



World Bank Administrative Tribunal

2018

Decision No. 580

**EO,
Applicant**

v.

**International Finance Corporation,
Respondent**

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

**EO,
Applicant**

v.

**International Finance Corporation,
Respondent**

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

2. The Application was received on 17 October 2017. The Applicant was represented by Marie Chopra of James & Hoffman, P.C. The International Finance Corporation (IFC) was represented by Ingo Burghardt, Chief Counsel (Institutional Administration), Legal Vice Presidency. The Applicant's request for anonymity was granted on 4 May 2018.

3. The Applicant challenges (i) his Fiscal Year 2016 (FY2016) Annual Review, (ii) his FY2016 performance rating of 2, (iii) the Opportunity to Improve (OTI) plan dated 28 November 2016, (iv) the recommended termination of his appointment in accordance with Staff Rule 7.01, Section 11, and (v) the non-extension of his term appointment.

FACTUAL BACKGROUND

4. The Applicant joined the IFC on 30 March 2009 as a Short Term Consultant. On 6 July 2009, he was appointed on a fixed-term appointment as an Associate Financial Officer, Level GF, in a unit of the Office of the Vice President, Treasury & Syndications (CFIVP). His contract was extended multiple times. On 1 July 2011, he was promoted to Financial Officer, tier GF-2.

5. As a result of a reorganization, effective 2 April 2012, the Applicant worked in Unit X and reported to Ms. A.

6. On 11 February 2016, the Applicant created and submitted his FY2016 business objectives, which were to (i) maintain a high standard in derivative valuation; (ii) enhance client satisfaction; (iii) enhance team effectiveness and relationships with clients; (iv) continue taking a lead role on model validation; (v) participate in model enhancements; and (vi) participate in infrastructure improvements.

7. At the end of February 2016, the Applicant was notified that he would be transferred to Unit Y, subsequent to a departmental reorganization, effective 1 April 2016, where he would be supervised by Mr. B.

8. On 9 March 2016, the Applicant had his mid-year conversation with Ms. A, Mr. B, and a Human Resources (HR) Business Partner. At this meeting, they discussed the status of the various projects in which the Applicant had been involved while in Unit X, the Applicant's handover tasks, and his upcoming projects/responsibilities in Unit Y. According to the Applicant, Ms. A did not communicate any expectation that his ongoing projects in Unit X should be fully completed prior to his transfer. According to the IFC, the Applicant was notified about "how his work was not meeting the standards of timely delivery, including some tasks that had been carried over from FY2015 which were still pending" and the Applicant's "continued tardiness in arriving to work and to meetings was also discussed."

9. On 31 March 2016, Ms. A submitted the mid-year review.

10. By email dated 2 May 2016, Mr. B asked the Applicant to add four more objectives to his Annual Review. He requested the Applicant to add a fifth objective on 1 June 2016, and the Applicant did so on the same date. The additional objectives were: "(1) learn to generate ALM reports; (2) participate in new ALM project; (3) take over TCS/LAM quarter-end processes; (4) help with new deals/initiatives [...]; and (5) take over TCS/LAM team utilities and tools (such as Treasury web portal and market data downloads)."

11. On 13 and 14 July 2016, the CFIVP held its management review meeting to discuss the performance of staff. The Applicant was tentatively assigned a relative performance rating of 2.

12. By email dated 20 July 2016, Mr. B asked the Applicant to add Ms. A as a co-supervisor on the Applicant's FY2016 Annual Review. He also sent another email on the same day, informing the Applicant that his list of feedback providers had been changed, by replacing three feedback providers, at Ms. A's recommendation.

13. On 27 July 2016, the Applicant met with Mr. B, Ms. A, his Director, and the HR Business Partner for his year-end performance review conversation. At the meeting, the Applicant was informed that, while working in Unit X he did not deliver major projects on time because of a failure to focus and prioritize; that he failed to complete major projects, including a specific model, or had other staff complete the projects for him; that most of the tasks assigned to him since his transfer were not complete or were only partially complete by the end of the fiscal year; and that he often arrived late to work. The Applicant refuted these statements, stating that delays were caused by external factors over which he had no control, that he had completed the model in question, and that none of the projects assigned to him after the transfer could have been completed in the remaining three months prior to the end of the fiscal year, since most depended on others taking action. Later that day, the Applicant sent an email to all the meeting participants to show that he had completed and turned in the model in question.

14. On 7 September 2016, the management team met to assign final performance ratings for staff and gave the Applicant a performance rating of 2, which means "below expectations."

15. On 19 September 2016, the Applicant began to draft his self-evaluation for the FY2016 Annual Review.

16. On 20 September 2016, Ms. A was added as a co-supervisor to the Applicant's Annual Review.

17. By email dated 27 September 2016, Mr. B asked the Applicant to finish his self-evaluation.

18. At a meeting on 29 September 2016, Mr. B informed the Applicant that he would receive a performance rating of 2 for FY2016 and would be placed on an OTI. Mr. B offered the Applicant

a printed copy of his written Annual Review, but the Applicant declined to take it, stating that he would review it after Mr. B signed and submitted the Annual Review.

19. On 4 October 2016, the Director signed the Applicant's Annual Review as the Reviewing Official.

20. On 11 October 2016, Mr. B discussed the OTI, which would run from 11 October 2016 to 1 May 2017, with the Applicant. He gave the Applicant a list of ten tasks/projects, which would be the substance of the OTI, and associated deadlines, many of which were in August or September. When the Applicant pointed out that many of the dates had already passed, Mr. B acknowledged this. Mr. B also instructed the Applicant to be in the office promptly at 9:30 a.m. every day.

21. By email dated 13 October 2016, Mr. B sent the Applicant a document titled "[The Applicant's] 'Opportunity to Improve (OTI)' plan for FY 2017," which contained the same list of ten tasks/projects with revised deadlines, past-due August and September dates having been replaced with dates in the near future. The Applicant was given until noon the following day to comment.

22. The IFC states that the Applicant accepted the OTI on 14 October 2016.

23. On 21 October 2016, the Applicant and Mr. B met to go over the status of the tasks set out in the OTI. The Applicant updated Mr. B on the tasks that he had completed and those he was working on.

24. On 26 October 2016, Mr. B again attached the OTI, requested the Applicant to update him on the status of the assigned tasks, and reminded the Applicant about the need to arrive at work by 9:30 a.m. and to complete the required number of hours.

25. On 24 November 2016, the Applicant submitted extensive responses to his supervisors' comments on the Annual Review.

26. The same day, the Applicant also filed a Request for Administrative Review (AR) of his Annual Review, his performance rating, the OTI, and the terms of the OTI.

27. On 28 November 2016, Mr. B issued a formal OTI. It included the same ten tasks/projects and deadlines as in the document of 13 October 2016, including three dates in October that had passed and a deadline in three days.

28. On 21 December 2016, the Administrative Reviewer concluded that the Applicant's co-supervisors "followed a fair process in identifying and communicating the performance deficiencies to [the Applicant] in a timely manner" and "acted within their discretion and followed proper procedures in deciding on [the Applicant's] performance ratings and the opportunity to improve plan he was provided with."

29. By email dated 22 December 2016 to the Applicant, the Director affirmed the Administrative Reviewer's findings in whole, confirming the Applicant's original Annual Review, performance rating, and OTI.

30. On 23 January 2017, the Applicant requested a Performance Management Review (PMR).

31. On 17 March 2017, the Performance Management Reviewer concluded:

[M]anagement established that [the Applicant's] performance evaluation and performance rating of 2 were based on a reasonable and clearly observable basis, namely continued tardiness in work program delivery, and properly reflected on his performance relative to other staff in the VPU [Vice Presidential Unit].

With respect to whether the proper procedures were followed, the Performance Management Reviewer "determined that management provided sufficient feedback to [the Applicant] during the review period regarding the areas of concern and followed the applicable procedures in arriving at the performance rating of 2" and did not recommend any changes to the original managerial decisions.

