencies in his performance at the 27 August 2013 PEP meeting.

73. The record shows that the Applicant received feedback on the concerns regarding his communication skills and the need to improve his writing skills. Setting aside the disputed discussions the Applicant had with Ms. X, Ms. AB and Mr. CD, the Tribunal finds that the confidential multi-rater feedback forms demonstrate that the Applicant received feedback from his colleagues during the review period. For instance, one colleague noted that “[b]eing a lawyer, [the Applicant’s] experience with quantitative analysis was relatively limited. As such he received feedback numerous times about how he could address these requests for quantitative analysis. He received this feedback well.” Furthermore, the comments that the Applicant could be more open to feedback suggest that feedback was offered to which the Applicant was not sufficiently receptive.

74. Additionally, the record includes email correspondence in which suggestions for corrections were made to the Applicant’s work. For instance, in April 2013 – within the review period – the Applicant received comments on his Employing Skilled Expatriates Topic Note. These comments included suggestions for improving the overall quality and analysis of the work product. The commentator stated “I would encourage the author to add more statistical analysis that shows what kind of restrictions apply where. [...] As a reader I was somewhat lost as to what areas [...] measured are more important than others [...]. The draft is missing an important part of

analysis that would justify the relevance of the new data [...] it seems important to set at the stage at the beginning on what you are trying to achieve with this note.”

75. The record also includes a summary of email correspondence on various projects the Applicant was involved in. The Applicant received positive feedback on his work product. One colleague commented: “The reform memo looks professional and makes good use of [...] examples.” A peer also commented on the Applicant’s Employing Skilled Expatriates Topic Note stating: “Overall my impression is that this is a well-crafted paper, it makes a clear case why the issue of work permits for expats is an important one, lays out the key concepts in a logical and consistent manner, provides useful case examples to illustrate concepts in a practical way, and also strives to explore the impact that this policy areas has on FDI flows and other relevant measures.”

76. The record also shows that the Applicant received feedback and guidance on his work. These comments are consistent with comments by the multi-rater feedback providers on the need to improve the overall quality of his work.

77. The Tribunal is satisfied that the Applicant was provided with adequate notice of areas of improvement and given the opportunity to rectify these throughout the review period. The Tribunal further notes that despite the concerns about the Applicant’s performance in some respects, he was nevertheless given a positive evaluation rating.

Supervisors and supplemental performance evaluations

78. The Tribunal will now address the Applicant’s contention that Ms. Y was wrongfully listed as one of his multi-rater feedback providers instead of as his supervisor. According to the Applicant, the IFC violated its own guidelines by having Ms. X serve as the primary supervisor leading the Applicant’s annual evaluation. To the Applicant, because he reported to more than one supervisor for a period of three months or more during the period under review, i.e. Ms. JA, Ms. Y and Ms. X, the proper vehicle for substantive review by multiple supervisors was a supplemental written performance evaluation.

79. Staff Rule 5.03, paragraph 2.01(d) provides that:

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.

80. The IFC's Guidelines on Performance Evaluation contains a Frequently Asked Questions section which also addresses this issue:

If I transferred from one department or manager to another during the year, who evaluates my performance?

The current department/manager is responsible for evaluating the staff member's performance. If during the review period the staff member has reported to more than one supervisor for a period of three months or more, you or your current supervisor should request the other supervisor(s) to provide supplemental written performance evaluations. The previous supervisor can also be listed as a co-supervisor, and will be able to provide end-year evaluation comments.

81. The record shows that the Applicant did not object when he was informed, on 26 June 2013, that Ms. Y would be listed as a feedback provider. On that date Ms. X contacted the Applicant and stated:

I wanted to ask you whether you were able to change your supervisor in the system for the PEP process. I believe [Ms. Y] has discussed this with you already. We will change your supervisor from [Ms. Y] to me and [Ms. JA]. [Ms. Y] will provide information as a feedback provider.

82. The Applicant responded the same day stating: "Yes, I've implemented those changes." He then proceeded to list the five feedback providers with Ms. Y's name at the top. The Tribunal finds that, having made no objections to the placement of Ms. Y as a feedback provider, the Applicant cannot belatedly complain that she should have been listed as a supervisor, and should have given him a supplemental evaluation.

83. Furthermore, the Staff Rules and Guidelines do not state that supplemental written performance evaluations are mandatory. Both documents clearly state that such supplemental evaluations "may be requested," and the responsibility to request one lies equally on the Applicant.

The Tribunal addressed a similar claim in *Mpoy (No. 8)*, Decision No. 480 [2013] and held in para. 33 that:

In the Tribunal's view, based on the language of the Rule, a supplemental OPE covering the Applicant's work [...] could have been requested by the Applicant or his OPE Manager. This was an option; the Staff Rule does not mandate it. If the Applicant were genuinely interested in it, he could have requested it.

