



**World Bank Administrative Tribunal**

**2017**

**Decision No. 569**

**EI,  
Applicant**

**v.**

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

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

**EI,  
Applicant**

**v.**

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

1. This judgment is rendered by the Tribunal in plenary session, with the participation of Judges Stephen M. Schwebel (President), Mónica Pinto (Vice-President), Ahmed El-Kosheri, Andrew Burgess, Abdul G. Koroma, Mahnoush H. Arsanjani, and Marielle Cohen-Branche.
2. The Application was received on 16 December 2016. The Applicant was represented by Marie Chopra of James & Hoffman, P.C. The Bank was represented by David R. Rivero, Director (Institutional Administration), Legal Vice Presidency. The Applicant's request for anonymity was granted on 13 October 2017.
3. The Applicant challenges the denial of her request to be returned to duties in the Main Clinic of the Bank unless she first undergoes a physical and psychological evaluation and is deemed fit to work in that environment.

**FACTUAL BACKGROUND**

4. The Health Services Department (HSD) operates a health clinic (Main Clinic) for Bank Group Staff in the Bank's Main Complex, two levels underground. HSD also has a satellite clinic in the International Finance Corporation (IFC) building, a couple of blocks from the Main Complex.
5. The Applicant joined HSD in 1997 as a consultant. In May 2009, she became a full-time staff member in HSD. The Applicant states that her responsibilities as an Occupational Health Nurse include providing direct health care services to Bank staff, advising Bank staff on work-related health matters, and advising and assisting country offices on health-related matters.

6. Over the years, there have been leaks and flooding in the Main Clinic for various reasons, including heavy rains that caused moisture to reach the interior walls and human error or mechanical breakdowns of washing, vending, and ice-making machines in the Main Complex cafeteria, which is above the Main Clinic. These leaks and floods resulted in the collapse of parts of the Main Clinic's ceiling, soaked furniture, supplies and carpets, and standing water.

7. The Applicant claims to have slipped in a puddle of standing water in one of the Main Clinic treatment rooms, seriously injuring her back and tearing her right meniscus, in January 2013. In February 2013, she suffered a conjunctive hemorrhage in her right eye. She claims that it was caused by dust, epoxy, and other irritants released into the Main Clinic during repairs to a treatment room. In April 2013, in two separate incidents, the Applicant tore her left and right retinas during coughing episodes. She has been compensated for these injuries through the Bank's Workers' Compensation Program.

8. On 3 May 2013, Firm X, an environmental consulting firm contracted by the Bank to confirm that remediation efforts were satisfactory, inspected the indoor air quality and tested for microbes in the Main Clinic and Laboratory. It found (i) no evidence of mold growth, based on a visual inspection, (ii) no evidence of excessive moisture in the area, based on infrared scans and moisture meter readings, (iii) no significant concentrations of any pathogenic bacteria, and (iv) no significant concentrations of allergenic fungi, which suggested no significant indication of mold proliferation in the air.

9. By email dated 11 June 2013, the Applicant requested an air filter/cleaner "to help decrease irritants or allergenic elements that are causing my respiratory, eye problems and neurological symptoms [...]." The next day, Dr. A, a Senior Occupational Health Specialist, approved the Applicant's request to "give her the best possible opportunity and comfort." He also stated:

As we have demonstrated a number of times with testing indoor air quality, the clinic meets all national and international standards for all of the pollutants or contaminants mentioned in your internet link. None of the chemicals or contaminants mentioned were present in the clinic environment.

10. On 14 June 2013, Firm X conducted a reassessment of the Main Clinic, analyzing for airborne ultrafine particles, which have been suggested as potential allergy triggers for susceptible people. It found satisfactory levels of dust concentrations and other potential allergen triggers, including ultrafine particles, and did not observe any active moisture or mold.

11. On 17 July 2013, the Applicant underwent an Independent Medical Examination (IME), upon the request of the Bank's Claims Administrator in response to the Applicant's claims for work-incurred injuries. The examining physician suggested the following reasons for why the Applicant continued to react to her workplace environment "given that remediation removed sources of mold, irritation and dampness":

One possibility is that the space is not as free from irritant and allergic hazard as it might appear. In this case, extensive remediation has already been carried out and monitoring by the usual methods has not indicated a putative source. [...] Inaccurate mold assessment as an explanation is therefore unlikely, although it has not been ruled out completely. [...]

A second possibility is that she is demonstrating "learned behavior", a conditioned response to stimuli, in which a person in an environment, especially one she perceives as threatening, responds unconsciously with a conditioned behavior, in this case cough. While this is not uncommon, it is a diagnosis of exclusion and therefore highly uncertain. It would be rare, however, for such behavior to proceed to a traumatic retinopathy.

A third possibility is that she is demonstrating the "damp indoor spaces" effect described by the Institute of Medicine [...] which documented that individuals with existing respiratory disease frequently experience prolongation and worsening of symptoms, including cough, in damp surroundings even when other moisture-related exposures, specifically mold and other bioaerosols, are not elevated. [...] exposure may have permanently exacerbated her underlying condition (in other words, changed her baseline) [...]. It does provide an explanation for her cough and acute symptoms at work.

A fourth possibility is that she is responding to variations in environmental conditions within the range of acceptable practice. [...] [The Applicant], being exquisitely sensitive to change to begin with, fits the well-described profile of individuals who have the most problems with indoor air quality and are most likely to be sentinel cases of discomfort or symptoms.

12. In the examining physician's opinion, the Applicant "is experiencing a combination of the third and the fourth, against a background of preexisting chronic airways reactivity, unrelated to work." According to him, all the possibilities lead to the same conclusion that the Applicant "is not able to work in the current Health Clinic area without risk of aggravating her condition and of respiratory symptoms, most particularly cough, which may predispose her to another ocular injury."

13. Regarding the Applicant's fitness for duty, the examining physician concluded in the IME:

She is capable of performing all the duties of an occupational health nurse, with the possible exception of using solvents (such as alcohol wipes) for prolonged periods if that is one of her triggers. The specific function of her job that she is not capable of performing is performing those functions in her current *location*, given that it appears to be the *location* rather than the job function that is associated with her problem. [Emphasis in original.]

14. On 1 August 2013, in response to the IME's conclusions, the Applicant was reassigned to part-time duties in the IFC Clinic and part-time duties in the Laboratory, which is in a separate suite across the hall from the Main Clinic, "to manage and mitigate any future risk of injury or harm, especially work in the 'Clinic area' proven hazard free by environmental experts."

15. On 21 October 2013, Firm X inspected the Laboratory Office, where the Applicant was relocated. It found no evidence of mold growth, damage, or excessive moisture and no significant concentrations of pathogenic bacteria or allergenic species of fungi. Firm X recommended "to wipe down the supply and return air diffusers with a safe detergent to optimize the environment and minimize any impacts on those who may have hypersensitivities to common building dusts."

16. On 18 December 2013, Firm X inspected Examination Room #2, in response to complaints about odors. It found no evidence of airborne bacteria or fungi that would be consistent with microbial damage and that "all other test parameters were satisfactory showing good ventilation and thermal comfort control." However, Firm X suspected that the odor was likely in the ceiling tiles and recommended that the ceiling tiles be changed.