32. By email dated 24 March 2017, the Vice President & Treasurer of the IFC shared the PMR report with the Applicant and informed him that he accepted the recommendations.
33. On 27 March 2017, the Applicant, Mr. B, the Director, the HR Business Partner, and a Staff Association representative met to discuss the Applicant's OTI mid-year summary progress. The Applicant was informed that he had already failed the OTI and that his appointment would be terminated. According to the Applicant, Mr. B also strongly urged him to resign.
34. On 3 April 2017, the Applicant, Mr. B, the HR Business Partner, and the Staff Association representative met again. Mr. B decided to terminate the OTI immediately and informed the Applicant that he would initiate the termination in the system.
35. On 6 April 2017, the Applicant applied for sick leave. By email dated 10 April 2017, the Staff Association representative, on behalf of the Applicant, informed Mr. B and the HR Business Partner that the Applicant "has been working with HSD [Health Services Department] and subsequently needs to take some time off due to an illness." The Applicant's sick leave was approved on 10 April 2017 and he was subsequently placed on Short Term Disability (STD).
36. On 10 April 2017, Mr. B initiated the OTI termination memo in the system, recommending that the Applicant's employment be terminated for unsatisfactory performance, in accordance with Staff Rule 7.01, "Ending Employment," Section 11.
37. By email dated 2 May 2017 to the Director, Mr. B stated: "[B]ased on [the Applicant's] continued unsatisfactory performance, I am recommending his termination from the World Bank Group."
38. On 15 June 2017, the Applicant's STD leave was confirmed to cover the period from 6 April 2017 to 31 July 2017. It was subsequently extended until 5 November 2017.
39. By email dated 20 June 2017, Mr. B informed the Applicant that his appointment would not be extended beyond its current end date of 27 January 2018.

40. Further to an independent medical examination, in a report dated 5 July 2017, a psychiatric evaluation of the Applicant concluded that he was

suffering from both anxiety disorder and depressive disorder which have been brought on by the stress that he feels he has been working under at work. [...] Both medical conditions make it difficult for him to function effectively at work. [...] I believe that [the Applicant's] reaction is genuine and that he is not fabricating his reaction or malingering.

The psychiatrist also recommended that the Applicant “should be transferred to a different department at IFC or at the World Bank, where he might be a better fit.”

41. On 18 July 2017, in response to the Applicant's request of 13 July 2017 for an extension to file a consolidated application, the President of the Tribunal allowed the Applicant until 22 September 2017 to file an application.

42. On 14 August 2017, in response to the Applicant's request of 11 August 2017 for a further extension, the President of the Tribunal allowed the Applicant until 17 October 2017 to file an application.

43. On 17 October 2017, the Applicant filed this Application with the Tribunal. He challenges (i) his FY2016 Annual Review, (ii) his FY2016 performance rating of 2, (iii) the OTI dated 28 November 2016, (iv) the recommended termination of his appointment in accordance with Staff Rule 7.01, Section 11, and (v) the non-extension of his term appointment.

44. The Applicant requests the following relief: (i) rescission of his FY2016 Annual Review and removal of all record(s) of it from his personnel files, (ii) rescission of his FY2016 performance rating of 2 and removal of all record(s) of it from his personnel files, (iii) the award of a performance rating of at least 3 for FY2016, (iv) rescission of the OTI dated 28 November 2016 and removal of all record(s) of it from his personnel files, (v) conversion to an open-ended position or, in the alternative, the extension of his term appointment, (vi) a retroactive salary increase consistent with a performance rating of 3 for FY2016, (vii) compensation “for the

extraordinary stress caused by management's unfair treatment [...] and the damage to his reputation," and (viii) legal fees and costs in the amount of \$40,134.95.

SUMMARY OF THE MAIN CONTENTIONS OF THE PARTIES

The Applicant's Contention No. 1

The FY2016 Annual Review was arbitrary and unfair

45. The Applicant claims that the Annual Review failed to properly recognize his positive achievements and unreasonably gave negative factors greater weight. In terms of his achievements, the Applicant states that he fully satisfied all of his performance objectives for his work in Unit X and fully completed all additional handover tasks. On the other hand, he argues that the negative criticisms "are almost entirely red herrings that fall into one of four categories: (a) caused by factors outside [the Applicant's] control; (b) false critiques; (c) tasks [the Applicant] was not or could not have been expected to complete; (d) peripheral or unrelated tasks, or some combination thereof."

46. The Applicant argues that the Annual Review gave disproportional weight to the last quarter of FY2016, thereby penalizing him "for not completely fulfilling objectives that obviously could not possibly have been completed by the close of FY2016."

47. The Applicant observes that the Annual Review failed to take into account mitigating factors regarding delays in the Applicant's work. First, regarding the Applicant's tardiness in completing the requisite model validations for quarter-end, the Applicant explains that he could not complete his validations until other staff entered all the underlying trading data and corrected errors in coding. However, according to the Applicant, these other staff routinely entered trades at the last minute or made mistakes in their coding, which the Applicant would catch, so he did not receive the final, corrected versions of trades until well after quarter-end. Second, regarding the failure to complete a specific project by 30 June 2016, the Applicant notes that the project launch was delayed to November 2016 so he could not have nor could he have been expected to complete the valuation models for this project during FY2016. Third, regarding the failure to deploy a bond

price download program or begin work on an “MBS and Futures/Option download program,” the Applicant states that he could not have begun work until the Information Technology Department installed the requisite software, which did not happen in FY2016.

48. The Applicant argues that the Annual Review includes unfair and inaccurate criticisms. According to him, Ms. A falsely stated that he did not implement model enhancements developed in connection with the Risk team, that he did not complete a specific model himself, and that he made no progress with respect to FTP to SFTP conversions. To the contrary, the Applicant claims that he fully completed the model enhancements for which he was responsible, he himself completed the model in question, and he fully completed the critical external Bloomberg conversion.

49. The Applicant contends that the Annual Review unfairly criticized him for not completing tasks that were not his responsibility or that could not have been completed during the relevant period.

50. Finally, the Applicant notes that many of Mr. B’s comments in the Annual Review improperly relate to matters on which the Applicant worked in FY2017, thereby falling outside the scope of the FY2016 assessment period.

51. According to the Applicant, his first opportunity to make any rebuttal to his supervisors’ statements was on 24 November 2016 in the Staff Acknowledgement Comments section of the Annual Review, well after his performance rating was finalized and after the Annual Review had been approved by the Reviewing Official. The Applicant argues that the IFC failed to meet its obligation “to evaluate performance through a process that affords staff adequate opportunity to correct deficiencies and defend themselves—including by making any criticisms available in writing—before it assigns performance ratings.” (Emphasis in original.)

The IFC's Response

The Applicant's FY2016 performance evaluation had an observable and reasonable basis

52. The IFC repeats and relies upon Ms. A's comments in the Annual Review regarding the Applicant's failure to complete work or failure to deliver on a task related to the Applicant's individual business objectives. The IFC urges the Tribunal to defer to the managers' judgment "on the due weight of timeliness in delivery and actual completed for [Unit X] staff as key factors of their performance evaluation."

53. The IFC acknowledges that the Applicant was evaluated positively for his technical and analytical skills, but notes that his workplace behavior was not positive, as identified in the section "Areas of Development." Moreover, the Applicant did not comply with Ms. A's requirement that her team members give status reports of their work program or task lists on a weekly basis, despite emails following up with him on tasks that were overdue.

54. The IFC notes that the Applicant had a well-documented history of tardiness in core work program delivery and in arriving to work, such that "the possibility of a 2 rating was discussed during the FY2015 Annual Review Meeting."

The Applicant's Contention No. 2

The Annual Review and performance rating violated fair procedures

55. The Applicant contends that he was not given any notice by his managers that they considered him to be performing below expectations or any opportunity to defend himself. He further notes that at the 27 July 2016 meeting, he was not given any written comments to which he could respond or react. By the time he received written comments about his performance, on 27 September 2016, he claims that his performance evaluation and performance rating had already been finalized, "rendering any argument futile."

