

Decision No. 100

Mohan L. Jassal,
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal, composed of P. Weil, President, A.K. Abul-Magd and E. Lauterpacht, Vice Presidents, and F.K. Apaloo, R.A. Gorman, E. Jiménez de Aréchaga and Tun Suffian, Judges, has been seized of an application, received July 5, 1989, by Mohan L. Jassal, against the International Bank for Reconstruction and Development. Consequent upon a request made by the Applicant the Tribunal ordered the Respondent to provide the Applicant with a copy of the "IAD Investigative Panel Report" abridged under the supervision of the Tribunal. The Tribunal decided not to grant the Applicant's other requests for documents and answers to interrogatories. An application to intervene was filed by a present member of the Bank staff on August 20, 1990. The principal proceedings were suspended and pleadings relating to the intervention were exchanged among the staff member and the parties. Thereafter the usual exchanges of pleadings between the parties took place. The case was listed on May 9, 1991.

The relevant facts:

2. The Applicant was employed by the Bank at the time of the 1987 Reorganization as a Principal audit analyst at level 20 in the Internal Auditing Department (IAD) where he had worked for eleven years. During this period, he received positive evaluations from his supervisors, and he was promoted twice. Most recently on May 1, 1986 – pursuant to recommendations made by his supervisors several months before – the Applicant was promoted to level 20.

3. By memorandum dated April 28, 1987, the Applicant's manager, in preparation for completing the Applicant's performance review (PPR), requested three senior auditors, who had supervised the Applicant's work, to evaluate his performance. In general their evaluations were very positive, and they all agreed that he should be given greater responsibility.

4. However, in his comments on the Applicant's PPR for the period March 1986 to February 1987 – which were dated May 29, 1987, but which were apparently formally prepared and filed in late July 1987 – the Applicant's manager, though also commenting positively on the Applicant's work, stated that:

[T]he level of responsibilities, i.e., the scope and complexity of assignments given to Mr. Jassal, is not commensurate with the requirements of his current grade level (Level 20). Also, in carrying out his assigned work, it appears that Mr. Jassal will need to sharpen his focus on the broad and important implications of his findings. In making these comments, it is recognized that the routine nature of the assignments given to Mr. Jassal in previous years has not helped him to achieve the required professional growth.

He recommended that the Applicant be progressively assigned responsibilities commensurate with his current grade level and that he then be evaluated for the period ending December 31, 1987, which was earlier than the date for his next PPR.

5. In June 1987, prior to the date of the Bank Reorganization affecting the IAD, the Applicant's manager was appointed Acting Director of that Department, and he was placed in charge of the departmental selection process. Late that same month, in a memorandum to the Senior Vice President, Administration, a group of IAD staff members complained about the Acting Director's inadequacy as a manager and requested an inquiry into

certain charges made by them against him.

6. The selection process for the IAD in the reorganized Bank nonetheless continued with the Acting Director in charge. Selections for post-Reorganization positions in IAD were made by a committee composed of the Acting Director and three members of the Personnel Management Department (PMD) recently assigned to work with the IAD. This Selection Committee was assisted by a senior staff member from outside the audit sector, who reviewed the selection criteria for positions in the IAD as well as the selection decisions later reached; that staff member had no comment on either the criteria or the specific decisions.

7. The Applicant was not selected for any of four audit analyst positions in the post-Reorganization Bank at grade levels 18 through 20, though three such positions were left vacant. In the minutes of the Selection Committee it was recorded of the Applicant who was considered for the position of audit analyst at level 20:

Skills/abilities criteria 4, 5, & 6, was not met and criteria 2 & 3 partially met. Personal characteristics criteria 2 was not met and 3 partially met. His request not to be selected into IAD was taken into account. However, he did not meet the selection criteria.

The selection criteria for the position of audit analyst were as follows:

Skills/Abilities:

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2. Knowledge and experience of Bank policies and procedures. Experience in the use of the Bank's (or similar) EDP systems, and the retrieval and analysis of data using on-line microcom-puters or similar technology, is desirable.

