



World Bank Administrative Tribunal

2017

Decision No. 572

**EJ,
Applicant**

v.

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

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

**EJ,
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 21 November 2016. The Applicant was represented by Ryan E. Griffin 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 contests the following: (i) the decision of 3 February 2015 in which Human Resources (HR) informed the Applicant that he was not shortlisted for the position of ICT (Global Informatics and Communication Technologies Department) Practice Manager in the Transport and ICT Global Practice (GTIDR); (ii) the Applicant's 2015 Overall Performance Evaluation (OPE); and (iii) the Applicant's 2015 performance rating.

FACTUAL BACKGROUND

Applicant's employment history

4. The Applicant joined the Bank on 9 March 1998 as a Short-Term Consultant (STC). In June 2000, the Applicant received a Term appointment as a Regulatory Economist, level GF, in ICT. At the completion of his three-year term, his position was converted to an Open-Ended appointment. In 2004, the Applicant received a promotion to Senior Regulatory Economist, level GG. In June 2008, the Applicant became a Senior ICT Policy Specialist. In March 2012, the

Applicant was promoted to Lead ICT Policy Specialist, level GH, the position that he currently holds. The Applicant has also served as the ICT Regional Coordinator for Regions 1 and 2.

5. Up until the incidents at issue in this Application, the Applicant had always received strong performance ratings. The Applicant received performance ratings of 4 (“exceeds expectations”) for 2011, 2012, and 2013, and a performance rating of 5 (“significantly exceeds expectations”) for 2014. The Applicant received Talent Review ratings of 8 (“High Achiever” or “High Performer”) for every year 2013-2015. For 2014, the comments on the Applicant’s Talent Review describe him as a “potential sector manager for INF in the future,” while his 2015 comments list “team management” as one of his areas of strength.

Ethical concerns raised by the Applicant in late 2014

6. The Applicant asserts that he took action on several “ethical concerns in the ICT unit” in late 2014. Among such actions were: (i) disclosure to his management and the Office of Ethics and Business Conduct (EBC) of “a perception of preferential treatment” of a specific telecommunications corporation and a “potential perception of conflict of interest in the case of the management” of a trust fund for ICT; (ii) discussion about a potential conflict of interest in the recruitment of a GG-level Specialist, “including communicating concerns with [EBC]”; (iii) discussion “with colleagues and management” of situations with consultants “involved in upstream (business development and project preparation) and downstream (project execution) activities”; and (iv) his comments on Spark “on the need to have merit-driven decisions in the selection of Management of Global Practices, at a time when staff raised concern about bias in the selection of Management for the Transport and ICT Global Practice.”

7. In addition, the Applicant asserts that he discussed with the Ombuds Services Office allegations of abusive behavior by his supervisor and “health issues arising from the work environment.” According to the Applicant, he assisted another colleague in going to the Ombudsman and the Respectful Workplace Advisor with complaints of abusive treatment by the Applicant’s supervisor.

8. Finally, the Applicant alleges that on 14 November 2014 he met with the Senior Director, GTIDR, and that at this meeting, the Senior Director stated that the Applicant was the only one in the Global Practice creating problems regarding the recruitment of the GG-level Specialist. The Applicant also alleges that in late November 2014 the Senior Director was not pleased with the Applicant's assistance in bringing to light potential ethical issues regarding contracts between the Bank and a French telecommunications company.

Non-selection for the position of ICT Practice Manager in GTIDR

9. The Bank underwent a structural reorganization in June 2014 in which fourteen Global Practices, including GTIDR, were established. Following the reorganization, there was an increased need for new practice manager positions. A recruitment process to fill forty-seven practice manager positions across different Global Practices started at the end of 2014 within the Bank.

10. On 24 November 2014, GTIDR advertised the position of ICT Practice Manager. The job announcement indicated that the ICT Practice Manager would be responsible for "telecommunications, broadcasting infrastructure, satellite systems, spectrum management, broadband, development and related topics." It also stated that the Bank "is committed to achieving diversity in race, gender, nationality, culture, and educational background. Individuals with disabilities are equally encouraged to apply. Women are strongly encouraged to apply for this [Practice Manager] position." The job announcement noted that the Practice Manager would report to the Senior Director, GTIDR.

11. According to the job announcement, the ICT Practice Manager was required, among other things: to be "a recognized global telecommunications policy expert" with "demonstrated in-depth experience working across practice, disciplinary and institutional boundaries, and with multiple stakeholders"; to have "strong written and oral communication skills" and a "track record of successful management of diverse teams"; to "demonstrate courage of convictions, ownership and self-mastery with the Organization in accordance to [the Bank's] values"; to "lead and inspire staff

to perform and deliver for better results”; and to “help others achieve their fullest potential through coaching and mentorship.”

12. On 4 December 2014, a Senior Operations Officer emailed the “GP [Global Practice] Leadership Team Principals” with instructions regarding the recruitment process for several practice manager positions. In this email, she emphasized that the hiring managers needed “to make sure the managers we hire have great people management skills, and not compromise this principle under any circumstances” and that they “use this opportunity to improve the diversity of our management cadre” by “putting a particular focus on SSA/CR (Sub-Saharan African/Caribbean) managers while continuing to [strengthen] our female and Part II representation in our management team.” The Senior Operations Officer attached the “GPVPU [Global Practice Vice President Units]: Batch Recruitment Process for Practice Managers” (the Recruitment Guidelines) in which details regarding recruitment timeframe, candidate evaluation, shortlisting guidelines, and conduct of interviews were provided.

13. A Short-listing Committee (SLC) was established to review and shortlist candidates for five practice manager positions, three of which were in GTIDR, including the challenged ICT Practice Manager position, and two positions which were in the Energy & Extractives Global Practice (GEEDR). The Senior Director chaired the SLC for all five practice manager positions. In addition to the Senior Director, the following members comprised the SLC: a Senior HR Business Partner, Human Resources Department, Client Services (CHRCS); the Senior Director of GEEDR; the Director, Strategy and Operations, of Europe and Central Asia Region (ECA); the Senior Director of Public-Private Partnership Cross Cutting Solutions (GCPDR); and the Director of GTIDR.

14. The vacancy announcement for the challenged ICT Practice Manager position closed on 14 December 2014. Seventy-one applications were received. Eighteen candidates were longlisted for the position, including the Applicant. The SLC shortlisted four of these candidates. The shortlist consisted of two men from Part I countries, one woman from a Part I country, and one woman from a Part II country. The Applicant was not among the shortlisted candidates.

15. The shortlisting process was documented by the SLC. In its minutes, the SLC stated that the Applicant was a “seasoned telecom specialist; strong delivery track record; currently ICT coordinator for [Regions 1 and 2]; passionate; can be stubborn; eager to get the role, but his interpersonal skills are not as strong; occasional lack of maturity/judgement; joined Bank 15+ years ago in ICT; would benefit from assignment outside ICT unit.”

16. On 2 February 2015, the SLC submitted its proposed shortlisted candidates to the Global Practice Vice President (GPVP) for approval. The GPVP approved the shortlist on the same date.

17. On 3 February 2015, the Applicant received an email from HR informing him that he was not shortlisted for the position of ICT Practice Manager. The email informed him that “other candidates were assessed to more closely match the required criteria for this position.”