56. The Applicant rejects the contention that he was given timely notice of his performance issues through (i) his Annual Reviews since FY2013, (ii) emails from Ms. A in FY2016, (iii) the

9 March 2016 mid-year conversation, and (iv) the 27 July 2016 year-end conversation. Regarding his Annual Reviews since FY2013, the Applicant notes that the feedback was “overwhelmingly positive” and “nothing in those documents indicates that any identified concerns were of such magnitude that, if not addressed, they would [...] yield a performance rating of 2.” As to the emails from the Applicant’s manager produced by the IFC as evidence that the Applicant was made aware of his poor performance, the Applicant contends these are misleading, do not give the full picture, and “nowhere did either Ms. [A] or Mr. [B] suggest that the criticisms cited could result in a performance rating of 2 and possible termination.” As to the mid-year conversation, the Applicant claims that Ms. A did not communicate any expectation that he would complete outstanding projects, Mr. B instructed him to hand off all ongoing projects and responsibilities before the transfer, and he was told that the transfer would give him “a new opportunity to benefit both [Unit Y] and his own career growth.”

57. The Applicant also observes that any notice of performance deficiencies given during the mid-year conversation would not have been timely because he only had eight full working days remaining in Unit X so he would not have had any meaningful opportunity to correct identified deficiencies or complete any outstanding projects. According to the Applicant, in the new unit, he only had three months to take on the responsibilities of his new position before the end of the fiscal year and was only provided with additional objectives in May, a number of which involved projects or materials to which he did not have access until months later. Finally, the Applicant contends that the year-end conversation cannot constitute timely notice since it took place after the end of the fiscal year so he could not have made corresponding improvements in FY2016.

58. Moreover, the Applicant claims that the participation of the Director, who was the Reviewing Official, in the performance evaluation process denied him the right to have the evaluation assessed by an official who was not already invested in the outcome. Specifically, the Director participated actively in the 27 July 2016 year-end discussion, which the Applicant argues was inappropriate, “created a hostile and abusive atmosphere,” and “undercut his ability to act as an impartial reviewer of the evaluation.”

59. The Applicant asserts that the performance rating was an abuse of process, first, because it was based on the Applicant's lack of progress on projects in which he was involved in FY2017, rather than in FY2016. Second, the Applicant observes that his performance rating was proposed weeks before the year-end discussion and was finalized on 7 September 2016, weeks before Ms. A could have added her written comments to the Annual Review, before the Applicant's managers saw his self-evaluation, and well before the Applicant had an opportunity to review his managers' criticisms and defend himself.

The IFC's Response

The IFC followed fair procedures in assessing the Applicant's FY2016 performance

60. The IFC disputes the Applicant's assertion that he did not receive fair notice of any performance issues. To the contrary, the IFC recalls the Applicant's managers sending him reminders throughout the year and relies upon the mid-year conversation and year-end discussion, where performance issues were discussed.

61. The IFC explains that the Applicant's managers did not have any written comments for him at the year-end discussion because the ePerformance process starts with the staff member's self-evaluation, which the Applicant created only on 19 September 2016. The IFC recalls that the Applicant's performance was discussed on 27 July 2016 and throughout the year and that the Applicant did not claim that the comments on his Annual Review were inconsistent with the comments at the 27 July 2016 meeting.

62. In response to the Applicant's contention that his transfer did not give him an adequate opportunity to improve and avoid a performance rating of 2, the IFC states that the Applicant's managers could not have told him in advance of his year-end performance assessment that his performance was likely to be rated a 2.

63. As well, the IFC asserts that management should be able to meet and discuss staff performance ratings before a staff member has created his evaluation form, otherwise the ePerformance system becomes the performance management process itself.

64. The IFC submits that it followed proper procedures in setting the Applicant's performance rating because his rating was finalized on 7 September 2016, after his year-end discussion on 27 July 2016. It further states that a tentative performance rating was assigned to the Applicant because his manager had "a reasonable and observable basis for the relative and absolute performance evaluation."

65. The IFC contends that there is nothing in the IFC's regulatory framework that precluded the Director from attending any performance discussion, including the year-end discussion, and his presence "was not prohibited under any of the mandatory Policy, Directive[s] or Procedures." It claims that the Director's presence "was not inhibiting nor did it create a hostile work environment" and recalls that the Director frequently attended weekly team meetings where work program matters were discussed. The IFC also notes that the Applicant did not object to the Director's presence at the year-end discussion.

The Applicant's Contention No. 3

The OTI was unfair, arbitrary, and an abuse of discretion

66. The Applicant argues that the OTI was unfair and arbitrary because it was based on an Annual Review and performance rating that violated the requirements of a fair process.

67. The Applicant also claims that the OTI did not conform to prescribed processes and requirements and "deliberately set [the Applicant] up to fail." First, the OTI was *de facto* implemented on 11 October 2016, before it was officially submitted or authorized, and was based on an incomplete, defective document that set out a list of tasks associated with deadlines that had already passed. The Applicant complains that he did not receive all the required information—i.e., written explanation of the areas that needed improvement, clear expectations and metrics about the work to be performed, guidance, support and resources, and an explanation of the consequences if the performance standards were not met—prior to the commencement of the OTI period.

68. Second, the Applicant asserts that the OTI "lacked clear expectations or metrics for assessing progress" and, of the ten tasks, only one "had any indication of the evaluation matrix."

The Applicant claims that he did not have any opportunity for substantive input or discussion about which tasks would be included in the OTI, the substantive expectations associated with each task, or the metrics that would be used to assess his performance. He relies on his emails to Mr. B requesting guidance, which he claims were responded to with unhelpful or antagonistic responses.

69. Third, the Applicant argues that the OTI “imposed deadlines arbitrarily without consideration of whether those deadlines were reasonable or realistic.” The Applicant points out that the IFC has offered no explanation as to how Mr. B arrived at the revised deadlines or the reasonableness or appropriateness of each deadline.

70. Fourth, the Applicant states that “the OTI did not set a reasonable, realistic timeframe that took into account the nature of the alleged performance deficiencies or the sought improvement.” Namely, the original OTI purported to run from 11 October 2016, but was not authorized until 28 November 2016 and the time frame was further shortened because of the IFC’s closures, the Applicant’s planned leave, and the leave plans of other staff upon whom the Applicant depended to move forward on certain projects. The Applicant also recalls that he was informed on 27 March 2017, nearly a month before the end of the OTI, that he had already failed the OTI, so the OTI period was further reduced. The Applicant argues that the decision to terminate the OTI as of 27 March 2017 meant that he was deemed to have failed the OTI before any of his FY2017 task deadlines had passed, thus denying the Applicant a genuine opportunity to succeed.

71. The Applicant submits that Mr. B’s assessment of the Applicant’s performance during the OTI did not give sufficient weight to the completed tasks, failed to consider changing circumstances and mitigating factors, and was based on a premature end to the OTI.

72. The Applicant argues that the OTI was an abuse of discretion because it did not take into account the genuine health issues impacting his performance. According to the Applicant, his anxiety and insomnia worsened throughout the OTI period and his symptoms became more obvious, such that “any reasonable, observant manager would have questioned whether [the Applicant’s] underlying health issues might be impacting his performance.”

73. The Applicant states that his symptoms were so severe at the time he was placed on STD that “any reasonable person would have considered that the same underlying medical conditions might have also been affecting [the Applicant’s] ability to perform those duties in the days and weeks prior to his diagnosis.”

74. The Applicant submits that, on 10 April 2017 when Mr. B initiated the OTI termination memo, he did so without further inquiry, despite being on notice that the Applicant had been assessed and qualified for STD. The Applicant argues that, as a result, Mr. B had a duty to request a Fitness for Duty Assessment before ending the OTI and recommending termination.

The IFC’s Response

Placing the Applicant on an OTI was consistent with Staff Rule 5.03 on performance management

75. The IFC claims that the performance rating of 2 constitutes the notice to the Applicant of the opportunity to improve, and the “Applicant had an extra three months before any formal performance rating of 2 and the period to improve under the formal OTI.”