17. In May 2014, the Applicant was assigned to be in charge of the medical clearance program, in addition to her full-time duties.

18. By email dated 13 August 2015, the Applicant requested an end to her temporary reassignment and a return to full-time duties in the Main Clinic as soon as possible.

19. By email dated 10 September 2015, the Applicant's supervisor informed the Applicant that there were no immediate plans to relocate the Main Clinic and asked the Applicant to provide medical documentation supporting her request to return to the Main Clinic.

20. The Applicant responded by email on 1 October 2015, advising that she has "presented no respiratory symptoms outside the Main Clinic since [her] work modification" and that her health issues were related to her work location, not any physical disability.

21. Dr. A responded to the Applicant by email on 2 October 2015 and stated that "there is no hazard in the clinic and has not been since the last confirmatory testing in July 2013," however the Applicant had been reassigned to the IFC Clinic to accommodate her out of concern for her health.

22. On 13 October 2015, Firm X conducted an inspection to examine the indoor air quality in the Main Clinic, following a leak from the cafeteria. The inspection was conducted after the area was remediated. Firm X reported:

The site inspection found no evidence of active leaks or visible mold conditions. Other indoor air quality indicators [...] were unremarkable. The data collected indicate that the indoor air quality in the MC Building HSD Clinic Area meets applicable indoor air quality standards during this test period.

23. Further to a medical examination on 10 November 2015, Dr. B, the Applicant's treating physician, certified that the Applicant was "medically and physically fit to work full-time except in areas where there are known water leaks and mold growth, to avoid recurrence of her reactive respiratory disorder and worsening of her retinal problems." On the same date, Dr. C, another treating physician, also noted that the Applicant "is suffering from severe allergies, including a

mold allergy” and requested that the Applicant be accommodated for this condition in her work environment.

24. At a meeting in early December 2015 with the Applicant, her representative, and HSD staff, the Applicant was presented with the options of: (i) continuing under an accommodated work program to work outside the Main Clinic for a limited time, (ii) returning to the Main Clinic, subject to “a thorough evaluation of both [her] physical and mental health status to ensure that [she is] fit to undertake duties in this area,” and (iii) if neither an accommodated work program or a return to the Main Clinic would be possible, then transition to sick leave and short term disability.

25. On 13 January 2016, Dr. A informed the Applicant that she would not be permitted to return to the Main Clinic unless she undergoes physical and psychological IMEs. In the alternative, the Applicant was offered to transition to sick leave and short term disability.

26. On 12 February 2016, the Applicant submitted a Request for Review to Peer Review Services (PRS). She challenged “the continuing unhealthy condition in the Main Clinic and adjoining office in the Laboratory [which] has remained uncorrected,” the denial of her request to return to work in the Main Clinic in light of “the confirmatory air quality testing done in October 2015 [which] supports a clear and nonhazardous environment,” and the requirement that she undergo physical and psychological evaluations prior to returning to work in the Main Clinic.

27. On 16 May 2016, Firm X conducted an inspection of the Main Clinic to confirm the efficacy of clean up, in response to suspected mold conditions behind the wallpaper in two rooms of the Main Clinic. Firm X concluded:

No visible mold was identified in the areas of concern. There were no signs of residual moisture and remediation efforts appear successful. Airborne mold testing in the Health Clinic did not show any significant evidence of mold proliferation. No further action is required at this time.

28. In its report of 18 July 2016, the PRS Panel concluded that “management acted consistently with [the Applicant’s] contract of employment and terms of appointment in making the decision

requiring that she undergo an independent physical and psychological exam to return to work in the Main Clinic.”

29. By letter dated 19 July 2016, the Vice President, Human Resources transmitted a copy of the PRS Panel report to the Applicant and informed her that he accepted the PRS Panel’s recommendation to deny her request for relief.

30. On 22 August 2016, the Main Clinic sustained a leak because of a breakdown of a soda machine in the cafeteria. By email dated 24 August 2016, Dr. D, the Senior Medical Officer, informed the Applicant that she could work from home for the remainder of the week, in response to her concerns about a box of damp supplies that had been moved to the Laboratory, although Dr. D did not know whether the box actually posed a risk. The Main Clinic was quickly remediated and the box in question was discarded.

31. Firm X conducted a series of inspections on 25 August, 1 September, and 9 September 2016 to identify additional areas for remediation and to monitor the drying progress and post-flood conditions. It concluded, after the inspection on 9 September 2016, that:

It appears that all of the affected wallboard, carpet ceiling tiles and solid ceiling affected by the [22 and 26 August 2016] flood incidents have been removed and replaced. Work to close up and resurface walls is underway. [...] No visible mold was identified. Inspection of all affected materials in HSD have been replaced and all conditions were found dry.

32. On or about 14 September 2016, a leak occurred in the library area of the Main Clinic. Firm X conducted a follow-up inspection on 16 September 2016, and noted that most damaged areas were removed and the remaining areas were found dry. However, it identified trace visible mold in certain wall sections, which the Bank had scheduled for removal, and slightly elevated airborne counts of water damage indicator molds. The latter could be explained by the clean-up activity in the Main Clinic, which could stir up molds that had settled in dust and debris, and Firm X recommended steps for remediation. Firm X also identified other wet areas in Treatment Room #8, the library, and adjacent offices and made recommendations for additional cleaning and remediation.



33. On 22 September 2016, Firm X conducted a follow-up inspection and found that all formerly damaged areas had been repaired and/or replaced and there were no residual damp conditions or apparent visible mold. It recommended re-cleaning Treatment Room #4, where elevated counts of water damage indicator molds were measured. The Bank sealed off the room where residual mold spores had been identified, until such time as they were cleaned. On 4 October 2016, Firm X conducted a post-flood inspection and found that all formerly damaged areas were repaired or replaced, there were no residual damp conditions, no apparent visible mold, and the space was fit for normal use and occupancy.

34. On 25 October 2016, the Bank signed a contract with Firm X to conduct proactive environmental testing of the Main Clinic for the next six months, with three site visits, to confirm the efficacy of the Bank's remediation efforts.

35. On 6 December 2016 and 1 February 2017, Firm X conducted follow-up inspections of the Main Clinic and found no visible indications of moisture or leaks, no apparent visible mold, and no evidence of water damage indicators. It concluded that the Main Clinic area remained fit for normal use and occupancy.

36. In December 2016, the Bank's President approved the move of the Main Clinic to a different location, as a result of the anticipated change of focus in HSD's activities due to outsourcing urgent care health services and the business disruptions caused by water intrusion. The new location is currently occupied by the Laboratory and Records area, where the Applicant currently works part time. According to the Bank, starting in the fall of 2017, the Main Clinic will no longer provide urgent care services to staff, and HSD staff will perform more limited tasks in the new space.

37. On 20 April 2017, Firm X conducted its third post-flood inspection of the Main Clinic area. It noted that all areas were clean and dry, and that there were no visible indications of moisture, leaks, mold, or water damage indicators nor were any odors of concern detected. Firm X concluded that the area was fit for normal use and occupancy.