3. Ability to make qualitative judgments in evaluating the adequacy and effectiveness of systems and controls over diverse Bank activities, and to discuss and present findings and potential recommendations to client management and staff.

4. Ability to handle routine audit assignments with relative independence. At Level 20, the ability to work with only general guidance from Senior Auditors or Auditors, and to use resourcefulness and initiative on assignments.

5. Ability to develop recommendations and draft segments of reports clearly setting them out, for further consideration by Senior Auditors or Auditors.

6. Sustained record of good performance, and demonstrated potential for professional growth to higher levels.

Personal Characteristics:

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2. Ability to analyze problems and issues noted, and to make practical application of principles and concepts.

3. A sense of priorities in the organization and execution of assignments, and in effectively utilizing the allotted time.

These were the criteria for a level 19 position and it was understood that for a level 20 position the same criteria applied but that the broader scope and higher level of complexity of assignments given to analysts at that level would be considered.

8. After his failure to be selected for a position in IAD, the Applicant entered Round 2 of the selection process in the Reorganization. He failed to secure a position and was separated from the Bank with the Enhanced

Separation Package (Package B).

9. In October 1987 after the Reorganization had been concluded, the Bank convened an investigative committee to examine the charges that had been made against the management of IAD. The Panel concluded in a report completed in December 1987 (the IAD Investigative Panel Report) that certain managers in IAD had engaged in mismanagement and should be replaced, but that there was no cause to set aside the decision not to select the Applicant for a post-Reorganization position.

10. The Applicant sought administrative review and took his case before the Appeals Committee, which dismissed his appeal. The Respondent's management refused to overturn the selection decision taken.

11. After the application and answer were filed with the Tribunal, the Tribunal, at the request of the Applicant, directed the Respondent to make available to the Applicant portions of the IAD Investigative Panel Report. Because the Bank had retained this report subject to assurances of confidentiality, the Tribunal directed that it be made available to the Applicant in heavily abridged form and under strictures of confidentiality. Subsequently, a staff member discussed in the report filed an application for intervention in this proceeding, claiming that the Bank had violated its assurances of confidentiality and that disclosure of portions of the report in the pleadings or in the Tribunal's judgment could cause him injury. The Applicant contended that intervention was inappropriate, while the Respondent, although it challenged neither the confidentiality of the IAD Investigative Panel Report nor the right of intervention, contended that there was no need for any additional order by the Tribunal on the matter of confidentiality.

The Applicant's main contentions:

12. The Applicant's performance was satisfactory in every respect and he also had the qualifications for a level 20 position as audit analyst, the requirements for which had not changed during the Reorganization.

13. The Respondent abused its discretion by not selecting the Applicant for one of the vacant audit analyst positions of which three remained unfilled after the Reorganization.

14. The Respondent abused its discretion in leaving the selection process for audit analyst positions to be controlled by the manager who by his actions had shown a clear prejudice against the Applicant and who subsequently was found to be a deficient manager by the IAD Panel.

15. The Applicant's services were terminated because his performance was unfairly found to be unsatisfactory by the manager on one occasion. Insofar as he was not given a period during which to improve his performance before his appointment was terminated there was a violation of Staff Rule 7.01, Section 11.

16. The Applicant's non-selection for a position of audit analyst graded level 18/19/20 was disproportionate to the alleged defects of his performance and skills and abilities. He could have been offered at least a position at level 19.

17. There is an established practice in the Bank that a staff member's employment may not be terminated without cause except for redundancy. This is an essential element of the contract of employment which cannot be changed without the consent of the staff member. The Respondent violated this term of employment by not giving the Applicant a vacant position during the Reorganization, because he was not redundant, there was no good reason not to retain the Applicant in the Bank, and particularly because he had no opportunity to defend himself against the criticisms of his supervisor.

18. The Applicant never declared a preference during the Reorganization to leave the Bank and take the Enhanced Separation Package (Package B).

19. The Applicant, when he failed to be selected in Round 1, actively and adequately took part in the Round 2 selection process but did not succeed in finding a position, particularly because he had been put on probation

in IAD as a result of the manager's improper motivation.

