World Bank Administrative Tribunal

Reports

2001

No. 256

[EF],
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

World Bank Administrative Tribunal
Office of the Executive Secretary

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[EF],
Applicant

v.

International Bank for Reconstruction and Development,
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1. The World Bank Administrative Tribunal has been seized of an application, received on February 28, 2001, by [the Applicant against the International Bank for Reconstruction and Development. In [*EF*], Decision No. 249 [2001], the Tribunal denied the Bank's request to declare the application inadmissible for lack of jurisdiction. The parties thereafter submitted their written pleadings on the merits. The case has been decided by a Panel of the Tribunal, established in accordance with Article V(2) of its Statute, composed of Thio Su Mien (a Vice President of the Tribunal) as President, Elizabeth Evatt and Jan Paulsson, Judges. The case was listed on November 14, 2001. On November 20, 2001, the Applicant's counsel requested that a Declaration at Annex 1 to the Respondent's Rejoinder, as well as the facts in the Respondent's Rejoinder which recite this Declaration, be struck from the record in this case. The Tribunal so orders: the Declaration, and factual assertions that depend on it, are struck out on the grounds that the Declaration introduced new facts, which should have been raised in the Respondent's Answer so as to allow the Applicant an opportunity to respond.

The complaint

2. The Applicant challenges three decisions which had the following respective effects: (1) placing him on a performance improvement plan (PIP) for

unsatisfactory performance soon after withdrawal of a decision to make him redundant; (2) rating his performance as unsatisfactory in the 1999 overall performance evaluation (OPE); and (3) terminating his employment for unsatisfactory performance in breach of the procedure set out in Staff Rules 5.03 and 7.01. He contends that these decisions were arbitrary, discriminatory, and retaliatory; and therefore constituted an abuse of discretion.

The relevant facts

3. The Applicant joined the Bank as Regular staff member on November 21, 1983, as a level 22 Technical Training Specialist. He was promoted to a level 23 Technical Assistance Officer position in 1988. In July 1995, he was promoted to the position of level 24 Senior Environmental Specialist. He held that position when he was made redundant in December 1998 pursuant to Staff Rule 7.01, paragraph 8.02(c), which provides:

> 8.02 Employment may become redundant when the Bank Group determines in the interests of efficient administration that:
>
> > (c) A position description has been revised, or the application of an occupational standard to the job has been changed, to the extent that the qualifications of the incumbent do not meet the requirements of the redesigned position….

4. On March 12, 1999, the Applicant requested administrative review of the redundancy decision on the grounds that:

> (i) he had not been informed that his position description had been revised or that the application of an occupational standard to the job had been changed; the failure to redesign the job or to give notice of such redesign was a violation of Staff Rule 7.01, paragraph 8.02(c);

(ii) the reason cited for his redundancy was his alleged failure to build a work program, a criticism which, he asserted, was not justified because under the Bank's policy it was the responsibility of managers to "play a much greater role in balancing and managing workloads," which his managers had failed to do;

(iii) management improperly removed two projects in his work program, i.e., the Black Sea Regional Environmental Program and the Georgia Black Sea Integrated Coastal Zone Management Project, which were assigned to other staff soon after he joined the Europe and Central Asia Rural Development/Environment Sector (ECSRE)/Environmentally and Socially Sustainable Development Sector (ECSSD) Unit; and

(iv) the redundancy decision was a result of hostile management treatment of him ever since he joined the ECSRE/ECSSD Unit.

5. The administrative review was conducted by the Vice-President of the Europe and Central Asia Regional Office ("VP-ECA"). In a memorandum to the Applicant dated April 28, 1999, he accepted that the redundancy decision had been improper, stating that the Applicant's position had not been revised with the degree of formality required by Staff Rule 7.01, paragraph 8.02(c), and the Tribunal's judgment in *de Raet* (Decision No. 85 [1989]). He also noted that the changes to the position had neither been documented nor communicated to the Applicant. Accordingly, he rescinded the redundancy decision. At the same time, when answering other complaints of the

Applicant, including the allegation that management had failed to assist him in building his work program, the VP-ECA went on to state:

> Because of the lack of clarity as to the grounds of your redundancy and because reasons for your limited workload appear to be based on underlying performance issues, I have determined that you should be given an opportunity to improve your performance in your current position. To ensure that you know what is expected of you, I have asked Ms. [X] to provide you with a position description for the Senior Environmental Specialist in ECSSD. This is the position that you have been occupying all along; it does not include the new requirements. During the next six months you will be given an opportunity to perform the requirements of your current job. At the end of that period, I have asked Ms. [X] to assess your performance and make recommendations to me about the appropriate course of action.