84. The Tribunal finds that there were no procedural irregularities in the conduct of the Applicant's performance evaluation.

The 2013 SRI

85. The Applicant argues that the salary increase he was awarded was contrary to Staff Principles 2.1 and 9.1, and the IFC's Salary Increase Matrix. According to the Applicant, the salary increase of 1.63% was inconsistent with his "Fully Satisfactory" rating of 3.2, and he should have received, based on the IFC's own matrix, a salary increase of at least 2.05%. The Applicant further contends that the SRI was awarded prior to the completion of the performance evaluation. The IFC, on the other hand, contends that the Applicant's SRI rating and subsequent salary increase were determined in accordance with the applicable procedures and practices.

86. The Tribunal has recognized that "[g]iven the various decisional elements that are properly taken into account in making such a comparative assessment, it is difficult to support a claim of abuse of discretion." *Marshall*, Decision No. 226 [2000], para. 24. However, SRI ratings must have a "reasonable and observable" basis, and ratings which are based on arbitrary OPE processes will be set aside. *See BY*, Decision No. 471 [2013], para. 31.

87. The IFC produced an explanation for the salary increase awarded to the Applicant. It noted that in 2013:

The general HR matrix for IFC provided a range of possible salary increases for staff with salary in salary range zone 1, like Applicant. For staff in that salary zone rated with a "3" SRI, possible salary increases ranged from .8% to 3.3%. Because there are three sub-ratings in rating range "3"- 3.1, 3.2, and 3.3, HR also broke the

data down further for individual unit directors. For example, HR calculated that the recommended range for a 3.2 SRI rating in salary zone 1 should be between 1.40% and 1.80%.

Even more specifically, for the 2013 SRI process in Applicant's unit, HR also performed an additional calculation that took into account the unit's budget, and provided a precise recommended salary increase for a staff member with a 3.2 rating and a salary in zone 1. This was done by HR for all units, in order to make it easier for Directors to assign appropriate salary increases while staying within their budgets for those increases. For a staff member in Applicant's unit with a 3.2 SRI rating in salary zone 1, this recommended salary increase was 1.634%.

A unit director could deviate from HR's calculated recommendations, but then would have to change other recommendations, too, in order [to] stay within the unit budget. In this case, Applicant's Director, [Mr. CD], did not change Applicant's recommended increase, and left it at 1.63%.

88. The Tribunal observes that a Human Resources expert testified before the PRS Panel and explained how the SRI ratings are set. She noted that the Directors have to make the final decision on where staff members are placed on the performance curve. With respect to the actual salary increase she stated that:

When the SRI ratings are sent to compensation we then get a merit matrix within which we need to set the actual percentage, the actual dollar amount for the increase. There is a range for each combination of SRI rating as well as the position in the salary range. [...]The Director gets an SRI budget, and I have yet to see one where it exactly balances their budget. So then the Director has to adjust within [...] a small range for each rating and zone combination within which the Director can adjust the final increase. [...]

In [the Applicant's] case, [the Applicant] got the exact suggested percentage.

89. She specifically stated that not everyone who received a 3.2 SRI received a 1.63% increase but they received an increase within the range. She stated: "some got lower, some got higher, some got exactly what the system spit out."

90. The Tribunal notes that such a decision to award a staff member a higher salary increase is discretionary, and consistent with its jurisprudence, will not set aside such a decision unless it is shown to have been arbitrary, made with improper motive, or discriminatory. In this case, the Tribunal is satisfied that there was a "reasonable and observable" basis for the Director's decision,

and he reasonably exercised his discretion in determining the amount of salary increase to award the Applicant, in light of the obligation to balance the budget. The Applicant was not awarded less than the amount automatically computed for him based on his SRI rating and zone.

91. The Applicant wishes the Tribunal to draw a negative inference from the IFC's refusal to produce a document or chart showing the salary increases awarded to IFC staff who received 2013 SRI ratings of 3.1, 3.2, or 3.3. The Tribunal finds that such an inference is unnecessary. The Applicant has not demonstrated why the decision of the GIA Director should be viewed with suspicion, nor has he demonstrated why the amount others received is relevant to his case. The Applicant was not awarded less than what was computed for him. The Tribunal finds no evidence of arbitrariness, improper motive or discrimination in setting the Applicant's SRI rating and salary increase.