20. The Applicant requests that:

- (i) the Bank reinstate the Applicant in a regular staff position with an assignment commensurate with his training and professional experience. As the Applicant's service was terminated more than 36 months ago, the Package B benefits should be treated as liquidated damages not subject to return, since the Applicant has exhausted these funds to meet the daily expenses of sustaining life;
- (ii) if the Respondent declines reinstatement, the Respondent pay compensation to the Applicant in the amount of the income he would have received until his normal retirement age of 65 years, had the Bank not violated the terms of his employment, less the amount of Package B benefits he had received;
- (iii) the Respondent pay the Applicant an amount equal to one year's salary as compensation for physical and mental hardship inflicted on him and his family and for expenses in connection with the search for new employment; and
- (iv) the Respondent reimburse the Applicant for legal costs and fees as of March 14, 1991 in the amount of \$12,943.93.

The Respondent's main contentions:

21. The Applicant's non-selection for a position of audit analyst was in accordance with the provisions of Staff Rule 5.09, because his skills, qualifications and work experience were found insufficient for the revised requirements of the position. There was no abuse of discretion on the part of the Respondent.

22. Because the Applicant's separation from service was not for unsatisfactory performance pursuant to Staff Rule 7.01, there could have been no abuse of discretion in respect of a decision relating to his performance, or breach of any obligation to give the Applicant an opportunity to improve his performance before his appointment was terminated. The Applicant's separation from the Respondent's service was not a sanction imposed upon him but was because of redundancy, a ground recognized by Principle of Staff Employment 7.1 (b) (iii).

23. No essential element of the Applicant's conditions of employment was violated when he was separated from the Respondent's service, because this was the result of new skills requirements being established for certain positions consequent upon the organizational structure of the Bank being substantially changed.

24. There was no prejudice on the part of the supervisor while serving on the selecting committee. There was clear evidence that the Applicant's supervisor regarded the responsibilities of the Applicant in IAD as limited and felt that he needed more training. Moreover, an objective decision was taken by the Selection Committee, after consideration of all the circumstances, that the Applicant should not be selected for retraining.

25. In any case the Applicant had stated verbally that he wished to leave the Bank with Package B.

26. The Respondent did not leave the Applicant without means of seeking alternative employment outside the Bank. As part of his separation package he received an amount for training.

27. Even if the Applicant has been injured, he has failed to show that the damages he claims exceed the differential between what he received under Package B and what he would have received under Staff Rule 7.01, Section 8, which is \$109,562.

28. Costs or attorney's fees are awarded only exceptionally by the Tribunal, even when an Applicant wins. There are no exceptional circumstances in this case which would warrant the award of costs or such fees.

Considerations:

29. The Applicant's principal contention is that the failure by the Respondent, during the Bank-wide Reorganization in July 1987, to select him for a position as audit analyst was an abuse of discretion, being discriminatory or at least arbitrary and capricious. He claims that the individual who had effective decision-making power in the Reorganization – the person who at that time was the Acting Director of the Internal Audit Department (IAD) and who had previously been the Applicant's supervisor – was biased against the Applicant on account of the Applicant's criticism of him to Bank officials. The Applicant also claims that the Respondent abused its discretion by appointing the Acting Director to membership on the Selection Committee, despite the Respondent's awareness of severe and widespread criticism of his integrity by departmental staff.

30. As the Tribunal has often stated, a decision by the Bank to select a staff member for a particular position rests within the Bank's discretion, and may be overturned by the Tribunal only when it concludes that this discretion has been abused. "The Administration's appraisal in that respect is final, unless the decision constitutes an abuse of discretion, being arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure," Suntharalingam, Decision No. 5 [1981], para. 24. The Tribunal will not set aside a decision of the Bank unless it was "reached in an arbitrary manner, involving, for example, unfairness, failure to allow the Applicant to state his case, or other departures from established procedures, bias, prejudice, the taking into consideration of irrelevant factors or manifest unreasonableness," de Raet, Decision No. 85 [1989], para. 67. This standard of scrutiny has been applied by the Tribunal in cases arising from the 1987 Reorganization, in which staff members have been displaced from their previous positions on the ground of redundancy as a result of the redefinition of job duties or the reduction in the number of departmental positions.