6. On May 7, 1999, the Applicant met with Ms. X, his supervisor ("the Supervisor") and Mr. Y, the Reviewing Manager ("the Reviewing Manager") to discuss his performance during the 1999 OPE cycle. The Applicant's account of the meeting is that no rating was given or discussed for any project. However, according to the Supervisor, as documented in her memorandum of June 2, 1999, to the Applicant, both she and the Reviewing Manager gave the Applicant frank feedback and advice on how to ameliorate his performance. According to the Applicant, the Supervisor agreed to draft her OPE section and to send a copy to the Applicant for discussion at the next OPE meeting.

7. On May 12, 1999, the Supervisor sent the Applicant a note listing the duties expected of a Senior Environmental Specialist in ECSSD as requested by the VP-ECA. On June 2, 1999, the Supervisor sent the OPE signed by her to the Applicant for his review, comment and signature, together with a memorandum which summarized the feedback given to him on May 7, 1999. These documents set out in detail the substantive and behavioral deficiencies observed in his performance between January 1998 and

March 31, 1999. The Supervisor proposed a PIP of six months. According to the Applicant, on June 11, 1999, a second performance meeting was held to confirm the Supervisor's conclusion of June 2, 1999. The Applicant informed the Supervisor that he would be appealing against the decisions of the VP-ECA to the Appeals Committee. The Applicant refused to sign the OPE sent to him by the Supervisor. (This was recorded in the OPE on June 30, 1999.)

8. On June 29, 1999, the Supervisor wrote to the Applicant notifying him that his 1999 OPE was unsatisfactory and that with effect from July 23, 1999, and pursuant to Staff Rule 5.03, Section 3 (Management of Unsatisfactory Performance), he would be given a period of three months to improve his performance. The Applicant was also informed that failure to improve his performance to a sustained satisfactory level at the end of the trial period might result in termination of employment. The Supervisor mentioned that she had consulted both the Reviewing Manager and the VP-ECA, and that both supported her plan.

9. In a memorandum dated July 22, 1999, the Supervisor informed the Applicant that the PIP would commence on July 27, 1999, enclosed the terms of reference of the work program, and suggested that a meeting be held on July 27, 1999 to discuss them.

10. The Applicant sent to the Supervisor an e-mail on July 29, 1999, commenting that the terms of reference were unlimited in scope, vague and theoretical, and would probably be “a good recipe for failure.”

11. As the Applicant was due to go on his pre-approved annual leave from August 1, 1999, to September 14, 1999, the PIP was postponed to commence on

September 14, 1999. On August 24, 1999, by way of provisional relief, the Appeals Committee recommended a definite PIP period and an outside mentor. This was agreed to by management. On September 14, 1999, the Supervisor stated in an e-mail to the Applicant that the PIP had begun from that date and would run for a period of six months, but that the work to be performed would be limited initially to three months. The work for the second three months would only be identified upon "successful completion" of the first three months.

12. After his return from annual leave, the Applicant received the September 14, 1999 e-mail from his Supervisor dealing with the various points raised by the Applicant in respect of the terms of reference in his e-mail of July 29, 1999. She affirmed that these issues had been dealt with in their July 27, 1999, meeting. Although clarifications were given to the Applicant, he continued to raise objections to the PIP: its length, the work assigned to him, and other issues. He suggested how outside reviewers should be selected, and asked that his Supervisor be removed as his manager, because of alleged bias. He expressed some suspicion that the process and substance of the PIP had been devised in bad faith.

13. On October 5, 1999, the Supervisor wrote to the Applicant as follows in response to various points raised by him:

> First, I have to say that I am dismayed that we have now been discussing the terms of reference for your work under the performance improvement plan since July, but the work itself has not begun. It is time to come to closure on the work program you will carry out under the PIP and move forward.

14. On October 13, 1999, the Ombudsman was called in to mediate on the plan for the PIP. An agreement was reached on the projects to be undertaken, the duration of the PIP, the content of the work program and the delivery schedules. Soon

thereafter, the Applicant sought further clarifications as to the scope of the agreement. The Ombudsman duly answered his questions.