18. On 4 February 2015, the Applicant emailed the Senior Director asking for a meeting with him to “understand the reasons of this outcome” and stating that “this selection process may have been affected by certain external factors and, if this is the case, [he] would like to have a discussion, an understanding, and reconsideration of the list.” The Senior Director responded later that day, stating that he was surprised by HR’s email and that “it was something he had wanted to discuss with the Applicant, and others, directly.”

19. On 5 February 2015, the Applicant emailed the Senior Director noting that he had the integrity, track record, and qualifications to be on the shortlist, and that all he was asking was “a fair chance at a position of GP Manager for which [the Applicant] worked for the last twenty years of [his] career.”

20. On 12 February 2015, the Senior Director met with the Applicant. The Applicant claims that the Senior Director informed him that although the SLC recognized his strong technical and leadership skills, the SLC considered that his breadth of professional experience was weak relative to that of other candidates, that the Applicant had not rotated outside ICT, and that the Applicant could at times “ruffle feathers” in interactions with his peers.

21. At this meeting and in follow-up emails from 12 February through 19 February 2015, the Applicant requested that the Senior Director reopen the shortlisting process and provided the Senior Director with additional evidence of his suitability for the position. The Applicant also raised concerns that the SLC had not been provided with his 2014 OPE.

22. The Bank asserts that, pursuant to the Applicant's request, the Senior Director consulted with HR, his Vice President, and members of the SLC to hear their views on whether there were grounds to reopen the shortlisting process and reconsider the Applicant for the shortlist. The consensus of the SLC members was that the arguments the Applicant had produced, and his overall competitiveness in view of the other applicants for this position, did not justify a reconsideration.

23. The Applicant challenged the non-selection before Peer Review Services (PRS) in Request for Review No. 244. The PRS Panel issued its Report on 5 March 2016, concluding that the Bank had acted consistently with the Applicant's contract of employment and terms of appointment in making the non-selection decision. The PRS Panel recommended that the Applicant's requests for relief be denied. The Bank accepted the PRS Panel's recommendation on 6 May 2016 and immediately notified the Applicant of its decision.

2015 OPE and performance rating

24. On 8 April 2015, the Applicant had his mid-year discussion for the Fiscal Year 2015 (FY15) performance period with his supervisor. The Applicant asserts that, in that discussion, his supervisor did not highlight any operational or behavioral concerns but instead highlighted his managerial skills and good track record in business development.

25. On 10 April 2015, the Applicant entered his comments on the mid-year discussion into the Bank's performance management system, stating:

My managerial skills were highlighted in this conversatio [sic]. These included my ability to lead teams and mentor junior staff, my handling of difficult team situations in [...], and in particular my ability to completely reshuffle the three teams, to meet the internal and external client demand, without creating any issue or dissatisfaction among the affected team members. My ability to address and

solve conflicts identifying win-win situations has been recognised by my supervisor. The good track record in business development has also been highlighted, including the ability to raise funds for a new broadband study in [Region 1], the successful conclusion of a RAS [Reimbursable Advisory Services] in [...] and a new TF [Trust Fund] with [Project X], and new operational engagements in [...]. In terms of areas for self-improvement, I have expressed a strong preference for the area of communications. I believe that effective communication is absolutely key for a leader. I have good skills in this area, but would like to excel.

26. The Applicant's supervisor did not enter any comments on the mid-year discussion in the performance management system.

27. For the year-end FY15 performance evaluation process, the Applicant designated ten staff members as feedback providers, all of whom were approved by the Applicant's supervisor. Seven of these staff members provided feedback in the performance management system. Another designated feedback provider submitted his comments by email to the Applicant's supervisor on 18 August 2015.

28. On 7 July 2015, an ECA Country Director emailed the Applicant's supervisor to provide written feedback on the Applicant's FY15 performance even though she was not one of the Applicant's designated feedback providers. According to the Bank, it is a general practice for the leadership in the country offices to provide feedback on staff working with country management units (CMUs). The Bank asserts that the ECA Country Director provided feedback on the Applicant's performance and that of another fifty staff members from different Global Practices.

29. On 5 August 2015, the Applicant met with his supervisor for an initial discussion of his FY15 performance. At this meeting, the Applicant's supervisor informed the Applicant that he had received feedback from seven of his designated feedback providers and from the ECA Country Director. The Applicant's supervisor informed the Applicant that the ECA Country Director had provided negative feedback on the Applicant's interpersonal skills, warranting a 2 on his performance rating, but that the Applicant's supervisor "was inclined towards giving [the Applicant] a [performance rating of] 3." The Bank states that the Applicant strongly objected to the negative comments and asked his supervisor not to take them into account.

30. Later that day, the Applicant emailed his supervisor asking him to “take immediate action against the defamatory statement that you have shared with me in our discussion. The statement is false, defamatory and harmful.” The Applicant asserted that his supervisor had not raised this matter during the mid-year review.

31. On 13 August 2015, the Applicant asked his supervisor to seek additional feedback from the ECA Director, Strategy and Operations, regarding his performance with Project X. The Applicant’s supervisor sought the advice of an HR Business Partner who informed him on the same date that he “should not be the one requesting additional feedback [...]. [The Applicant] can ask [the ECA Director] to send feedback via an email [...].” The HR Business Partner added “with the new system, there is no negotiation with staff on your assessment.”

32. On the same date, the GG-level Specialist emailed the Applicant’s supervisor to bring to his attention that the Applicant was complaining about her recruitment and creating a negative perception about her at the Bank. This staff member enclosed email exchanges with the Applicant in which she asked the Applicant to “stop harming [her] reputation and harassing [her] in this unfair way” while the Applicant denied having done so.

33. On 16 August 2015, the Applicant’s supervisor confirmed to the Applicant that he could seek additional feedback from the ECA Director, Strategy and Operations.

34. On 27 August 2015, the Applicant’s supervisor had a discussion with HR to seek its guidance regarding the Applicant’s performance during the year, his objections to negative feedback received on his performance, and the harassment allegations by the GG-level Specialist.

35. On 28 August 2015, the Applicant met for a second time with his supervisor to discuss his performance. According to the Applicant, at this meeting his supervisor did not raise any performance issues but rather spent a significant amount of time blaming him for having reached out to EBC regarding possible conflicts of interest. The Bank’s account of that meeting is that the Applicant “was very aggressive, [...] unwilling to take feedback in the right spirit, and wanted to punch holes in every single piece of feedback that [the Applicant’s supervisor] was providing

him.” The Bank also asserts that the Applicant’s supervisor informed the Applicant of the GG-level Specialist’s accusations against him.

36. On 29 August 2015, the ECA Director, Strategy and Operations, provided the Applicant’s supervisor with additional feedback on the Applicant’s performance.

37. Between 1 and 3 September 2015, the Transport & ICT Management Team met for the Management Review Meeting. They discussed performance assessments and performance ratings of GTIDR staff, including the Applicant’s. According to the Bank, the Applicant’s performance rating of 3 was finalized at this meeting.

38. On 25 September 2015, the Applicant’s supervisor sent his draft Overall Comments on the Applicant’s performance to the HR Business Partner for her advice. On 27 September 2015, the HR Business Partner made minor suggestions.