Procedural irregularities in setting the Applicant's SRI

92. In setting the SRI, the "established order of things" is first the conduct of a proper performance evaluation embodied in a written performance review, followed by the assignment of the staff member's SRI. *See CD*, Decision No. 483 [2013], para. 38. The record contains a document titled "Key Dates and Activities for FY13 Performance Evaluations and FY14 Performance Cycle." The document notes the following important dates:

By August 31

- Supervisor(s) reviews input and prepares feedback for management review meeting and performance evaluation discussion with Staff
- Departmental management review meetings completed to calibrate staff performance and decide key HR actions, such as SRI proposals and promotion recommendations
- Performance evaluation discussions between Supervisors and Staff completed and Supervisor(s) evaluation documented in PEP system

By September 10

- Reviewing Official signs-off on FY13 Performance Evaluations
- Promotion Assessment forms for panel cases are due
- SRI ratings to be finalized by Directors

By September 30

- SRI increases to be finalized by Directors for HQ

By October 9/15

- Supervisor communicate SRI ratings and salary increases to staff
- Supervisor signs-off on all staff FY14 objectives

93. The Applicant and his supervisors held the formal performance evaluation meeting on 27 August 2013. The Applicant avers, and the IFC does not dispute, that he did not receive a copy of his written PEP summary at that time. The PEP was signed off in the system by Ms. X as the primary supervisor on 26 September 2013. On 15 October 2013, Ms. JA signed the PEP as co-supervisor. The Applicant and Ms. JA held a subsequent discussion to further address the Applicant's performance on 18 October 2013. The Applicant received his SRI rating on 23 October 2013. On 30 October 2013, Ms. AB signed the PEP as the Reviewing Manager. On or around 31 October 2013, the Applicant received the written PEP.

94. According to the timeline above, the reviewing official, in this case Ms. AB, should have signed off on the PEP by 10 September 2013, and this should have been released to the Applicant. However, this was done over a month after the prescribed date, and a week after the Applicant received his SRI rating. The IFC's explanation of this delay is that the Applicant's PEP was lost in the system. According to email correspondence between Mr. CD, Ms. JA and a staff member in the Office of the GIA Director, as of 23 October 2013, they could not find the Applicant's PEP in the system. An email was sent that day later: "Mystery solved. [Ms. AB] is listed as the reviewing official for [the Applicant's] PEP. Please let me know if [Ms. AB] should sign off or if this should be reassigned for [Mr. CD's] final approval." It was agreed that Ms. AB would sign off on the PEP.

95. The issue is whether the Applicant has suffered any demonstrable harm for this procedural irregularity to justify compensation. The Applicant did have a formal PEP discussion with his supervisors on 27 August 2013. Though this discussion was brief, and included the announcement that the Applicant's contract would not be extended, the Applicant does not dispute that he was provided with feedback on his performance. Furthermore, the Applicant did not receive an unsatisfactory SRI rating. His SRI of 3.2 depicted a satisfactory performance, and the Tribunal has found that there was a reasonable and observable basis for the salary increase of 1.63%. The

Tribunal is satisfied that though there was a procedural irregularity in setting the Applicant's SRI before the Applicant received a copy of the PEP, this irregularity did not cause the Applicant harm to merit compensation. However it merits meeting some of the Applicant's costs as he had a legitimate reason to challenge the procedure adopted.

The basis for the non-extension of the Applicant's term contract

96. The Applicant contends that until the PRS proceedings commenced he was informed that his contract would not be extended due to "performance deficiencies." He argues that the IFC failed to follow the proper process for termination of a staff member's contract on grounds of unsatisfactory performance. He further argues that even if the IFC's claim of a "business needs rationale" was legitimate, the IFC failed to follow the proper redundancy proceedings. The IFC maintains that the Applicant's term contract was not extended due to lack of funds.

97. Indeed the Applicant was not entitled to an automatic extension of his term contract. *See CA*, Decision No. 475 [2013], para. 50. However, as was held in *BY*, Decision No. 471 [2013], para. 49, "where the real issue is management's dissatisfaction with the Applicant's performance, notice and the opportunity to improve are required prior to an adverse decision." Such an opportunity would usually take the form of an Opportunity to Improve Unsatisfactory Performance Plan (OTI).

98. The record shows that the Applicant was informed that his contract would not be extended at the same meeting which was called to discuss his formal performance evaluation. There is no evidence that the Applicant was forewarned that the meeting would also include a discussion on his contract extension. The IFC acknowledges that both matters were raised in the 27 August 2013 discussion the Applicant held with his supervisors Ms. JA and Ms. X. The IFC explains that the reason for this was to ensure that management gave the Applicant the required six months' notice based on the advice they received from their human resources officer.

99. If the Applicant's accounts are to be accepted, then there was confusing information disseminated to him as early as November 2012 when he states that he was informed by Ms. X

that his contract would not be extended due to lack of funds, but was later informed by Ms. AB and Mr. CD that he had some behavioral and performance issues. His contract was nevertheless confirmed and extended for an additional year.