38. On 19 July 2017, Firm X inspected the Main Clinic area, Laboratory, hallway, and the vacated/gutted suite to where the Main Clinic will be relocated. Firm X found no visible indications of moisture or leaks or apparent visible mold or significant water damage indicators. Having identified condensate buildup in an air supply duct in the hallway, Firm X confirmed that there was no visible mold and recommended a long-term strategy to prevent the duct from sweating.

39. On 5 August 2017, a leak occurred, but the Applicant was informed that the water damage did not impact her personal space in the Laboratory. Her supervisor offered to work out an alternative arrangement in the short term, if working in the area would be a problem for the Applicant. Remediation efforts were undertaken over the weekend. Firm X conducted an inspection on 11 August 2017 and found slightly elevated airborne mold counts, but concluded that this mold appeared to be from dust resulting from disturbances in the space related to the remediation or from outdoors, rather than due to mold growth. A further inspection on 17 August 2017 by Firm X indicated no elevated counts of mold.

40. The Applicant has been informed that her contract, which was to end on 17 May 2017, would be extended one year until May 2018.

#### *The present Application*

41. On 9 November 2016, the Applicant requested an extension of time to file her Application with the Tribunal. Her request was granted, and she was given until 16 December 2016 to file her Application.

42. In her Application of 16 December 2016, the Applicant contests the denial of her request to be returned to duties in the Main Clinic unless she first undergoes a physical and psychological evaluation and is deemed fit to work in that environment.

43. The Applicant requests the Tribunal to order the Bank to hire a new external independent investigator to inspect and assess the Main Clinic and Laboratory for environmental health and safety concerns. If such investigation finds the Main Clinic and Laboratory to be free of

environmental risk factors, the Applicant requests to be returned to her duties in the Main Clinic without any preconditions. In the alternative, if such investigation finds evidence of continuing environmental concerns, the Applicant requests the Tribunal to order the Bank to promptly and fully remediate identified risks, and once remediation is complete, to allow the Applicant to return to the Main Clinic without preconditions. Additionally, she seeks damages for medical and other expenses, compensation for pain, suffering, emotional distress, “for the damage to her career development,” and legal fees and costs in the amount of \$69,950.12.

## SUMMARY OF THE MAIN CONTENTIONS OF THE PARTIES

### *The Applicant’s Contention No. 1*

*The Bank is obligated to fully remediate the Main Clinic, but it has failed to do so*

44. The Applicant states “that Bank staff likewise have an essential right to work in a safe and healthy environment” and that the Bank’s failure to remediate mold and moisture in the Main Clinic is a violation of its obligation to provide staff with a safe work environment and respect their essential rights.

45. According to the Applicant, in the last five years, there have been obvious safety hazards in the Main Clinic, such as falling ceiling tiles, water dripping in electric fixtures, wet floors and scattered debris. The Applicant also points to recent incidents of leaks, flooding, and/or ceiling collapses, which contribute to moist and damp conditions, leading to a substantial mold problem. She relies on photographs from 2013, 2015, 2016, and 2017, which show stained and marked ceiling tiles, mold growth, and other water damage caused by leaks that she claims were not remediated within the 24 to 48 hours that it takes for mold spores to begin to grow. According to the Applicant, this is evidence that the Bank did not consistently take immediate action to address water damage or to keep the Main Clinic area free of environmental hazards.

46. The Applicant contends that the Bank’s efforts “do not address, contain or even identify the full scope of the existing problem.” She characterizes the Bank’s remediation as delayed, partial, and skin-deep and argues that the Bank has been willfully blind to sub-surface problems.

She states that, despite the environmental hazards in the Main Clinic, the Bank continues to fail “to thoroughly inspect the Main Clinic, fully and promptly remediate mold growth and prevent further leaks and moisture.”

47. The Applicant argues that the Bank’s duty to protect in this case means eliminating existing risks in the Main Clinic and preventing new risks from materializing. She rejects that the Bank’s duty to remediate depends on the Applicant’s ability to prove a causal link between the conditions in the Main Clinic and the Applicant’s symptoms.

48. The Applicant further argues that the duty to remediate is not linked to any heightened sensitivity on her part. She claims that multiple staff members have been affected by the moisture and mold in the Main Clinic, although their symptoms may have been less severe than hers. The Applicant notes that HSD staff have made informal verbal and email comments describing indoor allergy or other symptoms related to mold and moisture in the Main Clinic. She also cites testimony from the PRS hearing, where HSD staff described continuing leaks and moisture in the Main Clinic as well as the discovery of mold behind the wallpaper in the Main Clinic area in May 2016. She claims that other staff members have been reluctant to bring complaints to the Director of HSD because they do not believe he is interested in their opinions and concerns, and the Bank’s response to the Applicant’s complaint deters other staff from coming forward.

49. The Applicant also reasons that the Staff Rules contemplate that some staff will be more sensitive to certain hazards than others so the Bank’s obligation to remediate arises either where it is “necessary to meet the health and safety needs of a particular subgroup” or even if she were the only HSD staff member manifesting symptoms.

50. The Applicant claims that the Bank has not sufficiently remediated all of the problems in the Main Clinic. She rejects the results of the inspection reports as being “predicated on fundamentally flawed assumptions and methodologies.” The Applicant asserts that these inspections rely primarily on visual inspection and air sampling, which are not reliable, and when more sophisticated testing methods were used, such as infrared technologies and moisture meters, they were limited to major leaks but were not employed for problems caused by slow leaks or

hidden seepage. Thus, the Applicant contends that the inadequacies of the testing protocols mean that the Bank cannot rely on the inspection results to prove that the Main Clinic area is free of environmental hazards.

51. The Applicant points to remediation efforts by the Bank since the Application was filed as examples of reasonable efforts that the Bank could have taken previously to safeguard staff. In addition, the Applicant claims that the relocation of the Main Clinic exemplifies the kind of action that the Bank could have and should have taken earlier to safeguard staff from water intrusions.

### ***The Bank's Response***

*The Bank has exceeded its duty of care by taking proactive steps to remediate and by providing reasonable accommodations to the Applicant*

52. The Bank accepts that, as an employer, it has a duty to provide a safe and healthy work environment to its staff. It further accepts that mold spores, when released into the air, can be detrimental to health and that prolonged exposure to mold can severely and adversely affect a person's health.

53. The Bank does not dispute that, prior to 2013, there may have been instances of mold in the Main Clinic that were not remediated. However, it states that since 2013, the risk of mold has been adequately addressed. It alleges that many of the photographs of the Main Clinic's condition, produced by the Applicant, are from 2009 to 2012 and reflect interim, short-term measures taken immediately prior to remediation.

54. The Bank claims that when water leaks happen, it takes immediate measures to remediate any water damage to ensure that mold does not have time to grow. According to the Bank, it has "spared no expense" to "minimiz[e] the potential for the leaks from the kitchen area" over the past nine years. The Bank points out that not every instance of water intrusion requires outside contractors, as some cases were easily handled in-house for remediation or further investigation showed no leak or evidence of moisture, just stained tiles that needed to be replaced. The Bank

also cites medical opinions that leaks *per se* do not necessarily result in mold growth as long as they are remediated before mold spores have time to develop.