39. On 28 September 2015, the Applicant’s supervisor sent his draft Overall Comments to the Applicant “as part of consulting staff before finalizing their individual write-ups.” The next day, the Applicant emailed his supervisor expressing his disagreement with the Overall Comments and suggesting several changes.

40. The Applicant’s supervisor did not make any changes to his Overall Comments, notwithstanding the Applicant’s request.

41. On 4 October 2015, the Applicant’s supervisor completed the Applicant’s FY15 OPE and sent it to the Senior Director through the performance management system. On 5 October 2015, the Senior Director, as the Reviewing Official, signed off in the system on the Applicant’s supervisor’s assessment of the Applicant’s performance.

42. Later that day, on 5 October 2015, the Applicant emailed his supervisor expressing concern that his suggested changes had not been included in the Overall Comments. The Applicant did not sign the Performance Evaluation form.

43. On 19 October 2015, the Applicant emailed his supervisor reiterating his disagreement with the Overall Comments in his evaluation. On the same date, the Applicant's supervisor sought the advice of the HR Business Partner on whether he had the obligation to incorporate the Applicant's views in his Overall Comments. The HR Business Partner informed the Applicant's supervisor that "[y]ou are correct that you do not have to agree with [the Applicant]'s comments."

44. The Applicant challenged his 2015 OPE and performance rating before PRS in Request for Review No. 266. The PRS Panel issued its Report on 15 July 2016 and found that the Bank had acted consistently with the Applicant's contract and terms of appointment in connection with his 2015 OPE and performance rating. In reaching this conclusion, the Panel found that the Applicant "had pointed to some facts indicating that his engaging in protected activities was a contributing factor in his evaluation and rating" but that "the Bank had demonstrated by clear and convincing evidence that [the Applicant]'s Performance Evaluation would not have been different absent his engaging in protected activities." The PRS Panel recommended that the Applicant's requests for relief be denied. The Bank accepted the PRS Panel's recommendation and notified the Applicant of its decision on 1 August 2016.

45. The Applicant filed his Application before the Tribunal on 21 November 2016. The Applicant seeks: (i) invalidation of the selection process for the ICT Practice Manager position; (ii) rescission of the Applicant's 2015 OPE; (iii) a performance rating of at least 4 for FY15, and the consequent back-dated salary raise; (iv) compensation in an amount the Tribunal deems fair and just for: a) the harm to the Applicant's career, professional reputation, and personal life; b) the loss of potential benefits and income; and c) the intangible damages and distress caused to the Applicant; and finally (v) legal fees and costs in the amount of \$33,772.69.

SUMMARY OF THE MAIN CONTENTIONS OF THE PARTIES

THE NON-SELECTION FOR THE ICT PRACTICE MANAGER POSITION

The Applicant's contentions

46. The Applicant claims that he was discriminated against based on his gender and excluded from the shortlist for the ICT Practice Manager position even though he was eminently qualified for it. The Applicant contends that the SLC's decision was inappropriately influenced by the hiring managers' desire to improve management diversity and increase female representation during this selection process. The Applicant asserts that the Bank has failed to support its argument that the SLC's decision was reasonably and objectively based on the Applicant's lack of broad experience, and that the Bank's basis to exclude him from the shortlist because of his interpersonal skills and maturity is inappropriate because the longlisting and shortlisting processes should only entail an objective comparison of candidates' qualifications against the requirements announced in the vacancy.

47. The Applicant also claims that the Bank retaliated against him for having reported potential misconduct to the Ombudsman and EBC regarding: i) abusive behavior by his supervisor; and ii) a possible conflict of interest associated with Bank projects and the appointment of a GG-level Specialist. The Applicant contends that all his reporting activities occurred prior to the selection process for the ICT Practice Manager position. The Applicant first reported his supervisor's abusive behavior to the GTIDR Director in June 2014 and the possible conflict of interest to the Ombudsman and EBC in late 2014. The Applicant contends that the Senior Director knew of the Applicant's protected activities and retaliated against the Applicant by excluding him from the selection process.

48. The Applicant asserts that the shortlisting process was marred by a lack of transparency, objectivity, and rigor for the following reasons: i) the role gender played in the SLC's decision is unclear; ii) the SLC's contemporaneous documentation sheds little light on its evaluation of the Applicant vis-à-vis the four shortlisted candidates; iii) management's departure from the shortlisting guidelines in constituting the SLC was unexplained; and iv) the SLC's comments about

the Applicant appear to have been drawn from thin air, lacking any plausible basis at the shortlisting stage of the selection process. The Applicant submits that the Bank's failure to properly constitute an SLC under established shortlisting guidelines by not including a GG/GH-level staff representative on the SLC was critical in this instance because one of the Applicant's peers "could have provided a valuable alternative perspective regarding [the Applicant's] interaction with colleagues." In the Applicant's view, this procedural shortcoming justifies the award of compensation even without any additional finding that he would have been shortlisted but for management's failures.

The Bank's contentions

49. The Bank asserts that the Applicant has failed to establish a *prima facie* case of discrimination, and that the record shows instead that the Applicant was provided equal opportunity to compete and underwent the same evaluation as any other candidate for the ICT Practice Manager position. The Bank denies the Applicant's allegation that it engaged in *de facto* discrimination and asserts that because diversity and inclusion have been of critical importance to the Bank since its inception, management encouraged applications from women and individuals from Part II countries in the job announcement. The Bank denies, however, having compromised on managerial quality for the sake of diversity and reaffirms that the gender-balanced shortlist in this case was achieved naturally and solely based on the candidates' merits, managerial skills, and suitability for the position irrespective of gender or nationality.

50. Regarding the Applicant's claims of retaliation, the Bank maintains that the Applicant has failed to provide any factual support linking his protected activities with his exclusion from the shortlist for the ICT Practice Manager position. The Bank asserts that neither the Senior Director nor any other member of the SLC was aware of the Applicant's communication with the Ombudsman or EBC prior to deciding on the shortlist for the ICT Practice Manager position. The Bank claims that the Applicant's criticisms of his supervisor did not prevent him from obtaining a performance rating of 5 at the end of 2014.

51. The Bank submits that the SLC reached its decision unanimously and documented it contemporaneously. The Bank also submits that the SLC's decision not to shortlist the Applicant was made after having carefully compared the background, experience, education, technical skills, leadership style, judgment, and interpersonal skills of each candidate, including "strong team work and collegiality" and "strong written and oral communication skills." The Bank asserts that the SLC followed the required procedures for recruitment, was conducted fully with the support of HR, was properly constituted, and complied with the required approval channels.

52. Regarding the composition of the SLC, the Bank submits that HR explained before PRS that the inclusion of a GG/GH-level staff representative was not a requirement but something to be decided by senior management. The Bank asserts that the non-inclusion of a GG/GH-level staff representative in the composition of the SLC, "in consideration of the challenges," was not an unreasonable deviation from the shortlisting guidelines; it did not have any effect on the outcome of the shortlisting process nor did it invalidate the SLC's decision. The Bank adds that even though procedures did not contemplate the reopening of the shortlisting process, the Senior Director consulted with the rest of the SLC members, HR, and one of his Vice Presidents about the Applicant's request to reopen the shortlisting process, but they found that there was no basis for it.