31. In earlier cases arising from the Reorganization, the Tribunal has been confronted with claims that an applicant was improperly denied selection to a position that the Bank in fact gave to another staff member. This is the first case before the Tribunal in which an applicant claims to be qualified to serve in a post-Reorganization position that was left vacant. In such a case, a finding of redundancy must turn upon a conclusion that the content of the position was so defined as to render its previous occupant no longer qualified to discharge its responsibilities. Unsatisfactory performance by a staff member in his or her position prior to the Reorganization cannot alone furnish a basis for terminating service with the Bank on the ground of redundancy. To do so would be an improper use of the Reorganization procedures in order to avoid the protections otherwise afforded by the Bank's governing documents – Staff Rule 7.01 in particular – for termination of employment, and would therefore constitute détournement de pouvoir, subject to reversal by the Tribunal.

32. At the time of the Reorganization, the Applicant was serving as a principal audit analyst, at grade level 20. When new job categories were announced at the outset of the Reorganization of the IAD, the position of principal audit analyst was eliminated, but the audit analyst position remained, to be graded in the range of levels 18 through 20; it was contemplated that four such positions would be filled. The Selection Committee considered four staff members as candidates for these positions, but it selected only one of them, and left three of those post-Reorganization positions vacant.

33. It is alleged by the Respondent that the Bank, when it declined to appoint the Applicant to an audit analyst position, concluded that the Applicant's previous position in the IAD had been significantly redefined in the Reorganization, so as to be more demanding, and that the Applicant lacked the qualifications for the position as redefined. The Applicant contends, however, that the post-Reorganization audit analyst position at level 20 was in fact not materially different from his pre-Reorganization position and that he was fully qualified for selection.

34. The Respondent, on several occasions in its pleadings, insists that "the responsibilities of Applicant's position were changed as a result of the reorganization," that "Applicant was found to be unqualified for the new position," that "the skills requirements of [the audit analyst position] were altered, and generally new priorities were adopted," and that "changes were made and the requirements for positions were enlarged." Yet the Respondent fails altogether to go beyond these general assertions to state with any particularity the respects in which the audit analyst position was changed in the course of the Reorganization. It was surely contemplated that in the Reorganization certain positions would be changed in their job content such that, for

example, new technical skills (such as in macroeconomics or computers) would henceforth be required. The Bank might well, in such circumstances, reasonably conclude that the present occupant of that position lacked the requisite skills for the position as redefined, and indeed that such skills could not be acquired after a reasonable period of training. Non-selection by virtue of redundancy might then be appropriate even though that position would remain vacant for lack of any other qualified staff member. But the Respondent has failed to provide any specific information that would warrant a conclusion that the audit analyst position was redefined in so substantial a manner.

35. It is true that a report was prepared in April 1987 by the Support Units Task Force, and that it concluded that “the quality of IAD staff should be improved to enable the unit to fulfill a strengthened mandate,” that “the quality of IAD auditors is perceived to be uneven” and that “IAD should be equipped with experienced, first class auditors.” Such statements from the Task Force report, however, are no more specific than those in the Respondent’s pleadings. They fail to support the Respondent’s claim that the job description or the job content of the audit analyst position was changed in the Reorganization.

36. At the time of his non-selection, the Applicant was informed of the reasons therefor, as measured against the requirements of the post. The Selection Committee concluded that he only partially met “skills/abilities” criteria relating to knowledge of Bank policies and computer systems, to the ability to make judgments regarding Bank procedures and to communicate them effectively to Bank staff, and to the ability to handle assignments with independence; that he failed altogether to meet the criteria relating to developing recommendations and drafting reports, and relating to a sustained record of good performance and demonstrated potential for promotion. The Selection Committee also stated that the Applicant did not meet the “personal characteristics” requirement of ability to analyze problems and apply concepts, and only partially met the requirement of prioritizing tasks and efficiently utilizing time.

37. 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 as audit analyst altogether lacks support in factual evidence or reasonable inference, that conclusion must be found to be an abuse of discretion. The Tribunal will now consider whether such is the case here.