55. The Bank relies on Firm X's inspection reports to show that it follows all the necessary remediation steps after each water leak and then confirms the absence of air contaminants. It contends that Firm X is impartial and independent in providing its services to the Bank.

56. The Bank claims that Firm X followed the proper steps for testing for mold, namely, source sampling of materials that may be contaminated and, where mold may be growing, air sampling, collecting and counting of spores, and measuring temperature and relative humidity.

57. Referring to the industry practice of determining standards for acceptable levels of mold in the air, the Bank relies on Firm X's reports that indicate that "the mold spore and other microbial count in the Main Clinic area, post remediation, have been lower than outdoors and on par with the control environments." The Bank argues that Firm X's testing methodologies, which confirm the absence of harmful levels of bioaerosols, are in line or exceed the standards cited in the Application. Regarding the Applicant's contention that visual inspection and infrared analysis are insufficient, the Bank cites its expert who explains that "for areas that do not show signs of dampness, the best industry practices suggest using non-destructive sampling" and that "unless there is evidence of moisture, as evidenced by non-intrusive sampling, we advise against removing parts of undamaged walls, carpeting or ceiling." Firm X also states that it is not "the industry standard to routinely look for 'hidden mold' – mold that may exist in areas that are behind the walls [...]." The Bank notes that the Applicant "offers no credible alternative to the remediation steps that Respondent follows" nor does the Applicant present any experts to contradict Firm X's methodology.

58. The Bank argues that the Applicant had a pre-existing allergic condition that was aggravated by severe acute bronchitis or pneumonia. The Bank claims that the Applicant's hypersensitivity makes her more sensitive to incidents of flooding, and that no one else has formally complained of the environmental conditions in the Main Clinic since 2013. It rejects the Applicant's contention that other staff members are reluctant to raise their concerns with the

Director of HSD and points out that staff could have raised their concerns through other channels, such as other HSD senior staff, anonymous surveys, or an anonymous suggestion box in the Main Clinic, but have not done so.

59. The Bank states that it has reasonably accommodated the Applicant's condition, including by providing her with an air purifier, modifying her job duties to minimize her working hours in the Main Clinic, transferring her to the IFC Clinic, allowing the Applicant to leave when she may have been exposed to allergens, and retaining Firm X to test air quality on a proactive basis. The Bank further argues that it would not be reasonable to expect an employer to accommodate the special needs of one hypersensitive employee, such as the Applicant, and cites the Americans with Disabilities Act's reasonable accommodation policy, which the Bank voluntarily looks to when determining the reasonableness of its actions. The Bank contends that the Applicant is not entitled to a sterile work environment, which would be an undue burden on the Bank and beyond the reasonable accommodation required of the Bank.

60. The Bank states that the planned relocation of the Main Clinic is motivated by business considerations, namely, the business disruptions caused by recurrent water intrusion events, the amount of money spent on remediation, and the potential risk of dampness and mold growth. It asserts that the relocation is not because the present location is harmful to anyone's health.

***The Applicant's Contention No. 2***

*Restricting where the Applicant can work is discriminatory and unfair*

61. The Applicant alleges that the Bank's refusal to remediate the Main Clinic has effectively restricted her to working in the IFC Clinic and the Laboratory, thus isolating her from her colleagues, substantially altering the character of her work, and stunting her professional development, including her non-selection for a position of head nurse in 2015. The Applicant claims that the Bank discriminates against her because she has a greater sensitivity to environmental health hazards.

62. She claims that she understood the reassignment to the IFC Clinic and the Laboratory to be a temporary arrangement, a “disfavored placement” which she tolerated to give the Bank time to remedy the environmental situation in the Main Clinic. The Applicant claims that, having given the Bank enough time to remediate and prevent mold, she should be able to resume the duties for which she was hired in the Main Clinic, which should be a safe and healthy environment.

***The Bank’s Response***

*The Applicant’s reassignment is not discriminatory or unfair*

63. The Bank disputes the Applicant’s claim that her reassignment to the IFC Clinic and the refusal to return her to the Main Clinic has been done in bad faith, isolating her and blocking her career progression. The Bank relies on the Applicant’s 2014 and 2015 Overall Performance Evaluations (OPEs), which were positive and optimistic, including the Applicant’s self-assessment, and the Applicant’s failure to express any concern about her career development or isolation at that time. Regarding the Applicant’s non-selection for a position of head nurse in 2015, the Bank submits that this decision was not challenged in a timely manner and the Applicant was neither the second nor the third candidate recommended by the interview committee.

***The Applicant’s Contention No. 3***

*Requiring the Applicant to undergo a physical or psychological evaluation is unreasonable, unfair, and violates her privacy*

64. The Applicant argues that the Bank’s requirement that she undergo physical and psychological examinations before she can return to work in the Main Clinic lacks any reasonable basis, is arbitrary, discriminatory, and unfair.

65. First, the Applicant relies on the Bank’s argument that the Main Clinic has been fully remediated to contend that since she is fit to fully perform her duties in a mold-free environment, there is no need for any additional IMEs. In the alternative that the Main Clinic environment remains hazardous, the Applicant argues that “it is hard to imagine what kind of IME might declare



someone fit to work in an unhealthy environment” and that, in any case, the Bank would be responsible for remediation, regardless of the results of an IME.

66. The Applicant disputes the Bank’s requirement that she undergo a psychological examination. She claims that the 2013 IME reference to “learned behavior” as a possible cause of her symptoms is only a nominal consideration and that it is “an already highly unlikely condition that can’t be diagnosed with real certainty anyway.” She claims that there is nothing in that IME that establishes a reasonable basis for requiring her to undergo a psychological IME.

67. The Applicant also refers to the testimony of a former Senior Medical Officer at the PRS hearing, in which he rejected the possibility that her severe coughing and wheezing in 2013 could be “learned behavior” or a psychosomatic reaction. She argues that because he considered “learned behavior” to be an unlikely explanation for her symptoms, there is no reasonable basis for the Bank to require her to undergo a psychological IME.

68. The Applicant rejects the Bank’s allegation that her allergic responses may be psychosomatic. She explains that she was not at work on 23 and 24 August 2016 because of her Alternative Work Schedule and not because of hypersensitivity to a box containing damp supplies, which was moved into the Laboratory. The Applicant also cites the medical instructions of her allergist to avoid administering or spending time in the immediate vicinity of allergy shots. In response to the Bank’s allegation that she refused to come to the office due to allergy shots, the Applicant states that Dr. D specifically suggested that she work from home, rather than in the Laboratory because the Laboratory was crowded in September, and she worked at the IFC Clinic for a full day in September when a temporary, day-long allergy station was set up directly across from her office.

69. Regarding the Applicant’s comment to her supervisor about a seafood allergy, which the Bank relies upon as an indication of the Applicant’s psychosomatic tendency, the Applicant states that she has no recollection of mentioning the weather or her mood as triggers for the allergy. Rather, she claims that she told her supervisor she was allergic to shrimp and that she tries to avoid eating shellfish when she has a migraine because shellfish contain sulfites, which are a known

migraine trigger. Therefore, she argues that the Bank cannot rely on this comment as evidence that her symptoms are psychosomatic to justify a psychological IME.