THE APPLICANT'S 2015 OPE AND PERFORMANCE RATING

The Applicant's contentions

53. The Applicant claims that his supervisor failed to provide him with adequate notice of performance issues and did not accord him a fair opportunity to defend himself. The Applicant submits that his supervisor did not raise any performance issue at the mid-year discussion, even though the issues raised at the final 2015 OPE regarding the Applicant's communication style with his colleagues were known to the Applicant's supervisor months prior to the mid-year discussion. The Applicant contends that his supervisor did not accord adequate weight to the positive feedback he received on the Applicant's performance but chose instead to rely on the negative feedback he received from the ECA Country Director, a non-designated feedback provider.

54. The Applicant asserts that his performance rating of 3 lacked a reasonable basis and was motivated by retaliation. The Applicant claims that his rating had been predetermined by his supervisor prior to the conclusion of the performance evaluation, and without due consideration of the Applicant's comments and positive feedback, in violation of the Applicant's right to have his performance fully evaluated and compared to that of other staff before a performance rating is assigned. With respect to the allegations of retaliation, the Applicant contends that he has established a *prima facie* case of retaliation by demonstrating that he reported protected activities, that the decision-maker was aware of this, and that a connection exists between his protected activity and his "low" 2015 performance rating.

The Bank's contentions

55. The Bank asserts that the Applicant's 2015 OPE had an observable and reasonable basis, was properly motivated, and is supported by objective feedback from independent reviewers and the objective evaluation of the Applicant's supervisor. The Bank further asserts that the Applicant's supervisor gave equal weight to positive and negative feedback and fully accounted for additional feedback. The Bank submits that it followed performance review procedures in assessing and finalizing the Applicant's 2015 OPE because the Applicant's supervisor met with the Applicant twice regarding his year-end performance review, provided him with ample opportunity to give input, worked closely with HR representatives in deciding the Applicant's performance, and equally assessed positive and negative feedback. The Bank further submits that the Applicant had sufficient notice of performance issues and was aware of his weaknesses because the Applicant's supervisor and the Senior Director had interacted with the Applicant frequently throughout the year and had provided both oral and written constructive feedback on Project X and the Applicant's communication style with his colleagues.

56. The Bank asserts that it followed all relevant rules in awarding the Applicant's 2015 performance rating. The Bank submits that the Applicant's performance rating of 3, a fully satisfactory rating, resulted from a vigorous evaluation and discussion by management, was based on a comparative assessment of the Applicant's performance and that of his peers at the same GH level in the Transport and ICT Global Practice, and was consistent with the Applicant's

performance. Regarding the Applicant's claim of retaliation, the Bank asserts that the Applicant's supervisor was not aware of the Applicant's conversations with the Ombudsman and EBC until after the Applicant had filed his request for review with PRS challenging his 2015 OPE and performance rating. The Bank claims that it has provided clear and convincing evidence that the Applicant would have received the same performance evaluation and rating had he not engaged in protected activities, and that the Applicant's 2015 OPE and rating had an observable and reasonable basis.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

THE NON-SELECTION FOR THE ICT PRACTICE MANAGER POSITION

Standard of review in selection decisions

57. In *Riddell*, Decision No. 255 [2001], para. 23, the Tribunal made clear that

no staff member has a right to be selected to a particular position or to be included in a list of candidates for a position. The decision to select an applicant for a particular position, or to include him or her in a list of candidates, is discretionary and the Tribunal will not overturn such a decision unless it finds that it is tainted by bias or abuse of discretion.

58. The Tribunal has consistently held that it will not overturn a discretionary managerial decision unless it is demonstrated that the exercise of discretion was "arbitrary, discriminatory, improperly motivated, carried out in violation of a fair and reasonable procedure, or lack[ed] a reasonable and observable basis, constitute[ed] an abuse of discretion, and therefore a violation of a staff member's contract of employment or terms of appointment." *DO*, Decision No. 546 [2016], para. 33, citing *AK*, Decision No. 408 [2009], para. 41; *Desthuis-Francis*, Decision No. 315 [2004], para. 19; *Marshall*, Decision No. 226 [2000], para. 21; *de Raet*, Decision No. 85 [1989], para. 67.

59. In *Jassal*, Decision No. 100 [1991], para. 37, the Tribunal stated:

It is not for the Tribunal, in assessing the validity of the selection or non-selection of a staff member, to undertake its own examination of that staff member's record, or a criterion-by-criterion assessment of his or her qualifications. That is for the

Bank to do in the first instance, subject to review by the Tribunal only for abuse of discretion. But the Tribunal is charged with determining whether the Bank's decision was the product of bias, prejudice, arbitrariness, manifest unreasonableness, or unfair or improper procedure. Thus, if the Bank's conclusion regarding the Applicant's qualifications for selection [...] altogether lacks support in factual evidence or reasonable inference, that conclusion must be found to be an abuse of discretion.

60. The Applicant has raised several issues regarding his non-selection for the position of ICT Practice Manager. In particular, he claims that the Bank's decision was discriminatory and retaliatory and that the shortlisting process lacked objectivity, transparency, and rigor. The Tribunal will now address the Applicant's allegations in light of the foregoing standard.

Allegations of discrimination

61. In *Crevier*, Decision No. 205 [1999], para. 25, the Tribunal found that "discrimination takes place where staff who are in basically similar situations are treated differently." The Tribunal has consistently held that any form of such discrimination is prohibited within the Bank. In *DJ*, Decision No. 548 [2016], para. 57, the Tribunal stressed that:

Principle 2.1 of the Principles of Staff Employment provides that the Bank "shall not differentiate in an unjustifiable manner between individuals or groups within the staff." Staff Rule 3.00, paragraph 6.01(e) makes clear that wrongful discrimination by Bank staff members including "on the basis of age, race, color, sex, sexual orientation, national origin, religion or creed" constitutes prohibited misconduct. Staff Rule 3.01, paragraph 4.01 states that supervisors' treatment of staff shall not be influenced by "the race, nationality, sex, religion, political opinions or sexual orientation of the supervisor or the staff member."

62. Consistent with this principle, the Tribunal has stated that it "unhesitatingly invalidates discretionary decisions if the evidence shows that the decision was discriminatory based on [...] gender, or other prohibited grounds." *AI*, Decision No. 402 [2010], para. 39. The Tribunal observed, however, that just as it "is prepared to be firm on any question of [...] discrimination supported by the evidence, so too it is prepared to dismiss outright any unfounded allegation in this context." *Njovens*, Decision No. 294 [2003], para. 16.

63. In *AI*, para. 80, the Tribunal clarified that “the burden of proof in the case of alleged retaliation is no different from the burden of proof in the case of alleged discrimination.” In either case, the Tribunal requires that “an applicant asserting discrimination or retaliation must still make a *prima facie* case with some evidence to show the discriminatory or retaliatory motives behind the impugned decision.” *Bodo*, Decision No. 514 [2015], para. 77. In *DJ*, para. 58, citing *de Raet*, para. 57, the Tribunal noted that once an applicant has established his or her *prima facie* case, “the burden shifts to the Bank to disprove the facts or to explain its conduct in some legally acceptable manner.”