38. The Bank in July 1987 made essentially three decisions regarding the Applicant: (a) he was not qualified for selection to a level 20 audit analyst position; (b) he was not qualified for selection to a level 19 audit analyst position; and (c) no reasonable period of training would so qualify him. Although the Applicant’s performance at level 20 in the year prior to the Reorganization is most pertinent to the Tribunal’s review of the Bank’s decision, it is also pertinent to consider the Applicant’s earlier performance record. Such record might show weaknesses on which it was reasonable for the Bank to rely in its selection decision in July 1987.

39. The Applicant’s anniversary evaluation for 1982-83, completed by his immediate supervisor and next-in-line supervisor (the IAD Director), was unqualifiedly affirmative. His anniversary evaluation for 1983-84, completed once again by his immediate and next-in-line supervisors, was also unqualifiedly affirmative. In September 1984, a recommendation for the Applicant’s promotion was endorsed by the same two supervisors and also, significantly, by another supervisor, the person who would later serve as Acting Director, IAD, and who would provide a negative appraisal in mid-1987 and be instrumental in the Selection Committee’s decision not to select the Applicant to a position as audit analyst in the post-Reorganization Bank. Although the last-mentioned supervisor denied before the Appeals Committee in this case that the promotion recommendation had ever been sent to the Personnel Department, the Appeals Committee found that assertion not to be true.

40. The Applicant’s next Performance Review, covering 1984-86, was completed by a new immediate supervisor and the same next-in-line supervisor, and was once again unqualifiedly affirmative. As in the earlier evaluations, there were specific commendations for the quantity and quality of the Applicant’s work, his ability to

complete work on time, his Bank experience, his ability to communicate, and his ability to work unsupervised and to supervise others. Both of the Applicant's supervisors endorsed the view that "The substantive nature and complexity of work undertaken by him is clearly at a level normally carried out by staff at the next higher grade level," and they endorsed as well his promotion to the level 20 position of principal audit analyst.

41. In all of the evaluation reports beginning with March 1982 and concluding in February 1986, there is not a single negative or cautionary word regarding the Applicant's performance. The 1984 recommendation by the Applicant's supervisors that he be promoted to level 20 – which recommendation was temporarily impeded by the Bank-wide job grading exercise in 1985 – was ultimately acted upon and he received his promotion effective May 1, 1986.

42. On April 28, 1987, the Applicant's supervisor (to be designated two months later as Acting Director, IAD), in the course of preparing the Applicant's PPR, asked three senior auditors for detailed appraisals of the Applicant's work, including an assessment of the quality and quantity of his work, of whether they met the standards of a level 20 staff member, and of whether the Applicant demonstrated the potential for handling more complex and independent responsibilities. Those responses were forthcoming in early May.

43. The first senior auditor to respond did so in particularly laudatory terms; indications of certain minor shortfalls were accompanied by assurances that they either had no effect on the Applicant's performance or that they were readily susceptible to correction through counseling or training. The conclusion was that the Applicant's overall performance was "clearly within the Level 20 range," that certain of his qualifications significantly exceeded that level, and that with regard to the Applicant's dealing with senior staff under sometimes trying circumstances "I can safely say that at the time, there was no one on the IAD payroll, regardless of level, who could have done a better job."

44. The second senior auditor commented favorably on the Applicant's extensive knowledge of the Bank unit with which he worked, his diligence and his sense of responsibility. It was, however, pointed out that because the Applicant's previous supervisors had not been attentive to the progressive development of his abilities, the Applicant should be given greater future opportunities to prove his potential.

45. The third senior auditor commented on the Applicant's professional manner in handling sensitive issues, his quick grasp and sound knowledge of policies and practices, his initiative and sound analytical ability (which resulted in the formulation of significant recommendations), his interpersonal skills and his diversified experience. Here too, the conclusion was that the Applicant "is clearly performing at level 20," and suggestions were made to give the Applicant greater independent responsibility and some additional training (because of the past "lack of a structured staff development program in the Bank").