70. The Applicant also asserts that undergoing an IME, in this case, would violate her privacy and constitute a breach of HSD's ethical obligations to preserve the confidentiality of medical information. In this case, the Applicant states that her IME would be reviewed by her managers, whereas the Bank's fitness for duty assessment protocols mandate that the subject staff member's managers should be informed of an IME's conclusions by an HSD physician but such physician would not disclose the assessment's underlying clinical findings.

71. The Applicant claims that even if her medical information and the results of the IME are not shared with her supervisor, they would still be available to Dr. A, a Senior Occupational Health Specialist, and those in his unit, who are colleagues with whom she regularly interacts. The Applicant is concerned that sharing her medical information with them would color her relationship with her colleagues, violate her right to privacy, and that her pre-existing relationship with Dr. A may affect his ability to provide an unbiased assessment. She also notes that Dr. A ultimately reports to the Director of HSD, thus raising questions about Dr. A's ability to protect the Applicant's privacy vis-à-vis the Director of HSD, and Dr. A's neutrality because the Applicant suggests that Dr. A will face implicit pressure to decide according to the Director of HSD's preferences.

72. The Applicant emphasizes that in this case, where having an HSD physician evaluating another HSD staff member's fitness for duty would raise real privacy and conflict of interest concerns, she should be able to request that a physician outside HSD review the IME and make the fitness assessment, and relies upon Staff Rule 6.03, paragraph 3.03. She does not object in principle to a physical IME, "so long as her privacy is adequately protected and she receives a fair fitness-for-duty assessment from a neutral evaluator."

73. The Applicant asserts that requiring a psychological IME is unreasonable because her symptoms are fully consistent with those documented in other cases of mold-related illness and

are “the expected somatic response of someone with her documented medical history and physiology.”

***The Bank’s Response***

*Requiring an IME is reasonable and there are safeguards to ensure the confidentiality of the Applicant’s IME*

74. The Bank submits that the requirement for the Applicant to undergo an IME prior to returning to the Main Clinic is reasonable and justified. First, the Bank notes that an IME has not been conducted since 2013 when the Applicant’s work duties and location were modified, and the Applicant continues to express concerns about her health despite the Bank’s assertions that there is no objective evidence of mold in the Main Clinic. Second, the Bank claims that the two medical notes from the Applicant’s treating physicians in 2015 were deemed inadequate by Dr. A, “in light of the detailed opinion provided [...] in 2013 that indicated a variety of possible individual causes for Applicant’s health condition, which Applicant’s medical notes did not address.” Third, the Bank claims that allowing the Applicant to return to the Main Clinic without doing an IME “may expose Applicant to additional health aggravations and HSD to potential liability for knowingly exposing Applicant to an environment that was causing harm to Applicant.” It notes that the Applicant continued to complain about breathing difficulties and flare-ups that have occurred when she was in the Main Clinic’s vicinity.

75. The Bank claims that it requires an IME because the Applicant’s “perception of the threat that the Clinic poses to her has not changed since 2013,” notwithstanding that the Main Clinic is a safe environment. The Bank is concerned that the “Applicant’s perception of the risk associated with the Clinic is causing Applicant to physically react to her environment in a way that is detrimental to her health.”

76. The Bank submits that requiring an IME is in line with prevailing practice, such as the Enforcement Guidance on Reasonable Accommodation and Undue Hardship provided by the U.S. Equal Employment Opportunity Commission.

77. The Bank argues that a psychological IME is reasonable because the 2013 IME referred to potential “learned behavior” as a contributing factor to the Applicant’s medical condition. The Bank asserts that the Applicant continues to exhibit symptoms associated with mold exposure when in the Main Clinic, notwithstanding that the Main Clinic is now safe and the Bank remediates promptly to prevent mold growth.

78. The Bank explains that moving the Main Clinic to a new location does not abate the need for an IME because one of the duties the Applicant may be expected to perform in the future is administering travel and allergy vaccinations. Relying on the Applicant’s statement to her supervisor that she cannot perform allergy vaccinations nor be present in the same area where such vaccinations are being provided, the Bank claims that it will need to determine how to accommodate the Applicant.

79. The Bank also argues that a psychological IME is necessary because there is no medical explanation for why the Applicant should be negatively affected by being in the vicinity of allergy shots or for the Applicant’s seafood allergy in response to the weather or her mood, unless her condition is psychosomatic. The Bank notes that it requested a psychological IME long before the Applicant stated her concerns about allergies, although these concerns support the possibility that there is a psychosomatic component to the Applicant’s condition or that she is hypersensitive.

80. The Bank claims that neither the Applicant’s immediate supervisor nor her manager would be privy to her medical information or the results of an IME. According to the Bank, pursuant to Staff Rule 2.02 “Confidentiality of Medical Information and Medical Records,” the only information from an IME shared with managers by the Occupational Health Unit are recommendations regarding accommodations that may be necessary in light of a staff member’s condition.

81. The Bank rejects the Applicant’s allegations that Dr. A is biased against her or that his professional judgment or neutrality would be compromised in this case. According to the Bank, Dr. A is not the Applicant’s manager and does not make any employment-related decisions with regard to the Applicant. Neither her manager nor supervisor participates in reviewing medical

information in fitness for duty cases or makes recommendations to management on possible accommodations. The Bank emphasizes that neither HSD nor Dr. A will perform the IME or make a determination on the Applicant's health. Rather, Dr. A would "determine whether the Bank can provide [a] healthy and safe working environment within which the staff member can fully carry out her duties."

82. The Bank notes that the Staff Rules do not exempt HSD staff from undergoing an IME or undertaking a fitness for duty examination. It proposes that the Applicant's confidentiality concerns can be addressed through Dr. A having sole access to the Applicant's confidential medical information.

***The Applicant's Contention No. 4***

*The Bank should be ordered to hire an external independent investigator to inspect and assess the Main Clinic and Laboratory and should fully remediate any identified risks*

83. The Applicant requests, as specific performance, that the Bank be ordered to "hire a new external independent investigator to examine the Main Clinic and Laboratory for evidence of environmental health and safety concerns." Depending on the outcome of the investigation, the Applicant also requests the Bank to be ordered to "promptly and fully remediate identified risks."

84. The Applicant argues that the Bank should be required to obtain a second opinion because Firm X's conclusions that there have been no mold- or moisture-related problems in the Main Clinic since 2016 are contradicted by the evidence proffered by the Applicant. The Applicant raises questions about the quality of Firm X's services and suggests that Firm X cannot give a neutral, unbiased assessment.

85. The Applicant argues that the continued frequency of leaks in 2017 demonstrates that the Bank still needs to do further remediation.

86. The Applicant argues that the anticipated relocation of the Main Clinic does not render her request moot. First, she states that as long as the Main Clinic remains in its current location, HSD

staff have a right to a workplace that is free of health hazards. Second, the Applicant alleges that the future location of the Main Clinic is a space that also has a history of leaks and flooding, therefore, “regular, proactive monitoring for moisture and mold is still warranted.”