76. The IFC contends that “the OTI was designed to help [the Applicant] demonstrate that he could complete tasks within an agreed timeline.” First, the Applicant was already working on those tasks, including those which were already near completion, so the effort required to complete them would be minimal. Second, an OTI from 11 October 2016 to 1 May 2017 would give the Applicant more time to demonstrate that he could improve his performance.

77. The IFC rejects the claim that the OTI lacked clear metrics or guidance. Rather, it characterizes the language in the OTI, i.e., “complete by” or “take over” or “learn by,” as sufficiently clear.

78. The IFC also observes that the Applicant received sufficient guidance and support throughout the OTI period. The Applicant, Mr. B, and the HR Business Partner had regular OTI status meetings, in addition to continuous interaction between the Applicant and Mr. B, so the

Applicant had ample opportunity to obtain guidance, if needed. In addition, there were regular team meetings.

79. The IFC argues that Mr. B acted within his discretion when he decided to terminate the OTI on 3 April 2017 because the Applicant's failure to improve his performance was well documented.

80. The IFC states that "there was no reason to suspect that [the Applicant] had any health issues," as he did not share any information about this with Mr. B and he did not take sick leave during the OTI period. There was, therefore, no basis for Mr. B to request a Fitness for Duty Assessment. The IFC also argues that the onus was on the Applicant to bring his health issues to his manager's attention earlier, and not after he was notified that the OTI would be terminated. The IFC rejects any link between the Applicant's underperformance and health issues.

The Applicant's Contention No. 4

The termination of the Applicant's appointment was arbitrary, unfair, and an abuse of discretion

81. The Applicant argues that the decision to terminate his appointment "is necessarily arbitrary and unfair, because it arose out of his arbitrary, unfair Annual Review, Performance Rating, and OTI." He claims that the subsequent decision not to renew his contract was "a blatant attempt to do an end-run around the protections afforded to staff on STD, and achieve the same ends by other means."

The IFC's Response

The termination was a reasonable exercise of discretion

82. The IFC submits that it "exercised responsible and reasonable discretion in deciding not to renew [the Applicant's] term appointment at the end of its term due to his poor performance," while giving the Applicant several opportunities to improve prior to taking this decision. These opportunities include the notation of his tardiness in core work program delivery as an area of

development in his Annual Reviews since FY2013, his transfer from Unit X to Unit Y, and the OTI which carried over existing tasks from FY2016.

The Applicant's Contention No. 5

The Annual Review, performance rating, OTI, and termination were motivated by retaliation

83. The Applicant states that he spoke out about problems and concerns in his unit and volunteered to be one of the staff members aggregating anonymous comments and criticisms from other staff, some of which were highly critical of his managers' leadership. He submits that "Ms. [A's] and Mr. [B's] apparent vendetta against [him] followed directly on the heels of his vocal involvement in the [...] restructuring process."

The IFC's Response

The Applicant's FY2016 performance evaluation was not driven by retaliatory animus

84. The IFC rejects the claim that Ms. A retaliated against the Applicant for identifying himself in an engagement survey. It states that, while the Applicant "may have identified himself in a survey, he has not presented any evidence that the survey was actually sent to Ms. [A]" and states that all of the comments sent to Ms. A were anonymous.

85. Rather, the IFC contends that the Applicant "had difficulty working in a structured and disciplined environment," hence his poor performance evaluation.

The Applicant's Contention No. 6

The AR/PMR process does not replace or limit the right to Tribunal review

86. The Applicant submits that the replacement of Peer Review Services with AR/PMR for performance management decisions does not reduce staff members' ultimate rights to Tribunal review of those decisions.

87. As well, the Applicant recalls that the Tribunal should review applications *de novo* and rejects the IFC's suggestion that the Tribunal should be bound by the legal and factual determinations in the AR/PMR process, absent an express claim of error.

The IFC's Response

The scope of the Tribunal's review of performance management decisions is limited

88. According to the IFC, performance management decisions that have been examined through the AR/PMR process "should not be re-litigated at the Tribunal unless the Applicant can demonstrate that the Administrative Review and subsequent Performance Management Review were not supported by evidence or that said administrative review or performance management review were conducted in violation of their respective Directives or Procedures."

89. The IFC claims "that the two-tier performance management review system is undermined as part of the efficient administration of performance management, if the Applicants must not first demonstrate to the Tribunal that these reviews were conducted in violation of the Directives and Procedures setting them up."

90. As well, the IFC submits that, "unless the Applicant claims error in the facts upon which the Reviewer's recommendations were based in the Performance Management Review and submits new evidence, then the facts as stated in the Performance Management Review should be deemed admitted."

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

THE SCOPE OF THE TRIBUNAL'S REVIEW OF PERFORMANCE MANAGEMENT DECISIONS

91. In 2016, the World Bank Group introduced a new, two-tier process for reviewing performance management decisions. A staff member seeking review of a performance management decision must first do so through AR, where an HR specialist reviews the decision and provides management with a finding, including any recommended measures to be taken. A

decision is then taken by management. If the staff member is not satisfied with the outcome of an AR, the staff member may then seek PMR. The outcome of PMR is a recommendation to senior management, which then makes a decision.

92. The IFC claims that performance management decisions that have been examined through the AR/PMR process

should not be re-litigated at the Tribunal unless the Applicant can demonstrate that the Administrative Review and subsequent Performance Management Review were not supported by evidence or that the said administrative review or performance management review were conducted in violation of their respective Directives or Procedures.

93. As well, the IFC submits that, “unless the Applicant claims error in the facts upon which the Reviewer’s recommendations were based in the Performance Management Review and submits new evidence, then the facts as stated in the Performance Management Review should be deemed admitted.”

94. However, the IFC has not invoked any rule that would support its contention that the scope of the Tribunal’s review has been changed by the replacement of Peer Review Services with AR/PMR, in respect of performance management decisions. Similarly, in the past when the Appeals Committee was replaced with Peer Review Services, the Tribunal’s review function was not altered.

95. Referring to the Appeals Committee, which was the precursor to Peer Review Services, the Tribunal in *de Raet*, Decision No. 85 [1989], para. 54, held:

[T]he relationship of the Appeals Committee to the Tribunal is not that of an inferior to a superior court. The Tribunal is not a court of appeal from the Appeals Committee and does not review the manner in which the Appeals Committee has dealt with a case before it. The proceedings before the Tribunal are entirely separate and independent despite the fact that recourse to the Appeals Committee is a condition precedent to the commencement of proceedings before the Tribunal. The function of the Appeals Committee is to assist the management of the Bank to determine for itself whether there has been a failure on the part of the Bank. The function of the Appeals Committee ends with its recommendation, which the Bank

may or may not accept. [...] The Tribunal is the only body within the Bank that deals with complaints judicially and it does so only on the basis of the evidence before it.

96. Subsequently in *N*, Decision No. 356 [2006], para. 33, the Tribunal reiterated

that it does not sit as a court of appeals in respect of the proceedings, findings and recommendations of the Appeals Committee. (*See, e.g., de Raet*, Decision No. 85 [1989], para. 54; *Lewin*, Decision No. 152 [1996], para. 44; *Peprah*, Decision No. 275 [2002], paras. 19–20.)

97. Finally, in *Yoon (No. 4)*, Decision No. 317 [2004], para. 22, the Tribunal held:

The Tribunal reviews applications *de novo*. Its function is not to assess the regularity of the process that leads to an Appeals Committee recommendation, because that recommendation is of no moment in the Tribunal's assessment of the legal merits of any application.

98. The Tribunal reaffirms that it will examine challenges to performance management decisions *de novo*. The AR/PMR process is an administrative recourse mechanism and the reviewers make recommendations to the management, which makes the final decision. Neither the Administrative Reviewer nor the Performance Management Reviewer is a judicial body. The Tribunal remains the only judicial body to which an aggrieved staff member can file an application, and, under Article II, paragraph 1, of the Statute of the Tribunal, the Tribunal's role is to review decisions taken by the World Bank Group alleged to violate a staff member's contract of employment or terms of appointment, including performance management decisions.