64. In this case, the Applicant claims that the members of the SLC had received instructions to improve management diversity at the Bank and increase female representation, and that these considerations predetermined the selection process in favor of female candidates over him. He also claims that he deserved to be on the shortlist because he possessed comparatively higher levels of experience and expertise than at least one of the shortlisted female candidates.

65. The Tribunal observes that Principle 2.1 of the Principles of Staff Employment states that the Bank “shall encourage diversity in staffing consistent with the nature and objectives of the Organizations.” The Bank claims that consistent with its undertakings of diversity and inclusion it “encourage[d] applications from women and individuals from Part II countries.” The Tribunal finds that the Bank did not depart from its principles in encouraging females to apply for the ICT Practice Manager position in the job announcement. The Bank also acted consistently with its principles in instructing the recruitment teams for the various practice manager positions on 4 December 2014 to be mindful of the organizational aims of diversity and inclusion to strengthen “female and Part II representation in our management team.”

66. The Bank advances that, notwithstanding its commitments to strengthen diversity and inclusion within the Bank, the shortlist was solely based on the candidates’ merit. The pool of candidates for the position was strong and competitive. Out of the seventy-one candidates, eighteen candidates were longlisted and only four candidates were shortlisted. Consistent with the criteria specified in the job announcement, the SLC, in shortlisting candidates for the position of ICT Practice Manager, prioritized qualifications, relevant experience, and managerial and interpersonal

skills over considerations of gender or nationality. The evidence in the record therefore supports the conclusion that the selection process was based on merit.

67. According to the job announcement, the ICT Practice Manager would, among other things, need: to be “a recognized global telecommunications policy expert” with “demonstrated in-depth experience working across practice, disciplinary and institutional boundaries, and with multiple stakeholders”; to have “strong written and oral communication skills” and a “track record of successful management of diverse teams”; to “demonstrate courage of convictions, ownership and self-mastery with the Organization in accordance to [the Bank’s] values”; to “lead and inspire staff to perform and deliver for better results”; and to “help others achieve their fullest potential through coaching and mentorship.”

68. The Applicant claims that he was treated differently from the rest of the candidates during the shortlisting process. The SLC recorded the shortlisting process in minutes which are part of the record. The longlist was comprised of eighteen candidates, thirteen internal and five external, of whom twelve were male and six were female. The Tribunal has reviewed *in camera* the SLC minutes and observes that the SLC compared each candidate’s background, education, experience, managerial skills, judgment, and interpersonal skills against the requirements specified in the job announcement. Furthermore, consistent with the recruitment guidelines of 4 December 2014, “to make sure the managers we hire have great people management skills, and not compromise this principle under any circumstances,” the SLC carefully assessed the managerial and interpersonal skills of each candidate.

69. The SLC minutes show that while the SLC considered the Applicant a “seasoned telecom specialist; strong delivery track record; currently ICT coordinator with [Regions 1 and 2]” it found his interpersonal skills “not as strong” and with an “occasional lack of maturity/judgement.” The SLC also stated that the Applicant had spent more than 15 years in the same unit and that he “would benefit from assignment outside ICT unit.”

70. The Applicant was not, however, the only candidate subject to such assessment. It is evident from the record that the other longlisted candidates underwent similar assessments. For

instance, the SLC's assessment of a Part II female candidate, excluded from the shortlist, was that she had managerial and ICT experience but was "weak on telecoms; mixed feedback and views; rough edges." Another SLC assessment corresponds to a Part I male who, like the Applicant, was also excluded from the shortlist even though he was found to possess "very solid/good judgment. Good external experience." On the other hand, the SLC shortlisted a Part I male candidate who it found to be "mature" and who had the "potential to be a good leader." The SLC's assessment of a shortlisted Part II female candidate was that she had a "strong reputation in ICT," "excellent interpersonal skills," and "strong backbone." The Tribunal observes that each candidate was treated equally and their qualifications and skills assessed on a similar basis. The gender or nationality of the candidates played no role in the shortlisting process. The Tribunal is satisfied that the non-shortlisted candidates, including the Applicant, despite possessing good experience and technical skills, were assessed by the SLC to lack other skills essential for the position, which justified their non-selection.

71. In light of the above, the Tribunal finds that the Applicant has not made out a *prima facie* case of discrimination. The Tribunal further finds that, in any event, the Bank has disproved the alleged discriminatory motives and has explained its conduct in a legally acceptable manner.

Allegations of retaliation

72. The Applicant claims that his non-selection was in retaliation for his reporting of his supervisor's abusive behavior and a possible conflict of interest with the appointment of the GG-level Specialist. The Applicant submits that he first reported his supervisor's behavior to his management in June 2014 and the possible conflict of interest to the Ombudsman and EBC in late 2014, prior to the beginning of the recruitment process.

73. Retaliation is prohibited under the Staff Rules. Staff Rule 3.00, paragraph 7.06 states:

Retaliation by a staff member against any person who provides information regarding suspected misconduct, who cooperates or provides information in connection with a preliminary inquiry or investigation conducted under Staff Rule 8.01 or in connection with an initial review or subsequent procedures set forth in

Sections 8 through 10 of this Rule, or who uses the Conflict Resolution System, is expressly prohibited and shall result in proceedings under this Rule.

74. In *Bauman*, Decision No. 532 [2016], para. 95, the Tribunal observed that

retaliation against any person “who provides information regarding suspected misconduct or who cooperates or provides information in connection with an investigation or review of allegations of misconduct, review or fact finding, or who uses the Conflict Resolution System” is prohibited. *See* Staff Rule 3.00, paragraphs 6.01(g) and 7.06, and Staff Rule 8.01, paragraph 2.03; *see also* *CS*, Decision No. 513 [2015], para. 104; *Sekabaraga (No. 2)*, Decision No. 496 [2014], para. 60. This prohibition extends also to retaliation against any person who is believed to be about to report misconduct or believed to have reported misconduct, even if such belief is mistaken.

75. Staff Rule 8.02, paragraph 3.01, provides that:

Where a staff member has made a *prima facie* case of retaliation for an activity protected by this Rule (i.e., by showing that the staff member reported suspected misconduct under this Rule and has a reasonable belief that such report was a contributing factor in a subsequent adverse employment action), the burden of proof shall shift to the Bank Group to show – by clear and convincing evidence – that the same employment action would have been taken absent the staff member’s protected activity.

76. In *Bodo*, para. 77, the Tribunal, affirming this principle, stated that an applicant asserting discrimination or retaliation must still make a *prima facie* case with some evidence to show the discriminatory or retaliatory motives behind the impugned decision. The Tribunal explained that, without any elaboration on claims or evidence of actual or perceived retaliation, it has little to deliberate on.

77. In *O*, Decision No. 337 [2005], para. 47, the Tribunal further explained that any applicant alleging retaliation must discharge his or her burden of proof by:

[E]stablish[ing] facts which bring his or her claim within the definition of retaliation under the Staff Rules. An applicant bears the onus of establishing some factual basis to establish a direct link in motive between an alleged staff disclosure and an adverse action. A staff member’s subjective feelings of unfair treatment must be matched with sufficient relevant facts to substantiate a claim of retaliation,

which in essence is that the allegation of poor performance is a pretext to mask the improper motive.