100. The question before the Tribunal is what was the real reason behind the non-extension of the Applicant's term contract beyond its expiration in March 2014. The record shows that the project for which the Applicant was hired, the IAB project, disbanded around June 2013 due to lack of funding. One of the witnesses before the PRS Panel attested to the stressful work environment as members of the group were unsure of their contracts and whether they would be able to find alternative employment within the World Bank Group. By the Applicant's own account, he knew as early as November 2012 that there were budgetary constraints affecting the project. The Applicant was thus not the only one in that uncertain situation. The record further shows that the teams to which the Applicant provided cross-support had business reasons for not offering him a continued position.

101. The Tribunal is satisfied that there were legitimate business reasons for the non-extension of the Applicant's contract. However, the Tribunal finds that the confusion which arose was avoidable. The Applicant's term contract expired on 30 March 2014. The Applicant's supervisors had at least until the end of September 2014 to inform the Applicant of the decision not to extend his contract and still meet the requirement to provide him with six months' notice. There was therefore no need to merge such an important discussion with the Applicant's formal performance review.

102. Two HR experts testified before the PRS Panel that it was not recommended to combine the discussion on performance with a discussion on non-extension of a staff member's contract. One of them was specifically asked whether she would advise a manager to deliver news on the non-extension of a staff member's contract at the same meeting feedback on performance is provided. She responded that non-renewal of contracts is business driven, and the advice of human resources to any business manager is that "you have to really try not to put in the mind of a staff member that there is a link on the performance." She further added that:

De-linking of two meetings would be advised because this is not the same message; however, there could be circumstances where [a] manager delivers it in the same meeting, in the same set-up. I would not say that the meeting should be called to say 'this is your performance and this is what we do with your contract.' Sometimes the conversation inevitably is going in that direction and if the manager would tell that at the same meeting, I would not hold it against the manager. However, the purpose of the meeting to discuss performance should be to discuss performance.

103. Merging two important discussions into one can lead, as it did in this case, to the reasonable perception that the non-extension of the Applicant's contract was motivated, at least in part, by the Applicant's perceived performance deficiencies. This was further compounded by the fact that when the Applicant contacted Ms. AB and informed her that he was told the reason for his non-extension was his alleged "performance deficiencies," she did not deny that claim. There is nothing in the record that demonstrates any attempt to reassure the Applicant, prior to the initiation of PRS proceedings on 23 December 2013, that the non-extension decision was made independently of the perception of his performance.

104. However, the Tribunal observes that no policies or guidelines were violated. Both HR experts acknowledged during their PRS testimonies that due to timing, while not recommended, the discussions may be combined. The Tribunal nevertheless finds that the Applicant's claim in this respect was not wholly without merit, and a portion of his costs accordingly should be met by the IFC.

105. The Tribunal will now address the Applicant's assertion that management failed to comply with the procedures governing redundancies under Staff Rule 7.01. According to the IFC, Staff Rule 7.01 did not apply in this case as the Applicant's employment was not made redundant.

106. Staff Rule 7.01, paragraph 8.02 provides that:

Employment may become redundant when the Bank Group determines in the interests of efficient administration, including the need to meet budgetary constraints, that:

- a. An entire organizational unit must be abolished;
- b. A specific position or set of functions performed by an individual in an organizational unit must be abolished;

- c. The responsibilities of a position no longer match the skills and experience of the incumbent and are unlikely to do so within a reasonable period of time; or
- d. Types or levels of positions must be reduced in number.

107. The Tribunal observes that the IFC did not declare the Applicant's employment redundant. The record shows that the Applicant was fully aware that he was hired on a coterminous position funds for which were exhausted as of June 2013. In addition to the fact that he held a position assigned a fixed term, the existence of his position was tied to the funds available for the IAB project. The Tribunal finds no evidence that the procedures for redundancy were applicable in this case.

Concluding Remarks

108. The Tribunal finds that there were procedural irregularities in setting the Applicant's SRI before the completion of the PEP process. The Tribunal has repeatedly stressed the importance of complying with procedures governing the evaluation of performance and assignment of SRI ratings. Furthermore, given the confusion which arose from the 27 August 2013 meeting, the Applicant's challenge to the actual basis for the non-extension of his contract was not wholly without merit. The Tribunal accordingly will order the IFC to meet part of the Applicant's legal costs.

DECISION

- (1) The IFC shall pay the Applicant's attorney's fees in the amount of \$11,609.
- (2) All other claims are dismissed.

/S/ Stephen M. Schwebel

Stephen M. Schwebel

President

/S/ Zakir Hafez

Zakir Hafez

Acting Executive Secretary

At Washington, D.C., 13 November 2015