WAS THE FY2016 ANNUAL REVIEW ARBITRARY AND UNFAIR?

99. The Tribunal's assessment of performance evaluations is centered on the determination of whether the decision was arbitrary, discriminatory, improperly motivated, or carried out in violation of a fair and reasonable procedure. *See BY*, Decision No. 471 [2013], para. 33.

100. In *Marshall*, Decision No. 226 [2000], para. 21, the Tribunal further observed that “[e]ven 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.”

101. The Tribunal has held that “the assessment of performance has ‘to take into account all relevant and significant facts that existed for that period of review’ (*Romain (No. 2)*, Decision No. 164 [1997], para. 19), so as to ensure a reasonable basis for the OPE ratings and comments.” *Prasad*, Decision No. 338 [2005], para. 28.

102. In *Lysy*, Decision No. 211 [1999], para. 68, the Tribunal emphasized:

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.

103. The supervisors’ comments on the Applicant’s FY2016 Annual Review are mixed. His strengths were recognized as follows:

Very good technical and analytical skills. Always willing to help his team mates and the IT support team. Very thorough when validating models.
Highly technical and finance modeling skills. Detail oriented, client focus, and documenting his work are some of his strengths. He is very generous with his time in helping others.

104. However, his timeliness in delivery and completion of tasks was highlighted as an area for development. According to Ms. A, the Applicant needed to “timely complete the projects he starts; being on time during meetings; [f]ollow the processes in place such as providing weekly update for his progress; [l]earn to accept other opinions.” Mr. B observed:

Since he gets distracted, he forgets the priority and timeliness set for various tasks and in particular tasks that will have bigger impact for the clients. For all these reasons his completion and/or delivery of projects are very poor or sporadic. [...] He also pushes his thoughts or ideas on others rather than taking in others’ views and apply[ing] them in the best interest[s] of the organization. [...] He should also make sure he comes to work on a regularly scheduled time rather than coming in as he wishes.

105. The Overall Supervisor Comments state that the Applicant “may have all the necessary skills and competencies to do the various tasks that are assigned to him in this department. He needs to stick to a schedule, improve his focus and deliver as agreed with utmost quality.”

106. The issue of timeliness was also raised during the Applicant’s mid-year conversation and is documented in the Mid-Year Supervisor Comments as follows:

We have discussed i) the thorough job he has done in validating trades entered in the pricing engine, and working with Risk, Accounting and Auditors[,] ii) pending items that were planned for last year and were carried over to this year, iii) the status of his projects, the items that were completed and what was not completed, iv) the issues of timeliness and completion of tasks and v) the expectations during the transition phase and his deliverables in the new team.

107. Nine out of ten feedback providers provided feedback on the Applicant’s performance. The Tribunal notes a number of positive comments from feedback providers, such as “[the Applicant] commands a thorough understanding and experience of the structured products as well as modeling skills”; “[t]echnically very strong, and an asset to the Funding team in terms of the analysis and modeling he provides”; and “his diligent work ethic, knowledge and expertise are a valuable asset to QA.” His positive contributions and areas of strength are reflected accurately in the Annual Review. As an area for development, several feedback providers commented on the Applicant’s communication skills, which were characterized as “a little confrontational” and that he needed to “become better at managing conflicts and controversy.”

108. The record shows that, in response to the shortcomings in the Applicant’s performance identified by management and supported by emails, the Applicant disputed them or offered explanations about circumstances beyond his control.

109. The Tribunal recalls that it “cannot and should not conduct a microscopic inquiry into each facet of the Applicant’s work program and behavior during the assessed period.” *See Prudencio*, Decision No. 377 [2007], para. 74. While noting that the Applicant received considerable positive feedback from his feedback providers, the Tribunal confirms that it is ultimately the decision of the manager to balance positive and negative factors and to assess a staff member’s performance.

The Tribunal will not interfere lightly with this exercise of managerial discretion. On balance, the Tribunal finds that there is not enough evidence in the record to show that the Applicant's Annual Review was arbitrary, unfair, or unbalanced.

DID THE ANNUAL REVIEW AND PERFORMANCE RATING VIOLATE FAIR PROCEDURES?

110. The Tribunal has recognized the importance of respecting the requirements of due process in relation to performance evaluations.

111. In *Samuel-Thambiah*, Decision No. 133 [1993], para. 32, the Tribunal held:

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.

112. The first principle was reiterated in *Garcia-Mujica*, Decision No. 192 [1998], para. 19, where the Tribunal observed that the "staff member affected be adequately informed with all possible anticipation of any problems concerning his career prospects, skills or other relevant aspects of his work." *See also DC (No. 2)*, Decision No. 558 [2017], para. 68.

113. Furthermore, the Tribunal held in *Prasad*, paras. 25 and 30:

[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 [overall performance evaluation]."

[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 [...].

Sufficient Notice

114. The IFC claims that the Applicant's managers sent him emails throughout FY2016 flagging his performance issues and relies upon the Applicant's Annual Reviews since FY2013 and the FY2016 mid-year conversation and year-end discussion, as constituting timely notice of the Applicant's performance issues.

115. Although the Applicant claims that the feedback on his Annual Reviews since FY2013 was "overwhelmingly positive" and "nothing in those documents indicates that any identified concerns were of such magnitude that, if not addressed, they would overshadow [his] substantial achievements and core competencies to yield a performance rating of 2," the record shows that already, since FY2013, the issue of timeliness had been brought to the Applicant's attention.

116. In his FY2013 mid-year evaluation, Ms. A wrote, "I am also looking forward to seeing [the Applicant] better manage his time and take on more responsibilities and the lead on a few projects in the second part of the year." In the FY2013 Annual Review, she noted, "[t]here are however projects that were not completed due to time management issues [...]" and "[t]here are instances where delivery was not always timely and also some projects [were] not completed. Suggested improvements on our models are not yet implemented."

117. In his FY2014 mid-year evaluation, the Applicant was instructed to focus on specific projects "that are delayed or not finalized," including "[l]earn how to use Fincad/Numerix to quickly prototype and test models." In his Annual Review, Ms. A noted that "[o]ne of [the Applicant's] task[s] was to learn to use Cross Asset and Fincad [...]. Little progress was made." She also noted three projects that he had started, but had not completed. Finally, there were several references to the Applicant's need to complete projects on time, such as "[the Applicant] would benefit from completing projects he starts but does not finalize [...]" and "[the Applicant] should keep the clients updated while working on their projects; It would be beneficial for [the Applicant] to finalize the projects he starts and to work on enhancing his time management skills to deliver projects within the agreed time frame."

118. In FY2015, Ms. A acknowledged that “[t]he last quarter ha[s] seen an improvement in having all tasks timely finalized.” However, she also noted that “[k]ey projects where commitments to deliver were made are still pending or not started. Some were re-assigned to new team members [...]. Other major enhancements or model remediation projects haven’t started yet.”

In the Areas for Improvement section, Ms. A noted:

- 1- [The Applicant] has been given a few key projects that are still pending or not started. Looking forward to having him work on the awaiting critical models remediation and enhancements and timely delivering the needed features.
- 2- Finalizing started projects and avoiding being distracted by minor issues. This will help increase his output. [...]

She also wrote: “I am looking forward to seeing him completing timely the critical pending projects listed on his deliverables and increasing his output.”

119. In his FY2016 mid-year conversation summary, one of the five points discussed was “the issue of timeliness and completion of tasks.” The Applicant did not enter any comments regarding the mid-year conversation.

120. In response to the emails proffered by the IFC as examples of Ms. A following up with the Applicant on tasks which were overdue, the Applicant argues that they do not reflect the full, accurate picture since (i) he did not respond immediately because he was away on leave or because they were not sent to him; (ii) he did respond, addressing stated concerns, positive resolutions, and feedback; or (iii) there were contemporaneous emails, indicating legitimate reasons for the delays. Moreover, the Applicant claims that nowhere in these emails is it suggested that he might receive a performance rating of 2.