***The Bank’s Response***

*The Applicant’s request for specific performance should be denied*

87. The Bank contends that the evidence shows it has been diligent about minimizing leaks to the Main Clinic and Laboratory, addressing them as soon as they occur, remediating the area, and ensuring that no air toxins are present.

88. The Bank notes that it has already hired a leading expert to investigate and inspect the Main Clinic and Laboratory. It claims that hiring a second expert would be costly, disruptive, and unnecessary and contends that it is within management’s discretion to select experts, which is part of the Bank’s conduct of day-to-day operations and management. Moreover, the Bank notes that the Applicant has not produced any expert evidence that would cast doubt on the accuracy of Firm X’s conclusions.

89. The Bank also argues that the Applicant’s request for further inspections is moot because the Main Clinic will soon be relocated and in case of mold in the new location, remediation will be done during the reconstruction.

**THE TRIBUNAL’S ANALYSIS AND CONCLUSIONS**

**WHETHER THE BANK HAS SATISFIED ITS DUTY OF CARE TO THE APPLICANT**

90. The parties agree that the Bank has a duty to provide a safe and healthy work environment to its staff. This is consistent with Principle 2.1(b) of the Principles of Staff Employment, which provides: “The Organizations shall at all times act with fairness and impartiality and shall follow a proper process in their relations with staff members. [...] The Organizations shall make all

reasonable efforts to ensure appropriate protection and safety for staff members in the performance of their duties.”

91. Staff Principle 9 (“Appeals”) of the Principles of Staff Employment, paragraph 9.1, provides that staff members “have the right to fair treatment in matters relating to their employment.”

92. In *CL*, Decision No. 499 [2014], para. 73, the Tribunal considered the meaning of “fair treatment” as follows:

[...] the Tribunal considers that ‘fair’ treatment includes treatment that is unbiased (that is, conducing to equal treatment of staff in like circumstances) and reasonable (that is, reasonably related to the achievement of its objective and proportionate). In assessing fairness, it may also be relevant to consider whether the impugned treatment is conducive to the staff relations and morale that will sustain a staff of ‘the highest standards of efficiency and technical competence’ as required by Staff Principle 4.

93. The Bank accepts that mold spores, when released into the air, can be detrimental to health and that prolonged exposure to mold can severely and adversely affect a person’s health. The Tribunal finds that the Bank’s duty of care includes remediation and monitoring, in circumstances where leaks have affected the Main Clinic. In addition to transferring the Applicant away from the Main Clinic, since 2013, the Bank claims that it has responded to leaks in the Main Clinic by remediating and monitoring environmental conditions in the Main Clinic. The Tribunal will examine the reasonableness and efficacy of those efforts by the Bank since 2013.

94. According to the Bank, where outside contractors are necessary for remediation, the protocol is to (i) call the Bank’s property management company to identify the source of the leak, stop it as quickly as possible, assess the damage and determine the remedial work required; (ii) contract an external contractor to perform water damage repair work and retest the area to verify that it is completely dry; and (iii) contract an environmental consulting firm to test the air quality for the presence of mold spores, which is an additional, independent verification that the area is mold-free.

95. The record also includes various reports from Firm X since 2013, confirming that after each remediation and proactive inspection for six months after December 2016, the Main Clinic was fit for normal use and occupancy, with no residual damp conditions or apparent visible mold. The Tribunal finds it reasonable for the Bank to rely on Firm X's tests and conclusions. There is no evidence to support the Applicant's allegations of bias by Firm X. Although the literature relied on by the Applicant explains the limitations of testing indoor environments for mold, including air sampling, based on the record, the Tribunal finds that Firm X's methodologies conform to industry practice. Moreover, while the Applicant contends that the very presence of mold should trigger the Bank to act and that the Bank was willfully blind by failing to check non-visible surfaces, the Tribunal accepts Firm X's explanation, proffered by the Bank, that it is not "the industry standard to routinely look for 'hidden mold' – mold that may exist in areas that are behind the walls [...]" and that such mold spores are not likely to affect the health of building occupants, if they are undisturbed, dormant, or there is no air circulation.

96. The Bank contends that a sterile working space is not feasible in any office environment, "nor is it reasonable to expect any employer to accommodate [the] special needs of one hypersensitive individual." It further states that "to gut out the Main Clinic in an attempt to find mold [...] or to duplicate the costly testing that has already been done – is not a reasonable accommodation and would be administratively and financially burdensome on Respondent."

97. The Tribunal finds that the Bank's remediation and proactive monitoring of the Main Clinic in response to the leaks, as well as the scheduled relocation of the Main Clinic for business reasons, satisfy the Bank's duty of care. In conjunction with the Applicant's reassignment to the IFC Clinic and the Laboratory, which is discussed below, the Tribunal finds that the Bank reasonably accommodated the Applicant's medical needs.

98. Finally, having found that the Bank has satisfied its duty of care towards the Applicant by remediating and taking steps to proactively monitor conditions in the Main Clinic, the Tribunal holds that the Applicant's requests for specific performance should be denied.



## WHETHER THE APPLICANT'S REASSIGNMENT WAS DISCRIMINATORY OR UNFAIR

99. The Tribunal has recognized that “[i]n common with all employees, international civil servants have a right to be treated with dignity. This is also an aspect of fair treatment. Health and medical issues are, of course, topics that must be handled with sensitivity.” *CL*, para. 79.

100. In *BY (No. 2)*, Decision No. 481 [2013], para. 63, the Tribunal considered the issue of reasonable accommodation in the context of a staff member’s disability and stated:

Where more than one reasonable accommodation is possible, the Bank may choose between them on the grounds of cost or convenience. In the present case, rather than continue the search for vacant positions, the Bank was entitled to create a new position that would substantially eliminate the Applicant’s contact with his previous supervisors. [...] the obligation is to provide a reasonable accommodation based on medical need, not on the employee’s personal preference.

101. In *CL*, para. 74, the Tribunal examined the fairness of placing the applicant on an Opportunity to Improve plan (OTI), which included provisions for the applicant to take sick leave or work from home, should his health require. The Tribunal found that, at the time the OTI was agreed with the applicant, “it was not unfair. [...] It accorded with the medical advice received by the Bank and was reasonably related to the objective of improving the [a]pplicant’s work performance.” *Id.*

102. In *BI (No. 3)*, Decision No. 518 [2015], the applicant stated that she did not want to process Systems, Applications, and Products (SAP) transactions, which had been part of her job description, due to health issues. The fitness for duty assessment concluded that she was fit for duty, but recommended that she be excluded from SAP processing tasks. The Bank accepted the medical recommendation and, after discussion with the applicant, modified her work program to exclude SAP transactions processing. In its discussion of the applicant’s claims of retaliation and discrimination, which the Tribunal did not find, the Tribunal held that “the manner in which management handled the [a]pplicant’s health issues regarding SAP transaction processing was fair and reasonable,” noting that “management complied with the [fitness for duty assessment]

recommendation. While this necessitated a significant reorganization of the department, management acted promptly to accommodate the [a]pplicant's needs." *Id.*, para. 84.