78. In this case, the record shows that the Applicant engaged in protected activities prior to the selection process for the ICT Practice Manager position. Nonetheless, the Tribunal finds that the Applicant has not substantiated his claim that any or all of the SLC members knew of his protected activities at the time the shortlisting, or the reconsideration of the Applicant's shortlisting, took place. The Tribunal therefore finds that the Applicant has not established facts sufficient to amount to a *prima facie* case of retaliation.

Whether the shortlisting process lacked objectivity, transparency, and rigor

79. The Applicant's main claim is that the Bank's failure to include one GG/GH-level staff representative in the composition of the SLC in compliance with the Recruitment Guidelines calls into question the objectivity, transparency, and rigor of the shortlisting process. He also asserts that the lack of transparency is evident in the way the SLC documented the shortlisting process.

80. The Tribunal has addressed the need to observe the principles of objectivity, transparency, rigor, diversity, and fairness in the selection process (both shortlisting and interviewing) in a number of judgments. *See, e.g., Iqbal*, Decision No. 485 [2013], para. 40; *Hitch*, Decision No. 344 [2005]; *Perea*, Decision No. 326 [2004]; *Riddell*, Decision No. 255 [2001]; *Jassal*, Decision No. 100 [1991].

81. Regarding the application of these principles in the shortlisting process, the Tribunal held in *BK*, Decision No. 444 [2010], para. 46, that:

Principle 4.1 of the Bank's Principles of Staff Employment states that the purpose of the Bank's "recruitment policy shall be to seek to attract staff members of the highest caliber appropriate to job requirements." In this regard, the Tribunal notes that the Bank's Shortlisting Guidelines state that the shortlisting process should be guided by principles such as "objectivity," "transparency," "rigor," and "diversity." The Guidelines also state that the objective is to:

Create a short-list of candidates considered to be the best qualified to put forward for interviews. Shortlisting is screening a long list of candidates against the

selection criteria for the job. The short list of candidates should also represent the diversity and fungibility requirements of the sector. A Hiring Manager will typically convene a shortlisting committee (SLC) of up to 4 people, with at least one from outside the hiring unit. Shortlisting results must be documented.

82. The Tribunal found in *Iqbal*, para. 41, citing *BK*, para. 56, that:

The principles of “objectivity,” “transparency,” “rigor,” and “diversity” cannot be implemented unless the SLC is composed of staff members from more than one unit in addition to an HR Officer. These objectives in recruitment are realized if the Bank makes its shortlisting process uniform with clear guidelines and when the composition of a shortlisting committee is diverse. *Furthermore, staff members’ confidence in the shortlisting process will be enhanced by the Bank’s proper and contemporaneous documentation of the deliberations of the SLC in as much detail as practicable. Contemporaneous and detailed documentation of SLC deliberations is also a guarantee of a transparent, sound and fair recruitment process.* (Emphasis in original.)

83. The Recruitment Guidelines for the ICT Practice Manager position, which guided the recruitment process for forty-seven Practice Manager positions at the time, specified that “candidates will go through a comprehensive evaluation covering technical, behavioral, people, management and leadership skills.” The Recruitment Guidelines proposed the constitution of eight SLC clusters and recommended that each SLC be composed as follows: one GP Senior Director/Director as chair of the SLC; one or two Directors as appropriate; one GG/GH-level staff representative (decided by the Chair); one Regional GI Director/Sr. Adviser; one IFC/Cross-Cutting Solutions (CCSA) Senior Director/Director as appropriate; and one HR Business Partner. The Recruitment Guidelines contained a proposed list of names for each SLC.

84. The Applicant was one of the seventy-one candidates who applied for the position of ICT Practice Manager. The record shows that the SLC for this position was established in early December 2014 and composed of six members: the Senior Director as the SLC’s chair; the Senior HR Business Partner, CHRCS; the Senior Director of GEEDR; the Director, Strategy and Operations, of ECA; the Senior Director of GCPDR; and the Director of GTIDR.

85. The SLC did not include the GG/GH-level staff representative recommended in the Recruitment Guidelines. The Applicant claims that solely because of this failure the selection

process lacked objectivity, transparency, and rigor. The Tribunal disagrees. The Tribunal has held that “any decision to deviate from established best practices, which are recommended for the efficient and fair recruitment of staff, must not be arbitrary or lack a reasonable and observable basis.” *DO*, Decision No. 546 [2016], para. 46.

86. The Tribunal finds that the Bank’s decision not to include a GG/GH-level staff representative in the SLC was not arbitrary and did not lack a reasonable and observable basis. The record shows that the Recruitment Guidelines proposed that each SLC constituted for the selection of the forty-seven practice managers be composed of members from different units. The SLC constituted for the selection of the ICT Practice Manager position was composed of six members, including one HR representative, two representatives from the hiring unit, as well as representatives from other units. The SLC was also diverse in background, level, and gender. It was composed of female and male directors and senior directors who possessed the technical expertise and managerial experience required to ensure a comprehensive evaluation of the candidates. The Tribunal is satisfied that the Recruitment Guidelines’ objective to ensure diversity in the composition of the SLC was realized in this case.

87. The Applicant claims that the absence of one GG/GH-level staff representative was critical in this instance because one of the Applicant’s peers “could have provided a valuable alternative perspective regarding his interaction with colleagues.” However, there is no indication in the record that the SLC decision not to shortlist the Applicant was not reached consensually or that the participation of the staff representative in the SLC would have led to a different outcome.

88. The Applicant further claims that the SLC’s documentation sheds little light on his evaluation vis-à-vis the shortlisted candidates. But the record does not support this contention. The shortlisting process was documented in minutes which clearly attest to the SLC’s objective evaluation of each candidate and provide the basis for the Applicant’s non-selection. As evidenced by the SLC minutes, the view of the SLC members was that the Applicant, as opposed to the shortlisted candidates, lacked the managerial and leadership skills as well as the breadth of professional experience essential for the position.

89. In sum, the evidence on record leads the Tribunal to conclude that the shortlisting process did not lack transparency, objectivity, and rigor; the Bank's decision not to shortlist the Applicant for the position of ICT Practice Manager had an observable and reasonable basis and did not constitute an abuse of discretion.

THE APPLICANT'S 2015 OPE AND PERFORMANCE RATING

Standard of review in performance evaluations

90. The Tribunal has consistently held that the assessment of a staff member's performance is a matter that falls within the Bank's discretion. In *BI*, Decision No. 439 [2010], para. 22, citing *Desthuis-Francis*, Decision No. 315 [2004], para. 19, the Tribunal held:

The evaluation of a staff member's performance is in principle a matter within the Respondent's discretion. What constitutes satisfactory performance is to be determined by management [...] and management's appraisal in this respect is final absent an abuse of discretion.

91. The Tribunal recently reiterated the standard applicable in reviewing performance evaluations. In *DC (No. 2)*, Decision No. 558 [2017], para. 54, citing *BY*, Decision No. 471 [2013], para. 33 and *Prudencio*, Decision No. 377 [2007], para. 73, the Tribunal noted that

[its] assessment of performance evaluations is limited to determining whether the decision in question was arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure.

92. In *Marshall*, Decision No. 226 [2000], para. 21, the Tribunal further observed:

Even if the merit rating and SRI were not a product of intentional ill-will, they might still be overturned by the Tribunal if they were arbitrary or capricious [...].