121. Regarding the year-end discussion, the Tribunal finds that the criticisms of the Applicant’s timeliness and failure to complete projects mirror the comments given to him during the mid-year conversation. In *Ghazala*, Decision No. 501 [2014], para. 57, the Tribunal observed:

[T]he requirement that a staff member is provided adequate warning about criticism of his performance is to preempt any surprises in relation to an adverse performance decision, and to provide the staff member adequate opportunities to defend himself.

122. The Tribunal finds that, while the Applicant may not have been explicitly warned in his Annual Reviews since FY2013 that he might be given a performance rating of 2, the issues of timeliness and failure to complete projects were repeatedly flagged and noted as areas for improvement, thus constituting sufficient notice to the Applicant.

Year-End Discussion

123. The Tribunal has emphasized the importance of conducting a formal performance discussion in accordance with the Staff Rules and in the past has awarded remedies where this rule was breached. *See BY*, para. 29; *Prasad*, paras. 25–27; *Yoon (No. 5)*, Decision No. 332 [2005], para. 65; and *Mpoy-Kamulayi (No. 4)*, Decision No. 462 [2012], para. 46. In *Yoon (No. 5)*, para. 67, the Tribunal drew a clear distinction between “informal feedback sessions” during the year and “the year-end formal discussion,” noting that informal discussions or email correspondence are not a substitute for a formal performance discussion held prior to establishing performance ratings. This was affirmed in *Mpoy-Kamulayi (No. 4)*.

124. In *Mpoy-Kamulayi (No. 4)*, where the applicant’s salary review increase (SRI) rating and salary increase were set three days before the Applicant’s overall performance evaluation (OPE) meeting, the Tribunal found that the OPE meeting appeared “perfunctory” as it was not clear what the applicant could have done to change the decision already taken. As well, in *BY*, the applicant’s OPE and SRI ratings were set at a departmental meeting, which took place more than a month before the applicant had his formal OPE discussion. The Tribunal held that “the Applicant’s subsequent formal OPE discussion with Ms. X was perfunctory, and he was effectively denied any opportunity to address management’s concerns about his performance before the adverse ratings were set.”

125. In this case, the Applicant’s year-end discussion was held on 27 July 2016. Final performance ratings for staff, including the Applicant’s, were assigned during a management team meeting on 7 September 2016, and the Applicant’s Annual Review was finalized on 4 October 2016. Although the Applicant was not given any written documentation of his supervisors’ comments made at the year-end meeting, the Tribunal finds that he was not a passive participant during this meeting. Rather, he disputed some of Ms. A’s statements during the meeting. For

example, he “explain[ed] that the delays cited by Ms. [A] were caused by outside factors over which he had no control,” he rejected her claim that he had not completed a model in question, and he explained that none of the projects included in his objectives for Mr. B could have been completed prior to the end of the fiscal year. The Applicant also immediately sent a follow-up email to the meeting participants, countering Ms. A’s claim that he had not completed the model in question himself. The Tribunal finds that the Applicant had the opportunity and did avail himself of such opportunity to address management’s concerns about his performance before his performance rating was set and before his Annual Review was finalized. Therefore, the Tribunal finds that the year-end discussion was in accordance with the Applicant’s rights.

Participation of the Reviewing Official

126. With respect to the role of the Reviewing Official, Staff Rule 5.03, paragraph 2.01(g) provides:

The Reviewing Manager shall review and sign the performance evaluation and any supplemental evaluations. If the Reviewing Manager agrees with the assessment of the staff member’s performance, and recommendations, if any, comments are optional. If the Reviewing Manager disagrees with the assessment or recommendations, he or she shall set forth in writing and provide to the staff member the reasons for the disagreement and recommended action, if any.

127. The above-noted paragraph was interpreted by the Tribunal in *Yoon (No. 5)*, para. 65, as follows: “[...] under both the Staff Rule and the OPE Guidelines the role of the Reviewing Manager is simply to review the performance evaluation of a staff member and not to establish ratings or to participate in the formal OPE discussion.”

128. In *BY*, para. 30, the reviewing manager on the applicant’s OPE was directly involved in setting the applicant’s OPE ratings and the Tribunal found “that such direct participation does not conform with the Staff Rules and extends beyond the mere provision of guidance to Ms. X as claimed by the Bank.”

129. It is not disputed that the Director, who was the Reviewing Official, attended the Applicant’s year-end meeting. The Applicant claims that his participation in the performance

evaluation process violated his rights, while the IFC contends that there is nothing in the IFC's regulatory framework that precluded the Director from attending any performance discussion. Consistent with its jurisprudence, the Tribunal affirms that the Director's attendance and participation in the Applicant's year-end meeting constitutes a breach. The Tribunal's jurisprudence is not supplanted by the fact that the IFC's Policies, Directives, and Procedures are silent on this point. The Tribunal finds that the attendance of the Director, who was the Reviewing Official, at the Applicant's year-end meeting was in breach of Staff Rule 5.03, paragraph 2.01(g).

WAS THE OTI UNFAIR, ARBITRARY, AND AN ABUSE OF DISCRETION?

130. Staff Rule 5.03, paragraph 3.02(b) provides that a staff member whose performance is not satisfactory may be placed on an OTI plan. This consists of "discuss[ing] and shar[ing] with the staff member in writing: i. the aspects of performance that are not satisfactory, ii. guidance on what improvement is expected and by when, and iii. the possible consequences of failure to improve."

131. Staff Rule 5.03, paragraph 3.03 sets out the potential outcomes of an OTI as follows:

In the case of failure to achieve or sustain satisfactory performance following a documented opportunity to improve under sub-paragraph 3.02(b), a Manager or Designated Supervisor may recommend, with the concurrence of the HR Team Manager, further actions consistent with that documented discussion. The recommendation shall be in writing, to the next in line manager at Level GI or above, and may include; (i) reassignment to another position under Rule 5.01; (ii) assignment to a lower level position under Rule 5.06[;] or (iii) termination in accordance with Rule 7.01, Section 11, Unsatisfactory Performance. The staff member will be given a copy of the recommendation and at least 14 calendar days to comment prior to a decision on the recommendation.

132. Further guidance on the contents of an OTI plan is set out in the "Overview of the WBG's Opportunity to Improve (OTI) Process" in "A Toolkit and Resource Guide for Understanding and Addressing Poor Performance." According to the guidance, the OTI should:

- Specifically identif[y] the performance to be improved or the behavior to be corrected[;]
- Set a time frame that takes into account the nature of the deficiency and the nature of improvement that must be achieved and sustained[;]

- Provide clear expectations and metrics about the work to be performed or behavior that must change[;]
- Identif[y] the support and resources available to help the staff member make the required improvements[;]
- Establish a plan for reviewing progress and providing feedback to the staff member for the duration of the OTI[; and]
- Specif[y] consequences, including possibility of termination, if performance standards as identified in the OTI are not met[.]

133. According to the Tribunal in *AI (No. 2)*, Decision No. 437 [2010], para. 20, “[t]ermination of a staff member’s employment for unsatisfactory performance is a serious matter, and raises particular concerns where the staff member, like the Applicant in this case, has a record of good performance.”

134. As well, the purpose of a Performance Improvement Plan (PIP), which has since been replaced by the OTI process,

is not to dismiss a staff member but to give him or her an opportunity to improve, and to achieve required performance standards. This is why it is called a “Performance Improvement Plan” not a “Termination Plan.” The Bank must demonstrate that it made reasonable efforts to lift the staff member’s performance and that it provided timely feedback and guidance. *AI (No. 2)*, para. 66.

135. In *Oraro*, Decision No. 341 [2005], para. 89, the Tribunal held:

[S]taff members affected by a PIP should have an opportunity to discuss the evaluation and to comment on the written evaluation *before* a recommendation is made to the final decision maker [...]. That is the only period in which there is any realistic opportunity to affect the outcome. In this case, the management team met before the Applicant’s discussions with his [m]anager, and he had no opportunity to comment on the written evaluations before the termination recommendation went forward. (Emphasis in original.)