103. The Tribunal finds that the Bank's reassignment of the Applicant to the IFC Clinic and the Laboratory, in response to the conclusion of the 2013 IME that the Applicant "is not able to work in the current Health Clinic area without risk of aggravating her condition and of respiratory symptoms, most particularly cough, which may predispose her to another ocular injury" was a reasonable and fair response to the medical conclusion and satisfied the Bank's duty of care towards the Applicant.

104. According to the vacancy announcement for the Applicant's post of Occupational Health Nurse, she was to be responsible for "the delivery of nursing care, counseling, educational and training aspects of the health program of HSD, with emphasis on travel medicine." Her duties and responsibilities were to include:

- Advising traveling staff members and their families of country specific health requirements and risk exposure;
- Administering travel immunizations according to latest recommendations on a country-by-country basis;
- Providing emergency assistance and primary treatment through triaging for illness and injuries of occupational and non-occupational origin;
- Making nursing diagnoses and appropriate referrals when indicated;
- Providing advice in matters of physical and emotional health [of] staff members;
- Participating in health education and health promotion programs; and
- Maintaining accurate medical records in a computerized data base system.

105. When the Applicant's work location changed, some of her work responsibilities also changed. The Applicant claims that she had more administrative work, almost no patient care, and less interaction with other HSD staff in the Main Clinic. The change in duties and interaction with colleagues was inevitable. The Applicant could not have expected to perform the same tasks that she had been doing in the Main Clinic once she was no longer working in the Main Clinic. However, the Tribunal observes that the tasks that the Applicant was performing after the reassignment, including the additional responsibility of providing medical clearances for mission travelers, do not radically depart from her post description.

106. In her FY2014 OPE, regarding patient interaction, the Applicant stated: “Since I started at the IFC Clinic in July 2013, the patient census has increased exponentially from an average of 3-6 to 7-18 patients per day in my 3.5 hour shift. [...] Since starting at IFC clinic I regularly receive positive patient feedback.” Her results assessment reflects that she provided patient care in the IFC Clinic, travel medicine support including via telephone and email to colleagues in the Main Clinic, and actively participated in wellness events. Her supervisor noted, in two different sections of the OPE, that “although her health has required that she works outside the main clinic, [the Applicant] has remained an active member of the team and has made herself available to her colleagues when needed” and “although isolated by the physical location of her work, [the Applicant] still interacts with other staff.”

107. In fact, the Applicant’s summary of her individual business objectives, as set out in her FY2015 OPE, does not indicate any dissatisfaction with her work program, notwithstanding her distance from the Main Clinic. She writes:

Working in IFC Satellite Clinic, provides me with the opportunity to utilize and optimize my nursing knowledge and complex nursing judgment in assessing the health needs of my clients, providing the optimal care, motivating and supporting clients in managing their health. Despite the geographical location and working alone apart from my colleagues, I continue to collaborate inter-professionally and across units and departments. The individualized and personalized care resulted [in] trusting relationships with my clients in IFC and has provided me with great satisfaction.

108. Although the Applicant claims that she tolerated the reassignment because she believed the arrangement would be temporary, the Tribunal has regard to the contemporaneous nature of the comments in the Applicant’s FY2014 and FY2015 OPEs and notes that there is nothing in the record that shows that the Applicant expressed dissatisfaction with her responsibilities in the IFC Clinic and Laboratory, until she filed the Application.

109. Four years have elapsed since the Applicant’s reassignment to the IFC Clinic and Laboratory. The decision was an accommodation of the Applicant’s health issues. The Tribunal finds that the Applicant cannot now complain that it is discriminatory and unfair. As the Tribunal has stated, albeit in the context of accommodation of a disability, the Bank’s obligation to provide

a reasonable accommodation should be “based on medical need, not on the employee’s personal preference.” *BY (No. 2)*, para. 63. In this case, the Tribunal finds that the Bank’s reassignment of the Applicant to work in a different location was reasonable insofar as it responded to the Applicant’s medical needs, while maintaining her original duties and responsibilities as an Occupational Health Nurse to the extent possible in the new location and assigning her a new task, medical clearances, that was consistent with her job description.

110. The Tribunal further notes that the Applicant’s challenge of the non-selection decision for the position of head nurse in 2015 is not receivable, as the Applicant failed to request a review of this decision to PRS in a timely manner.

WHETHER REQUIRING THE APPLICANT TO UNDERGO A PHYSICAL AND PSYCHOLOGICAL  
EVALUATION IS REASONABLE

111. Staff Rule 6.07, “Health Program and Services,” paragraph 3.0 addresses “Health Assessments,” which may be done pre-employment, where staff are assigned to a duty station involving relocation, and in case of fitness for duty assessments. However, none of the assessments contemplated in this paragraph strictly apply to the Applicant’s situation, where she is requesting to be transferred back to her original work location.

112. The Staff Rules do not explicitly address whether the Bank can compel the Applicant to undergo an IME in the present circumstances. However, the Tribunal has regard to Principle 2.1(b) of the Principles of Staff Employment, which states that “the Organizations shall make all reasonable efforts to ensure appropriate protection and safety for staff members in the performance of their duties.” In the present circumstances, the Tribunal finds that the Bank’s duty of care to the Applicant encompasses the discretion to request the Applicant to undergo an IME, where the reassignment was due to medical reasons and the request to return to her original work location originated from the Applicant.

113. The Tribunal distinguishes between the present situation and the situation in 2013, when the Applicant underwent an IME at the request of the Bank’s Claims Administrator in relation to

her claims for work-incurred injuries. Regarding the latter, Staff Rule 6.11 mandates that “the claimant must submit to the Independent Medical Examination, if so required” by the Claims Administrator and the Claims Administrator also “may require the claimant to undergo an Independent Medical Examination (IME) at any time deemed necessary during the treatment period.” *See Lansky (No. 1 and No. 2)*, Decision No. 425 [2009], para. 43.

114. Nor does the present case fit the definition of a fitness for duty assessment, as contemplated by Staff Rule 6.07, paragraph 3.03(a), which states:

Fitness for duty assessments may be requested when performance problems are believed to be health-related or when a staff member has been on sick leave for periods that are extended and/or recurring. A fitness for duty assessment will determine the presence and extent of any health-related impairment to perform assigned duties.

115. While acknowledging that the Bank’s request that the Applicant undergo an IME before she can return to the Main Clinic is not a fitness for duty assessment, such request is an exercise of managerial discretion, which the Tribunal will now examine for reasonableness. Hence, the Tribunal will consider whether the IME requested is reasonably pertinent to the determination of whether the Applicant can return to the Main Clinic.

116. In *BE*, Decision No. 407 [2009], para. 31, the Tribunal noted: “A decision by a manager to request a fitness for duty assessment is important and must not be taken lightly. The Tribunal will overrule such a decision by the manager if it can be shown that the decision lacked a reasonable basis.”

117. In *CW*, Decision No. 516 [2015], the Tribunal found that the request for a fitness for duty assessment was not an abuse of managerial discretion, where the applicant had indicated to his manager that he was taking medication that negatively affected him and in response to the applicant’s performance deficiencies, which could be health-related, and concerns about his behavior.