93. In *Malekpour*, Decision No. 322 [2004], para. 21, the Tribunal confirmed that "a change in the assessment of a staff member by his supervisors cannot, in and of itself, be regarded as an abuse of discretion." A staff member is "entitled to a fair and proper performance evaluation every

year, but there is no rational basis for supposing that a high-performance rating in one year gives rise to a presumption that the same rating would carry over to the next or subsequent years.” *Id.*

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

The Applicant’s 2015 OPE process

95. The Applicant’s claim is that his 2015 OPE and performance rating were conducted unfairly and did not follow due procedures. The Applicant asserts that he was not given sufficient notice of any performance deficiencies, was denied the opportunity to defend himself, and had his positive feedback ignored by the Bank, which led to a low assessment and rating of his 2015 performance.

96. The Tribunal notes that the Applicant’s overall performance for 2015 was considered a “strong performance.” The feedback on the Applicant’s performance as Regional Coordinator for [Region 1] was that he was “very good technically, excellent with clients, good under pressure.” It also “acknowledged his leadership.” Although the general feedback on Project X was that he could have “sequenced and paced better and that the relationship with the CMU could have been managed more smoothly,” it acknowledged that the Applicant “did try to address these issues over time, resulting eventually in a satisfactory outcome.” The feedback on the Applicant’s “achievements in [Region 2] for reasons outside the control of the team, were somewhat mixed.” It acknowledged that some “gains” were made in a few countries and the Applicant’s “technical competence and sound understanding of economic issues.”

97. Areas of improvement were, however, identified in the Applicant’s OPE in which the Applicant’s supervisor encouraged the Applicant “not to be defensive while receiving constructive feedback, but take it in the proper spirit” and urged him “to be more diplomatic especially in his written communications to colleagues.” The Tribunal also notes that the Applicant’s talent review for 2015 noted that he was a high performer with managerial potential, “ready in 1-3 years” for a managerial role, but that he needed to develop his “soft skills.”

98. The Tribunal observes that the record contains evidence attesting to the Applicant's confrontational approach with some of his Bank colleagues, which his supervisor considered inappropriate for a manager. In an email of 13 August 2015, the GG-level Specialist emailed the Applicant's supervisor to bring to his attention that the Applicant was complaining about her recruitment and creating a negative perception about her at the Bank. In December 2014, the Applicant sent an email to another staff member in ICT with accusatory and abrasive language, which prompted the Applicant's supervisor to intervene.

Assessment of the feedback provided on the Applicant's performance

99. The Applicant claims that due process was not followed in the assessment of feedback and that inappropriate weight was unfairly accorded to negative feedback given by a non-designated provider. The Bank asserts that feedback providers identified areas of improvement with respect to the Applicant's performance in Project X and the Applicant's behavior.

100. The record shows that the Applicant designated ten feedback providers in the performance management system, all of whom were approved by the Applicant's supervisor. Seven of them provided comments in the system, one declined, and another one provided his feedback by email. The Tribunal examined *in camera* this feedback and found that the feedback providers unanimously praised the Applicant's technical skills, while some of them commended his managerial and leadership skills. Most of them, however, noted the Applicant's need to delegate functions, accept failures, and improve his communication skills.

101. The record further shows that on 7 July 2015 the ECA Country Director, a non-designated feedback provider, emailed the Applicant's supervisor to provide written feedback on the performance of fifty staff members from different Global Practices, including the Applicant, who had worked with CMUs. This assessment noted that the Applicant was "[t]echnically sound and [his] initial approach to business development [was] often efficient, but has not managed to deliver without substantial help from CMU and has put the dialogue in several countries at risk by not following up on initial exchanges [...] and a lot of communication issues with the CMU. Rating would be 2 on behavioral and 3 on technical aspects."

102. The Tribunal notes that the provision of CMU's performance feedback on the Applicant represents a general practice in CMUs. In order to issue this performance feedback, the full Department Management team for Project X – consisting of four country managers, three program leaders, and a Lead Economist – met with the ECA Country Director for a day and a half to discuss the performance of fifty staff members, including the Applicant. Each evaluated staff member was subject to similar assessments and received suggested performance ratings. In the Tribunal's view, the performance feedback was the result of an objective team assessment and was not biased against the Applicant.

103. Upon the Applicant's request, the ECA Director, Strategy and Operations, provided additional feedback on the Applicant's performance on Project X on 29 August 2015. In her feedback, the ECA Director, Strategy and Operations, noted that the Applicant "should have sequenced and paced the preparation for the [ECA] activity better." She also noted that the Applicant "took feedback well" and "showed flexibility and humility."

104. In an email of 21 August 2015, the Head of the European Commission's Broadband Unit expressed her "profound thanks to [the Applicant], first for the contribution to [an] event in June, which turned out to be a great success, and second for [his] unfailingly constructive and professional attitude, with which [the Applicant] led this project through administrative and legal uncertainties earlier this year. I believe if it was not for [his] diplomatic persistence and [his] ability to bring out positive aspects of our potential cooperation in difficult circumstances, the process may not have led [to] the well-designed plan for the project and for our relationship for the future."

105. The Applicant alleges that his supervisor failed to take into account the comments provided by the ECA Director, Strategy and Operations, and arbitrarily ignored the positive feedback from the Head of the European Commission's Broadband Unit, while inappropriately considering the ECA Country Director's negative feedback. The Tribunal finds, however, that the feedback from the ECA Country Director and the ECA Director, Strategy and Operations, are consistent with the comments provided by the Applicant's supervisor in the Applicant's OPE, in which he noted that "the feedback on [Project X], however, from different sources was generally that it should have been sequenced and paced better and that the relationship with the CMU could have been managed

more smoothly. That said, [the Applicant] did try to address these issues over time, resulting eventually in a satisfactory outcome.”

106. The Tribunal disagrees with the Applicant’s claim that his supervisor’s decision to exclude the feedback of the Head of the European Commission’s Broadband Unit was arbitrary. The Tribunal notes that this feedback was not directly addressed to the Applicant’s supervisor and treated with confidentiality, but that the feedback was shared with the Applicant. Furthermore, it is well established in the Tribunal’s jurisprudence that it is within the manager’s discretion to weigh the feedback available to identify trends and accord greater or lesser weight to it. The Tribunal is convinced that the Applicant’s supervisor did not abuse his discretion in not incorporating this feedback into the Applicant’s OPE.

107. Finally, the Tribunal observes that the feedback provided on the Applicant’s performance by designated providers contained a mix of positive and negative comments. While the feedback providers unanimously praised the technical skills of the Applicant, only some of them commended the Applicant’s managerial and leadership skills. To a few providers, the Applicant needed to improve his communication style with his colleagues. As stated in *CX*, Decision No. 517 [2015], para. 58, citing *Lysy*, Decision No. 211 [1999], para. 68: “A performance evaluation should deal with all relevant and significant facts, and should balance positive and negative factors in a manner which is fair to the person concerned. Positive aspects need to be given weight, and the weight given to factors must not be arbitrary or manifestly unreasonable.” The Tribunal finds that the Overall Comments and Areas of Improvement sections of the Applicant’s OPE are consistent with the feedback received from the designated providers.