46. Soon after receiving these evaluations, the Applicant's supervisor was named in early June 1987 to the position of Acting Director, IAD. That month, staff resistance to his appointment and to IAD management more generally led to a number of meetings with high Bank officials and to a memorandum written by IAD staff to the Senior Vice President, Administration, alleging mismanagement and improprieties on the part of the Acting Director.

47. In the midst of this intra-departmental conflict, the Bank appointed the Acting Director to serve with three others to comprise the Selection Committee for the Reorganization of the department. The three others were members of the Personnel Department with responsibilities relating to IAD; they were not and had never been members of the department, and none had operational experience in auditing work. Presumably in order to lend such expertise to the selection process, the Bank designated a staff advisor with accounting and audit experience to review the position criteria in advance of the meeting of the Selection Committee, and to review the individual selections afterward. Neither the staff advisor nor the three non-IAD members of the Selection Committee had direct personal knowledge of the work of IAD staff members being considered for selection, the Applicant among them.

48. The staff advisor reviewed the selection criteria on July 6, 1987, and made no suggestions for change. On

July 7, the Selection Committee met and made its selections. Nineteen staff members were selected for post-Reorganization positions (including one position as audit analyst), and three audit analyst positions were left vacant; the Applicant was not selected for any of those open positions, which could have been graded at level 18 or 19 or 20. When the Selection Committee considered the Applicant, a question was raised within the Committee as to whether the Applicant might be given training to qualify him for selection, but the Committee decided to reject this option. On July 9, the staff advisor from outside the department reviewed the selection decisions and made no suggestions for change.

49. Very shortly before the convening of the Selection Committee, and some six to eight weeks after receiving the uniformly favorable assessments of the Applicant from three senior auditors with whom he had consulted, the Acting Director, IAD, prepared a draft of a negative assessment for the Applicant's 1986-87 PPR. The draft, which was shown to the Applicant, claimed to take into account the written evaluations from the three senior auditors, and did in fact summarize some of their views very briefly. The Acting Director, after noting that the Applicant "has made efforts to contribute to IAD's work," wrote that the scope and complexity of his assignments were not commensurate with a level 20 position; that the "routine nature" of his assignments in earlier years "has not helped him to achieve the required professional growth"; that the Applicant was "detail-oriented"; and that his conclusions and recommendations were inattentive to implications such as their materiality and cost-effectiveness. The Acting Director stated in his draft that the Applicant would therefore be "closely monitored" on his work until December 31, 1987, at which time he would be "advised both as to whether he is capable of performing at Level 20, and on his future potential and prospects in IAD."

50. The Applicant asserts, without contradiction by the Respondent, that this critical evaluation was not transcribed onto the Applicant's PPR until late in July 1987, well after the Reorganization selection process for the audit analyst position, but that the Acting Director dated it May 29, 1987 (and appended the supervisory title that he had prior to his promotion to Acting Director). This gave the evaluation the appearance of having been completed well before the selection process. This irregularity of dating is compounded by the fact that the Applicant's PPR bears the same date – May 29, 1987 – accompanying the comments of the person who was at that time serving as Director, IAD, to the effect that the Applicant "should be encouraged in his present efforts to improve his professional capabilities. I confirm the decision to further evaluate his progress at December 31, 1987." It appears to be the case, however, that this statement was not transcribed on the Applicant's PPR until mid-August 1987. Yet, according to the Appeals Committee in this case, the indicated Director had left the department in May 1987, "and seems to have had remarkably little personal contact with his staff except for his immediate subordinates."

51. In sum, in light of the fact that the comments by supervisors on the Applicant's 1986-87 PPR were back-dated to show a May 29, 1987 date, the only pertinent written comments that could have been before the Selection Committee on July 7, 1987, were all of the very favorable annual evaluation reports from 1982 through 1986 and the three favorable assessments from the senior auditors that had been solicited by the Applicant's supervisor (who had by July 1987 become the Acting Director, IAD, and was also a member of the Selection Committee). The only negative comments that could have been placed before that Committee would have necessarily come orally from the Acting Director, whose views were flatly contrary to the documentary evidence and were not made a formal part of the Applicant's personnel records until much later that month. Indeed, when the Acting Director's criticisms were ultimately transcribed onto the Applicant's 1986-87 PPR, his principal criticism regarding the Applicant's performance (as distinguished from supervisory failure to give him challenging assignments) was his "need to sharpen his focus on the broad and important implications of his findings."