136. Similarly, in *AI (No. 2)*, para. 60, the Tribunal concluded that the applicant was denied due process and the opportunity to challenge the PIP evaluation since the PIP evaluation was not discussed with the applicant and he was not given an opportunity to comment on it before recommending the termination of the applicant’s employment to the Senior Vice President.

137. In *AI (No. 2)*, paras. 38 and 44, the Tribunal articulated the duties of a manager during the PIP process as follows: “to provide timely feedback with a view to improving the Applicant’s performance” and “to communicate clearly to the staff member what the latter is expected to deliver as part of a particular work program. [...] the PIP Notice Memorandum should set out details of what the staff member is expected to deliver.”

138. At a meeting on 11 October 2016, Mr. B presented the Applicant with the OTI plan. After the Applicant took issue with the deadlines in the plan, by email dated 13 October 2016, Mr. B sent another document titled “[The Applicant’s] ‘Opportunity to Improve (OTI)’ plan for FY 2017” and asked the Applicant for comments by noon the following day. The OTI plan stated:

The dates are modified based on the inputs and requests from [the Applicant].

FY 2017 plan:

Carry over from FY 2016 plan

- 1 Complete Bloomberg bond price download (Oct 15, 2016)[.]
- 2 Work with CTQLC/ALM team to learn the current processes and independently publish ALM reports (interest rate risk by Nov 30, 2016 and currency exposure report by Dec 5, 2016).
- 3 [...] modeling (Oct 31, 2016).
- 4 Take over month-end/quarter end processes for CTQLC (Latest by Oct 31, 2016).
- 5 Complete MBS cash flow download program conversion (Nov 30, 2016).
- 6 Complete Futures/Options download program conversion (Dec 15, 2016).

New for this year

- 7 LAM model development support (back up for [...] by learning the systems and processes) (Mar 31, 2017). Apply the training and understanding in developing and adapting LAM risk engine for ALM.
- 8 Analyze the alternatives for Treasury web portal and show proof of concept (During April 1–15, 2017).
- 9 ALM Analytics project: Adapt the risk engine as in step #7—April 30, 2017). Implementation as per project deadline when it is finalized.

General

- 10 Daily start time—latest by 9:30 a.m. (mutually agreed). Work end time is start time plus mandated number of hours. (Immediate).

139. However, it was not until 28 November 2016 that the OTI plan was issued, indicating that the OTI period was to run from 11 October 2016 until 1 May 2017. The memorandum identified unsatisfactory aspects of the Applicant's performance, and instructed the Applicant to address his deficiencies by "[f]ocusing on timely, accurate completion" of the tasks in the OTI plan and starting work by 9:30 a.m. at the latest. The memorandum repeated the list of tasks and deadlines set out in the 13 October 2016 document, with the following additions to items 4, 7, and 8:

- 4 Take over month-end/quarter end processes for CTQLC by Oct 31, 2016 the latest. The timely and quality completion of September 2016 quarter end to be followed by December 2016 quarter end will be evaluated as a measure of successful completion. In addition, training another staff member [...] for March 2017 quarter end. This will be verified based on the timely and quality completion of March 2017 quarter end activities and the feedback from [...]
- 7 LAM model development support: By learning and receiving training about the models, systems and processes [...], [the Applicant] should be ready to support LAM requests for new models and reports by Mar 31, 2017. Demonstrate the knowledge and understanding of the models, systems and processes by developing and adapting LAM risk engine for ALM by March 21, 2017.
- 8 Analyze the alternatives for Treasury web portal and show proof of concept during April 1–15, 2017. Prepare a detailed proposal including technical and implementation details at the end of the analysis.

140. The Tribunal finds that, on its face, the document titled "[The Applicant's] 'Opportunity to Improve (OTI)' plan for FY 2017" and given to the Applicant on 13 October 2016 does not satisfy the requirements of Staff Rule 5.03, paragraph 3.02(b). It is merely a list of tasks with associated deadlines. It does not identify the unsatisfactory aspects of the Applicant's performance, provide guidance on what improvement is expected and by when, or set out the possible consequences of failure to improve. Indeed, these three elements are found only in the 28 November 2016 document, which was issued one month and a half after the OTI period had purportedly begun.

141. Moreover, if the purpose of the OTI were to give the Applicant an opportunity to demonstrate timeliness in his completion of tasks, the Tribunal finds that the deadlines in the OTI

plan run contrary to this purpose. Three of the nine tasks have deadlines in October. Even if one were to use the 11 October 2016 date as the start date of the OTI, this would mean that the Applicant had half a month or less to complete those three tasks. If one has regard to 28 November 2016 as the start date of the OTI, the Tribunal remains troubled that an additional three tasks have deadlines of 30 November 2016 and 15 December 2016, less than half a month after the OTI plan was issued.

142. On 3 February 2017, the Applicant, Mr. B, the HR Business Partner, and a Staff Association representative had an OTI status meeting. The discussion was summarized by Mr. B in an email dated 8 February 2017 and subsequently modified by the Applicant on 9 February 2017. The differing characterizations of the meeting suggest to the Tribunal that there continued to be disputes about the reasonableness of the deadlines of the tasks set out in the OTI, the Applicant's timeliness, and clarity regarding what was expected of the Applicant during the OTI period. Mr. B also indicated that "[f]ew other tasks can be added until the end of FY17, since OTI is only up to May 1, 2017 as mentioned in the memo. [The Applicant] will be assessed based on the timeliness and accuracy of the tasks."

143. The Applicant was informed by Mr. B at the meeting on 27 March 2017 that the OTI would be terminated immediately. According to Mr. B, "[i]t was explained to [the Applicant] that he missed many deadlines already. So even by completing the ALM task or other tasks by April 30, 2017 will not change the status of OTI as described in the mid-year comments."

144. In *DC (No. 2)*, para. 81, the Tribunal held:

A decision to place a staff member on an OTI is not one to be taken lightly. It is a serious measure with potentially grave consequences for a staff member's employment. *See Mahmoudi (No. 2)*, Decision No. 227 [2000], para. 40. As a result, when instituting an OTI a staff member must be given a genuine chance to succeed, which was lacking in the present case.

145. The OTI is a serious exercise with significant consequences for the career of a staff member. It is designed to provide a last, genuine opportunity for a staff member to demonstrate that he or she is qualified and deserves to remain a productive staff member at the World Bank

Group. Both managers and staff members are expected to administer the OTI with the seriousness that it deserves. The OTI cannot be conducted casually or taken as a mere formality which managers must go through as a first step in ridding themselves of a staff member whose appointment they have already concluded should be terminated.

146. In this case, the Tribunal finds that the poorly drafted OTI plan, the fact that it was issued on 28 November 2016 although it appeared to cover the period from 11 October 2016, the lack of clarity about deadlines and tasks, and the early termination of the OTI, demonstrate that the Applicant was not given a “genuine chance to succeed.”

147. The Applicant has raised two other points to support his claim that the OTI was unfair. First, he claims that the 9:30 a.m. start time, set out in the OTI plan, was not mutually agreed upon, was arbitrary, and was not imposed on any other staff member. Second, he claims that the OTI should have taken into account his health issues, which impacted his performance.

148. Regarding the start time, Staff Rule 5.07, paragraph 3.01 sets out the regular hours of work at Headquarters as being from 9:00 a.m. to 5:30 p.m., Monday through Friday. The Tribunal finds the instruction in the OTI plan for the Applicant to arrive at work no later than 9:30 a.m. to be reasonable.

149. As for the Applicant’s health, the record shows that the Applicant first obtained counselling from the World Bank Group’s Health Services Department on 1 February 2017 and had three appointments between February and March 2017. As well, the possibility of the Applicant being evaluated for eligibility for STD benefits was discussed and agreed upon by the Applicant at a counselling session on 31 March 2017. A final medical report, dated 5 April 2017, assessed him as suffering from work-related stress and fatigue. The Tribunal finds no merit in the IFC’s suggestion that the Applicant abused STD “to rig the poor performance management process.”