Failure to provide adequate notice of performance issues

108. The Applicant claims that his supervisor failed to provide him with adequate notice of performance issues and a fair opportunity to defend his performance.

109. Staff Rule 5.03, paragraph 2.01, states that the Bank is under the obligation to meet and discuss the staff members' performance, achievements, strengths, areas of improvement, and future development needs, and to provide the staff member with a written summary assessment.

110. The Tribunal has stressed in its jurisprudence the importance of respecting the requirements of due process in relation to performance evaluations. In *K. Singh*, Decision No. 188 [1998], para. 21, the Tribunal held that:

Two basic guarantees are essential to the observance of due process in this connection. First, the staff member must be given adequate warning about criticism of his performance or any deficiencies in his work that might result in an adverse decision being ultimately reached. Second[,] the staff member must be given adequate opportunities to defend himself. (*Samuel-Thambiah*, Decision No. 133 [1993], para. 32).

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

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

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

112. The Tribunal also found in *DG*, Decision No. 528 [2016], para. 114, that "informal feedback sessions should serve to enable a staff member to anticipate the nature of the year-end formal discussion and resultant ratings on the OPE."

113. In the present case, the evidence shows that the Applicant's supervisor and the Senior Director interacted with the Applicant frequently throughout the year under review and provided both oral and written constructive feedback on Project X and the Applicant's communication style with his colleagues. There is also evidence that the Applicant's supervisor called the Applicant's attention to what was seen as a confrontational and aggressive approach with some of his Bank colleagues.

114. As part of the FY15 performance evaluation process, the record shows that the Applicant and his supervisor met on three occasions. They had their mid-year discussion on 8 April 2015. The Applicant and his supervisor met again on 5 August 2015 as part of the year-end performance evaluation. At this meeting, the Applicant's supervisor informed the Applicant that he had received feedback from seven of his designated feedback providers and from the ECA Country Director, who had provided negative feedback on the Applicant's performance. The record shows that the Applicant strongly objected to the negative comments and asked his supervisor not to take them into account.

115. A final meeting on the Applicant's OPE was held on 28 August 2015. At this meeting, the Applicant's supervisor informed the Applicant of the accusations made by the GG-level Specialist against the Applicant. One email in the record shows that the Applicant's supervisor informed HR of the outcome of this meeting, noting that the Applicant "was very aggressive [...] unwilling to take feedback in the right spirit, and wanted to punch holes in every single piece of feedback that [the Applicant's supervisor] was providing him."

116. The Tribunal finds that the evidence in the record, including email exchanges between the Applicant and his supervisor, supports the conclusion that the Applicant was duly informed of his performance weaknesses for 2015 and was given the opportunity to address them.

117. The Applicant further alleges that he was not awarded a fair opportunity to defend himself at the final stage of his performance process. The record shows that before the completion of the Applicant's OPE, the Applicant's supervisor, without being required to do so, emailed the Applicant his draft Overall Comments. The Applicant disagreed with his supervisor's comments and suggested several changes. Following the advice of HR that as a supervisor he was not obliged to modify his Overall Comments section of the Applicant's OPE, the Applicant's supervisor did not alter his comments and completed the OPE. The Tribunal is satisfied that in completing the Applicant's 2015 OPE the Applicant's supervisor complied with relevant procedures.

118. Based on the totality of the record, the Tribunal holds that there were no violations of due process, and that the Applicant's rights to receive adequate notice and defend himself were fully

observed throughout the Applicant's 2015 OPE process. The Tribunal also finds that the Applicant's 2015 OPE shows a fair and balanced assessment of the Applicant's performance and that the OPE had an observable and reasonable basis.

The determination of the Applicant's 2015 performance rating

119. In *DP*, Decision No. 547 [2016], para. 94, the Tribunal recently stated that:

The process of establishing performance ratings is based on a comparative assessment of staff members within the same unit. The Tribunal has recognized that “[g]iven the various decisional elements that are properly taken into account in making such a comparative assessment, it is difficult to support a claim of abuse of discretion.” *Marshall*, Decision No. 226 [2000], para. 24. However, the Tribunal has in the past set aside SRI ratings where it was evident that the SRI was based on an arbitrary or procedurally flawed OPE process. *BY*, Decision No. 471 [2013], para. 31. As such, the SRI decision must have a “reasonable and observable” basis. *Desthuis-Francis*, Decision No. 315 [2004], para. 26.

120. The Applicant alleges that the performance rating awarded to him in 2015 lacked a reasonable and objective basis and was retaliatory. The Applicant contends that his performance rating of 3 had been predetermined by his supervisor prior to the conclusion of the performance evaluation, and without due consideration of the Applicant's overall comments and feedback.

121. The record shows that between 1 and 3 September 2015, the Transport & ICT Management Team met for the Management Review Meeting to discuss performance assessments and performance ratings of GTIDR staff, including the Applicant. The Tribunal observes that these meetings “are conducted to evaluate the relative performance of staff by assessing their results in the context of others in their peer group, department or VPU [Vice President Unit]” and are “intended to achieve a collective view of individual staff performance and to ensure standardization, consistency, fairness and transparency in the application of performance ratings as well as self-service actions across VPU.” The Tribunal is satisfied that the Applicant's performance rating was determined following a comparative assessment of the Applicant's performance and that of his peers at the same GH level in the Transport and ICT Global Practice.

122. The Tribunal observes that a performance rating of 3 is not a “low performance rating” as the Applicant claims but is considered fully satisfactory. A performance rating of 3 is accorded when a “[s]taff member meets all or substantially all performance expectations, including workplace behaviors, considering the position requirements and compared to staff at the same grade level.” The FY15 Guidance for Performance Ratings Allocation proposed that ratings of 4 or 5 “should be exclusively used for rewarding exceptional performance.” It also noted that “[t]he distribution of performance ratings of 4 and 5 will continue to be strictly capped [...] respectively to 25% (4’s) and 10% (5’s) or total of 35% of 4’s and 5’s at management’s discretion at the department level.”

123. The Tribunal finds that the Applicant’s rating of 3 resulted from a proper evaluation and discussion by management and was consistent with the Applicant’s performance. The negative feedback in the record, along with the view of the Applicant’s supervisor of the areas in which the Applicant needed improvement, appear to balance the other positive feedback and positive comments given by the Applicant’s supervisor in the Applicant’s OPE and provide the basis for the Applicant’s rating.

124. The Applicant has made an additional claim that because his supervisor knew of his reporting of a possible conflict of interest to the Ombudsman and EBC his supervisor retaliated against him when determining the Applicant’s 2015 performance rating. The Tribunal observes that the Applicant engaged in protected activities in FY15 but notes that there is no convincing evidence that the Applicant’s supervisor was aware of the Applicant’s conversations with the Ombudsman and EBC prior to the completion of the Applicant’s 2015 OPE and allocation of the performance rating.

125. The Tribunal concludes that the Applicant’s performance rating of 3 is supported by the record, had an observable and reasonable basis, and is not tainted by retaliation.

DECISION

The Application is dismissed.

/S/ Stephen M. Schwebel

Stephen M. Schwebel

President

/S/Zakir Hafez

Zakir Hafez

Acting Executive Secretary

At Washington, D.C., 25 October 2017