52. The Respondent asserts that the decision-making process of the Selection Committee was not irregular, was consistent with due process, and most pertinently was structured in such a way as to limit the influence of the Acting Director – who had been the subject, over the previous month, of serious criticism by his departmental staff members, persons upon whom he would in effect be sitting in judgment as a member of the Selection Committee.

53. Although the Appeals Committee in this case found that the Bank had not acted arbitrarily in its decision not

to select the Applicant for an audit analyst position and that the selection procedures had ample safeguards so as to be reasonable, it also concluded that because the Acting Director was the only remaining manager in the department and because he was the only person on the Selection Committee with technical competence in the field, "he was bound to have a crucial voice in the selection process." The Tribunal reaches the same conclusion.

54. The other three members of the Committee, although no doubt highly competent in the exercise of their personnel function, had no operational experience in the auditing field, had little or no direct knowledge of the work of persons in the department, and had for the most part been assigned to work with the department only weeks before. It was therefore highly likely that the views of the Acting Director would be given very great weight. It is unlikely that any considerable restraint upon his influence could have been exercised by the outside staff advisor designated to monitor the Selection Committee's decisions; and that staff member in fact approved in advance all of the selection criteria and after the fact all of the individual selection decisions made by the Selection Committee – with the entire selection process being completed between July 6 and July 9, 1987.

55. The negative views of the Applicant's qualifications held by the most influential participant in the selection process were altogether without support in the Applicant's prior annual evaluation reports, and also fundamentally and clearly failed to reflect the positive views of the three senior auditors who were consulted by the Acting Director and who were fully familiar with the Applicant's work. The Bank's decision that the Applicant was unfit for a level 20 audit analyst position is found to be lacking in any evidentiary support and is therefore an abuse of discretion.

56. For all of the above reasons, the Tribunal reaches the same conclusion with even greater confidence concerning the Bank's decisions that the Applicant was unfit for a level 19 position and that further training would not cure his weaknesses.

57. The Applicant, while serving previously in a level 19 position, had been unqualifiedly praised and recommended (even by the person who ultimately became the Acting Director) for a promotion, and three senior auditors had stated in May 1987 that his performance was fully within, and in some respects beyond, what was expected of a level 20 audit analyst. There is thus no rational basis whatever for concluding that the Applicant could not perform at a level 19 position after the Reorganization – even accepting the Respondent's vague assertions that all audit analyst positions had taken on more rigorous qualifications.

58. The conclusion of the Selection Committee that any shortfall in the Applicant's qualifications could not be addressed by additional counseling and training is also arbitrary and manifestly without rational basis. The few references in earlier PPRs to the Applicant's amenability to training all support the conclusion that he was indeed receptive to training. The record before the Selection Committee would have shown that the Applicant's prior experience with the Bank had been characterized by a failure on the part of his supervisors to recommend or provide training opportunities. As the Appeals Committee concluded:

In spite of favorable performance evaluations, there was reportedly some dissatisfaction with several aspects of his performance, and yet he seems to have received minimal – if any – feedback, counselling, career development assignments, or training. In this situation, it is hard to understand how the Bank could have rejected the training/retraining program for the Appellant.

Moreover, the principal criticism of the Applicant that was set forth by the Acting Director in the 1986-87 PPR, prepared by him initially in draft form in the same week as the Reorganization selections were made – that he "need[s] to sharpen his focus on the broad and important implications of his findings" – is (to the extent it can be understood) of the sort that does not appear to defy correction through counseling and training.

59. The Respondent claims that the Selection Committee's decisions not to select the Applicant for a level 19 position, or for further training, were justified by the Applicant's written statement shortly before the selection process that he wished to be selected for a position outside IAD, or indeed that he preferred to leave the Bank

altogether with the special financial benefits contained in the Enhanced Separation Package (Package B). There is considerable factual dispute about the Applicant's stated preferences in this regard. Suffice it to say that the formal minutes of the Selection Committee state that the Applicant's "request not to be selected into IAD was taken into account. However, he did not meet the selection criteria." It therefore appears that the principal basis, if not the exclusive basis, for the Committee's decision not to select the Applicant was his lack of qualifications rather than his preferences regarding assignment. It is that decision that the Tribunal concludes to have been an abuse of discretion.