118. The basis for the Applicant's reassignment to the IFC Clinic and Laboratory is the conclusion of the 2013 IME, namely, that the Applicant was "not able to work in the current Health Clinic area without risk of aggravating her condition and of respiratory symptoms." The examining physician listed four possible causes for "why [the Applicant] continues to react within the workplace given that remediation removed sources of mold, irritation, and dampness."

119. Just as the Bank satisfied its duty of care by transferring the Applicant out of the Main Clinic in 2013 to accommodate her medical condition based on the results of an IME, the Tribunal finds that it is a reasonable exercise of discretion and a proper discharge of the Bank's duty of care for the Bank to require the Applicant to undergo an IME, prior to allowing her to return to the Main Clinic.

120. The Applicant does not object in principle to a physical IME, "so long as her privacy is adequately protected and she receives a fair fitness-for-duty assessment from a neutral evaluator." The Tribunal will address the issues of privacy and neutrality, below. However, the Applicant objects to a psychological IME, arguing that the Bank does not have any reasonable basis for requiring one. Therefore, the Tribunal will examine the Bank's reasons for requiring a psychological IME.

121. First, the Bank states that the Applicant continues to express concerns about her health, despite the lack of objective evidence of mold in the Main Clinic. It appears that the parties face the same situation as in 2013, when the Bank asserted that it had fully remediated the Main Clinic whereas the Applicant continued to experience physical symptoms. In 2013, the matter was resolved by the IME. The Tribunal notes that the 2013 IME was not limited to a physical or psychological examination, and the examining physician elaborated on all the possible causes, which included both physical causes and "learned behavior." As the Applicant continues to complain about breathing difficulties and flare-ups when she is in the Main Clinic's vicinity, the Tribunal finds that an IME would be reasonable and useful for the Bank to determine whether the Applicant can return to work in the Main Clinic.

122. Second, the Bank claims that the two medical notes from the Applicant's treating physicians were deemed inadequate by Dr. A, hence, the need for an IME. Dr. B's note stated that the Applicant is "medically and physically fit to work full-time except in areas where there are known water leaks and mold growth [...]" and Dr. C recommended that the Applicant should be accommodated for her severe allergies, including a mold allergy. The Tribunal finds that neither of these notes address all the possible causes of the Applicant's condition, as identified in the 2013 IME. They specifically do not address the possibility of a psychological dimension to the Applicant's condition, which is the Bank's reason for requiring an IME that includes a psychological evaluation. The Tribunal finds that this favors having a psychological component to the IME.

123. Third, the Bank also claims that an IME is necessary because one of the duties the Applicant may have to perform in the future is administering travel and allergy vaccinations, and the Applicant has stated to her supervisor that she cannot perform allergy vaccinations or be present in the same area where such vaccinations are being provided. However, while the Applicant cites the medical instructions of her allergist to avoid administering or spending time in the immediate vicinity of allergy shots, she also disputes the Bank's allegation that she refused to come to the office when allergy shots were being given and claims that she was able to work when a temporary day-long allergy station was set up directly across from her office. The Tribunal finds that it is premature and therefore unreasonable to require an IME based on future functions that the Bank anticipates the Applicant may have to perform, where it is not clear that the Applicant refuses to or is unable to perform such functions.

124. Fourth, regarding the Bank's argument that a psychological IME is necessary because there is no medical explanation for the Applicant's seafood allergy in response to the weather or her mood, the Tribunal finds that this is a disputed fact and ultimately not decisive, in light of the Bank's later contention that it requested a psychological IME long before the Applicant stated her concerns about her allergies.

125. By analogy, just as the documentation requested by a Claims Administrator under Staff Rule 6.11, paragraph 3.02 "must be reasonably pertinent to the disposition of the claim for

workers' compensation," the Tribunal finds that the request for a physical and psychological IME, in this case, must also be reasonably pertinent to the decision regarding the Applicant's return to the Main Clinic. *Courtney (No. 4)*, Decision No. 202 [1998], para. 15. In this case, the Bank's decision to accommodate the Applicant by reassigning her away from the Main Clinic depended on the results of the 2013 IME. In order for the Bank to effectively reverse that decision and return the Applicant to the Main Clinic, the Tribunal holds that, on balance, it is reasonable for the Bank to explore, at a minimum, whether the possible causes of the Applicant's condition in 2013 still exist, or whether there are new ones, that would justify the denial of the Applicant's request to be returned to the Main Clinic. Since one of the possible causes identified in the 2013 IME, "learned behavior," is psychological, the Tribunal finds the Bank's requirement that the Applicant undergo a physical and psychological IME to be reasonable. In so finding, the Tribunal takes note of the Applicant's allegation that the future location of the Main Clinic is a space that also has a history of leaks and flooding, therefore, "regular, proactive monitoring for moisture and mold is still warranted."

126. The Applicant has expressed concerns about the confidentiality of her medical records, including the results of an IME, and argues that there is a conflict of interest in having an HSD physician evaluate another HSD staff member's fitness for duty.

127. The Tribunal reiterates that "health and medical issues are, of course, topics that must be handled with sensitivity." *CL*, para. 79. However, the Applicant's status as an HSD staff member *per se* cannot excuse her from undergoing an IME. Nor can her right to privacy preclude an assessment of her fitness to work in a particular location.

128. Staff Rule 6.07, paragraph 3.03, regarding fitness for duty assessments, states that such assessments

are conducted by HSD [...]. As part of the fitness for duty assessment, HSD may request that an external physician conduct a health assessment of the staff member involved. [...] The outcome of the Fitness for Duty Assessment shall be provided by the Director, Health Services Department or a Health Services Physician, to the requesting manager, the staff member and the Manager, Human Resources Team. [...] If the staff member is found to be unfit to work on a sustained basis at the level



required by the position, the Director, Health Services Department or a Health Services Physician, the staff member's manager, and the Manager, Human Resources Team, will meet to decide what the next steps should be. These decisions will be conveyed to the staff member by the manager.

129. The Tribunal notes that in 2013, the Applicant's IME was conducted by an external physician, and it was that physician who found her unfit to work in her current location in the Main Clinic. The Applicant has not explained why the same process that was followed for the 2013 IME, to which the Applicant did not object, cannot be followed at present. The Tribunal finds that the Bank may require the Applicant to undergo an IME for the purpose of determining whether the Applicant can return to work to the Main Clinic, as long as there are safeguards for confidentiality and independence. Specifically, the Tribunal holds that the IME should be performed by a third party outside HSD.

130. In her Application, the Applicant raised genuine concerns about the conduct of the IME requested by the Bank, particularly with regard to ensuring confidentiality and independence. The Tribunal finds these concerns meritorious in principle. Therefore, the Bank will be ordered to cover some of the Applicant's legal fees and costs.

#### DECISION

- (1) The Bank may require the Applicant to undergo a physical and psychological IME, which shall assess her fitness to work in the Main Clinic;
- (2) The Bank shall ensure that the IME of the Applicant shall be performed by a third party outside HSD;
- (3) The Bank shall contribute to the payment of the Applicant's legal fees and costs in the amount of \$10,000.00; and
- (4) 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., 25 October 2017