15. During this period, there was little progress in the execution of the Applicant's work program. Consequently, he was unable to meet the various deadlines set out for his tasks, e.g., in relation to the Concept Paper for the Environmental Capacity Building Study ("the Concept Paper"). Although the deadline for its submission was extended to December 7, 1999, he failed to produce the Concept Paper on that date. Instead, he submitted a proposal for new terms of reference for an environmental capacity building study which he had conceived. In order to give him another chance, given the serious potential consequences for his future employment, he was allowed further time to produce the Concept Paper. The deadline was postponed to January 2000. When the paper was finally produced, Management and the Client Group found it unacceptable, and decided not to proceed with the Applicant's proposal. Another staff member was then assigned to carry out the originally planned work in accordance with the requirements and schedule specified by the Respondent.

16. On March 9, 2000, the Reviewing Manager and the Supervisor met with the Applicant to discuss his performance during the PIP. The Applicant's work was evaluated in a memorandum dated March 8, 2000. His performance was rated unsatisfactory and he was informed that his Supervisor and the Reviewing Manager would be recommending termination of his employment on the basis of this assessment. The VP-ECA concluded that termination was justified. The Applicant was given notice of termination to take effect on May 8, 2000.

17. On March 16, 2000, the Applicant filed an appeal with the Appeals Committee contesting the decision to terminate his employment. There were already two pending grievances: in July 1999, he had appealed against the decision of the VP-ECA granting him a "conditional reinstatement of his position," and in January 2000 he had appealed both against his 1999 OPE, where his performance was assessed as unsatisfactory, and the decision to place him on a PIP.

18. The Appeals Committee consolidated the three appeals. It came to the conclusion that there was no abuse of discretion either in respect of the 1999 OPE and the placement of the Applicant on a PIP, or in respect of the termination of his employment. However, it was of the view that the VP-ECA's administrative review had improperly imposed a PIP based on information not seen by the Applicant. Furthermore, the Appeals Committee took the view that the threat of a PIP was a "more unfavorable decision" than the contested redundancy decision, and that the decision imposing the PIP was therefore flawed. The Appeals Committee concluded by recommending a lump sum payment of six months' net salary, training funds equivalent to the maximum retraining funds that could have been made available to him as a part of his redundancy package, and the payment of legal costs up to a maximum of $5,000.

19. The Respondent accepted the recommendations of the Appeals Committee that there was no abuse of discretion in the 1999 OPE, the PIP placement and the termination decision but did not accept the Appeals Committee's recommendation that the Applicant be awarded relief with respect to the manner in which the PIP had been set in motion.

Application to Tribunal

20. On February 28, 2001, the Applicant submitted an application to the Tribunal against the decision of the Respondent. As noted in paragraph 1, the Respondent raised a jurisdictional objection which was heard and dismissed by the Tribunal in [*EF*], Decision No. 249 [2001].

21. The issues in this case are:

(i) When rescinding the redundancy decision, did the VP-ECA breach Staff Rules 5.03 and 7.01 or other due process requirements by directing the Applicant's supervisor to conduct a PIP?

(ii) Did the VP-ECA's decision taint the 1999 OPE, the decision to place the Applicant on a PIP, and the eventual decision to terminate his employment?

(iii) Were the 1999 OPE and the implementation of the PIP an abuse of discretion so as to render the decision to terminate the Applicant's employment for unsatisfactory performance invalid?

22. In respect of the first issue, the Tribunal notes that the VP-ECA, when rescinding the redundancy decision on the ground that it was improperly made, went on to address a number of incidental grounds advanced by the Applicant in support of his application for administrative review. He found that the allegations of the Applicant that his Supervisor failed to assist him to build a work program, that she abused her discretion in assigning some of his tasks to other staff, and that management was hostile to him, were not substantiated. He remarked:

> Because reasons for your limited workload appear to be based on underlying performance issues, I have determined that you should be

> given an opportunity to improve your performance in your current position…. During the next six months you will be given an opportunity to perform the requirements of your current job. At the end of that period, I have asked Ms. [X] to assess your performance and make recommendations to me about the appropriate course of action.

23. The question arises whether the VP-ECA had made a determination that the Applicant's performance was unsatisfactory and had directed the Supervisor to put the Applicant on a PIP. Additionally, there is a question whether the VP-ECA had by his decision placed the Applicant in a more unfavorable position than the one resulting from the challenged redundancy decision.

24. The Tribunal finds that the VP-ECA neither made a clear finding that the Applicant's performance was unsatisfactory nor explicitly instructed the Supervisor to implement a PIP in respect of the Applicant. True enough, the language used might suggest either an inference that the Applicant should be put on a PIP or that the Applicant needed closer supervision in his work. Nevertheless, the Tribunal cannot conclude that the VP-ECA usurped the functions of the Supervisor.