60. In view of the Tribunal's conclusions, it is not necessary for the Tribunal to address the Applicant's remaining contentions.

61. Because the Tribunal has concluded that the non-selection of the Applicant for the level 20 position of audit analyst in IAD constituted an abuse of discretion, and because the record indicates that three audit analyst positions were left vacant at the conclusion of the Reorganization, the appropriate remedy is to order the Respondent to reinstate the Applicant to such a position. Such an order would help to place the Applicant in the position he would be in, had the Respondent not violated his contract of employment.

62. Fully to achieve this objective, it is also necessary to compensate the Applicant for any injury suffered by him from the date of his improper non-selection and his separation from the Bank until the date of his reinstatement. Because, upon his separation from the Bank in late 1987 the Applicant was paid cash benefits under the Enhanced Separation Package (Package B), which the record indicates to have been the equivalent of approximately three years' salary, the Respondent is correct in asserting that this amount should be credited toward any monetary award due the Applicant for this interim period.

63. One component of such an award is the amount of earnings that the Applicant would have received from his employment with the Bank had it continued throughout this interim period. Another component is an amount to compensate the Applicant for the intangible injury resulting from the Bank's wrongful decision and the aggravating circumstances in which that decision was taken. The Tribunal concludes that these two components taken together approximate the cash payments already made to the Applicant under the Enhanced Separation Package. The Tribunal also notes that it would be unfair to require that the Applicant, as a condition of his return to Bank employment, pay back a substantial amount of money that he has received, and on which he has had to sustain himself, over a period of years since his separation.

64. Should the President of the Bank decide under Article XII(1) of the Statute of the Tribunal, that the Applicant should be compensated without further action being taken in the case, the Tribunal decides that the Applicant should be awarded compensation beyond that which has been noted in the preceding paragraph and already paid to the Applicant under Package B. The Tribunal sets this compensation, which should embrace his lost future earnings from Bank employment, in an amount equal to two years' net salary as of the date of the Applicant's separation from the Bank.

65. The Tribunal also awards to the Applicant ten thousand dollars (\$10,000) as costs, including attorney's fees.

66. A staff member of the Bank sought to intervene in this proceeding in order to protect his asserted right to confidentiality of the contents of a report prepared in late 1987 by a committee especially appointed to look into charges of mismanagement in IAD. He claims that on a number of occasions the Bank gave him explicit assurances that the contents of the report would not be disclosed, and the Respondent has in fact acknowledged its confidential nature. Because the Tribunal has taken steps to preserve such confidentiality in connection with its earlier Order to make an abridged copy of the report available to the Applicant, and has otherwise satisfied the interest of the petitioning staff member to the degree it deems proper and possible, the Tribunal, without ruling on the issue of admissibility, decides that the application for intervention is in any event without object.

Decision:

For the above reasons, the Tribunal unanimously decides that:

- (i) the decision not to select the Applicant for the position of audit analyst at level 20 be rescinded; the Respondent reinstate the Applicant to that (or an equivalent) position; and the amounts already paid by the Respondent to the Applicant upon his separation from the Bank under the Enhanced Separation Package may be retained by the Applicant as compensation for the injuries sustained by him by virtue of the non-selection decision;
- (ii) should the President of the Respondent, within thirty days of the notification of the judgment, decide in the interest of the Respondent that the Applicant be compensated without further action being taken in the case, then the Respondent pay the Applicant (in addition to the payment ordered under paragraph (i) of this decision) a sum equal to two years' net salary;
- (iii) the Respondent pay the Applicant costs in the amount of \$10,000; and
- (iv) all other pleas be dismissed.

Prosper Weil

/S/ Prosper Weil
President

C.F. Amerasinghe

/S/ C. F. Amerasinghe
Executive Secretary

At Washington, D.C., June 20, 1991