150. Regarding a manager’s duty to request a Fitness for Duty Assessment, Staff Rule 6.07, paragraph 3.03(a) 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. Fitness for duty assessments are conducted by HSD at the request of a staff member's manager or the Director, Health Services Department.

151. In *BX*, Decision No. 470 [2013], para. 48, the Tribunal found

that the documents produced by the Bank show that the Applicant's managers were clearly aware of the Applicant's health problems and that, in the circumstances of this case, it would have been reasonable for the Applicant's managers to have requested a fitness for duty evaluation. Even though the Staff Rule affords management discretion in requesting fitness for duty assessments, the Applicant's managers did not exercise this discretion in a reasonable manner.

152. Similarly in *CL*, Decision No. 499 [2014], para. 89, the Tribunal noted that "the record indicates that the Applicant's behavior in March and April 2013 should reasonably have been perceived as an indication that the state of his health had worsened and was affecting his performance," as evidenced by the director's contemporaneous emails noting that the applicant had considerably regressed, was barely at work, and his own admission "that it crossed his mind that the Applicant's behavior was something other than willful."

153. However, in this case, there is nothing in the record that alerted or should have alerted Mr. B to the Applicant's health during the OTI. Although the Applicant asserts that "his symptoms became more obvious" such that "any reasonable, observant manager would have questioned whether [the Applicant's] underlying health issues might be impacting his performance," there is nothing in the record that indicates that the Applicant's symptoms were made manifest.

154. While Mr. B recommended termination of the Applicant's employment for poor performance on 10 April 2017, the same day that he was informed by email that the Applicant needed to take time off because of an illness, the record does not show that he was aware, as of this date, that the Applicant was placed on STD.

WAS THE NON-RENEWAL OF THE APPLICANT'S APPOINTMENT ARBITRARY, UNFAIR, AND AN ABUSE
OF DISCRETION?

155. While the Applicant was on STD, Mr. B informed him by email on 20 June 2017 that "your IFC appointment will not be extended beyond the current end date, 27 January 2018. Please consider this e-mail as the required mandatory written notice."

156. Staff Rule 6.22, "Disability Insurance Program," paragraph 5.07 states:

A staff member on disability status as of the date of expiration of his/her Term Appointment is separated from service unless the appointment is extended according to Staff Rule 4.01, "Appointment," paragraph 6.01, "Extensions," and is not [to] be eligible to use any accrued Sick Leave balances beyond the date of separation.

157. Regarding the expiration of term appointments, Staff Rule 7.01, paragraph 3.01 provides that "[a] staff member's appointment expires on the completion of an appointment for a definite term, as specified in the staff member's letter of appointment, or as otherwise amended."

158. In *Rittner*, Decision No. 339 [2005], para. 30, the Tribunal held:

The Tribunal has had several occasions in the past to consider claims by staff members serving on Fixed-Term, Term or Temporary appointments to have their appointments extended or regularized. In *Kopliku*, Decision No. 299 [2003], para. 9, the Tribunal explained the governing principles in the following manner:

The legal principles that govern this case have been well established in the jurisprudence of the Tribunal. A staff member appointed to serve for a fixed period is not entitled, absent unusual circumstances, to the extension or renewal of that appointment. Staff Rule 7.01, para. 3.01, states: "A staff member's appointment shall expire on the completion of an appointment for a definite term, as specified in the staff member's letter of appointment, or as otherwise amended." As the Tribunal has held before, in *Mr. X*, Decision No. 16 [1984], para. 35: "A fixed-term contract is just what the expression says: it is a contract for a fixed period of time." Accordingly, the Bank need not provide reasons for the non-reappointment of a person serving for a temporary and fixed term. "Absent unusual circumstances, the individual should be fully aware of the reason why his or her

appointment does not continue beyond the stipulated date: because the parties so agreed and have stipulated to that effect in the employment contract.” *McKinney*, Decision No. 187 [1998], para. 10.

159. In *CP*, Decision No. 506 [2015], para. 36, the Tribunal reiterated its previous holding that a staff member appointed to serve for a fixed period is not entitled, absent unusual circumstances, to the extension or renewal of that appointment.

160. In *DW*, Decision No. 556 [2017], para. 67, the Tribunal referred to the 2009 “Guidelines for Use of Term Appointments to Enhance Staffing Flexibility” and held that “managers have broad discretion regarding expiration of Term appointments. As the expiration date approaches, managers may ‘allow the term appointment to expire under its own terms, in which case staff should be given notice that it is practical from a business perspective and that allows staff time to plan future career arrangements [...].’”

161. In this case, the Applicant was not given any reasons for the non-extension in Mr. B’s email of 20 June 2017. Only during the Tribunal proceedings did the IFC explain that the decision not to renew the Applicant’s appointment was “due to his poor performance.”

162. In light of the flawed OTI process, which did not give the Applicant a genuine opportunity to succeed, the Tribunal finds that the non-renewal of the Applicant’s appointment, due to poor performance, constitutes a failure in the proper exercise of managerial discretion.

WAS THE APPLICANT RETALIATED AGAINST?

163. The Applicant contends that the Annual Review, performance rating, OTI, and termination constitute retaliation because he spoke out about problems in the unit and had volunteered to aggregate anonymous comments and criticisms from other staff about the management of the unit.

164. 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, “Disciplinary Proceedings,” or in connection with an initial review or subsequent procedures set forth in Sections 8 through 10 of this Rule, or who uses the Internal Justice Services, is expressly prohibited and shall result in proceedings under this Rule.

165. The Bank’s Code of Conduct describes retaliation in the workplace as follows:

Retaliation is any “direct or indirect detrimental action recommended, threatened, or taken because an individual engaged in a [protected activity.]” (SR 8.02) [...].

Retaliation in the workplace encompasses a range of behavior, from something as small as a remark to something as serious as an administrative action affecting a staff member’s work program or employment. When taken as a means of retaliation, other examples can include: reprimand, discharge, suspension, demotion, denial of promotion, and denial of transfer. Any staff member who in good faith raises a concern is protected from retaliation.

166. In *O*, Decision No. 337 [2005], para. 47, the Tribunal articulated the burden of proof in retaliation cases as follows:

The burden lies with an applicant to establish 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.

167. Likewise, in *Bodo*, Decision No. 514 [2015], para. 77, the Tribunal required 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.”

168. In this case, the record shows that the Applicant was one of several staff members who had volunteered to aggregate anonymous comments and criticisms from other staff about the management of the unit and had participated in an engagement survey. The IFC argues that there is no evidence that the survey was sent to Ms. A and that the comments in the survey were

anonymous. The Tribunal finds that the Applicant has not made a *prima facie* case that he was the subject of retaliation.

CONCLUSION

169. The Tribunal concludes that the Applicant's FY2016 Annual Review and performance rating were not arbitrary, unfair, or unbalanced. However, the participation of the Director, who was the Reviewing Official, at the year-end meeting constitutes a violation.

170. The Tribunal finds that the OTI process was unfair and did not give the Applicant a "genuine chance to succeed." In light of the flawed OTI process, the Tribunal further finds that the non-renewal of the Applicant's appointment due to poor performance constitutes a failure in the proper exercise of managerial discretion.

171. The Tribunal finds that the Applicant has not made a *prima facie* case that he was the subject of retaliation.

DECISION

- (1) The IFC shall have the option of reinstating the Applicant to a position in the World Bank Group similar to the one he was occupying at the time of the non-renewal of his appointment, but in a different unit, or paying the Applicant compensation in the amount of three years' net salary based on the last salary drawn by the Applicant;
- (2) The IFC shall rescind and remove all records of the OTI from the Applicant's personnel records;
- (3) The IFC shall pay the Applicant's legal fees and costs in the amount of \$30,000.00; and
- (4) All other claims are dismissed.

/S/ Mónica Pinto

Mónica Pinto

President

/S/Zakir Hafez

Zakir Hafez

Executive Secretary

At Washington, D.C., 18 May 2018