25. The Applicant also invokes the principle that a staff member who seeks review of an administrative decision through the Bank's formal grievance procedure cannot be penalized for having done so, by having the review result in a decision less favorable than the decision challenged. In support of his contention that the rescission of the redundancy decision left him in a worse off situation, the Applicant refers to *Samuel-Thambiah*, Decision No. 133 [1993], paragraph 37, where it was stated:

> The purpose of the administrative review is to provide for the possibility of reconsideration by a higher authority of decisions which a staff member considers adversely to affect his or her interest and rights. Therefore, it can only be conceived in the sense of allowing for a remedy, total or partial, in the event of the reconsideration being accepted by such authority. This is the very reason why the administrative review is open only to the aggrieved or affected staff member. The management has

> other means to have initial recommendations reviewed .... The possibility that the supervisor carrying out an administrative review could reach a more unfavorable decision is not within the spirit of the Staff Rules and would constitute a serious deterrent to seeking relief under the administrative process.

In that case, the Applicant had sought administrative review of a decision extending his probationary period. He requested confirmation of his appointment. The administrative review overturned the decision extending the probationary period and instead terminated his employment. This was patently more unfavorable than the decision challenged.

26. In this case, it is not established that the VP-ECA had made an evaluation of the Applicant's performance and directed his placement on a PIP. Even assuming that there was such a decision, the purpose of a PIP is to provide an employee with the opportunity of demonstrating his competence. Accordingly, it cannot be said that the review reached a result less favorable than the redundancy decision.

27. The second question is whether the 1999 OPE, the decision to place the Applicant on the PIP and the eventual decision to terminate his employment were in any way tainted by the decision of the VP-ECA. The Tribunal notes that on May 7, 1999, the Supervisor and the Reviewing Manager met with the Applicant and expressed their view that his performance for January 1998 – March 1999 was overall unsatisfactory and advised him "how to turn his performance around." An account of this meeting was documented in a memorandum dated June 2, 1999, which was sent contemporaneously with the 1999 OPE form signed by the Supervisor to the Applicant for his review and comments. The memorandum sets out the work program on which the assessments of the Applicant by the Supervisor and the Reviewing Manager were based. The 1999 OPE was signed by the Supervisor on June 2, 1999. In the signature column of the section reserved for the comments of the Applicant, it was recorded on June 30, 1999 that the

Applicant had refused to sign the OPE. The Reviewing Manager signed the 1999 OPE form on July 29, 1999. Meanwhile, on June 29, 1999, the Supervisor sent a letter to the Applicant notifying him that following upon the 1999 OPE discussions, the Applicant would be placed on a PIP pursuant to Staff Rule 5.03, Section 3 (Management of Unsatisfactory Performance). Although the OPE form had yet to be signed by the Reviewing Manager, he was a participant at the May 7, 1999, meeting. The letter of June 29, 1999 giving notice of the PIP was copied to him. Moreover, the Supervisor's memorandum of June 2, 1999, which was sent out contemporaneously with the OPE form, stated that both the Supervisor and the Reviewing Manager had agreed to place the Applicant on a PIP. The Reviewing Manager was thus fully aware of, and in agreement with, the course of action taken.

28. Under Staff Rule 5.03, paragraph 3.02(a), if a staff member's performance is not satisfactory, the designated supervisor "shall provide the staff member a period to improve performance in the staff member's position." Although the Rule does not prescribe when such an assessment should be made, one would expect it to follow the OPE. In this case, the PIP was, in substance, preceded by the 1999 OPE.

29. The Tribunal is of the view that in the 1999 OPE and PIP processes, the Supervisor had acted independently. The concerns which the Supervisor expressed in the OPE were a consistent reflection of her earlier concerns about the Applicant's performance rather than a response to the administrative review. The record shows that she was the main participant in the entire evaluation process and that the conclusions that the VP-ECA came to in his memorandum of April 28, 1999 were reached after consultation with the Supervisor and reflected her assessment of the situation. The

Tribunal thus concludes that the 1999 OPE, the PIP and the eventual termination of the Applicant's employment were not tainted by the decision of the VP-ECA.

30. Accordingly, the Tribunal finds that there was no abuse of discretion on the part of the Respondent in respect of the 1999 OPE, the PIP and the termination of the Applicant's employment.

Decision

For the above reasons, the Tribunal decides to dismiss the application.

/S/ Thio Su Mien
Thio Su Mien
President

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

At Washington, D.C., December 4, 2001