

Decision No. 99

Klaus Berg (No. 2),
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 June 12, 1989 by Klaus Berg, against the International Bank for Reconstruction and Development. The Tribunal rejected the Applicant's request for certain preliminary measures, including the production of documents. The usual exchange of pleadings took place. The case was listed on January 17, 1990.

The relevant facts:

(a) The Reorganization

2. The general facts relating to the 1987 Reorganization are as stated in paragraphs 5 to 40 of Decision No. 40.

(b) The particular facts of the case

3. At the time of the Reorganization of the World Bank in 1987, the Applicant had been in the World Bank for 19 years, of which he had spent 11 years as a division chief. The last position he held prior to the Reorganization was Chief of the Agriculture Division 1, South Asia Projects Department, at level 26, which he had occupied since 1983.

4. In the Applicant's Performance Review for the period ending June 1986 the Vice President (VP) of the Applicant's region, the South Asia Region (SAR), had made comments, dated April 15, 1987 that:

The issues [sic] of Mr. Berg's management of his Division is to be discussed with him by the Projects Director. Should there be a reorganization within the Region, Mr. Berg would not be on a priority list for reassignment as a Division Chief.

The Applicant objected to this assessment but could not discuss it with the VP, SAR, until May 4, 1987. As a result of discussions, the VP, SAR, revised his review of the Applicant's performance but only in a memorandum to files, dated June 9, 1987, in which he stated:

I would modify the comments made in the personnel review, with the suggestion that Mr. Berg's management capabilities are substantially better than seem to be reflected in the assessment provided in the regional management review process that underlay the comments. Mr. Berg should be assessed carefully in the future exercise of his management capacities, but it is clear from the staff perception that Mr. Berg's capacity as a manager is much greater than is reflected in the above quotation.

5. Meanwhile, on May 22, 1987, the Vice President, Personnel, sent a memorandum to all Vice Presidents and Directors concerning the selection process for division chiefs pursuant to Staff Rule 5.09, "Implementation of Reorganization." It described the roles, responsibilities and steps in the process, emphasized the importance of adhering to the procedure prescribed, and indicated the extensive data that would be provided to selection managers. Among other things it was stated:

[I]ncumbency will be an underlying factor, since in most cases the first market for selections would be managers and advisers in existing or constituting units. Incumbency alone, however, would not be given precedence over needed skills as a selection criteria [sic].

Between May 22 and June 3, Regional Senior Management Teams (RSMTs), composed of the Regional Vice President, Department Directors, Chief Economists, Senior Operations Advisers and Chief Personnel Officers met to make tentative selections for their respective Regions. For their use in selecting for the positions of Division Chief, Project Adviser and Lead Economist, the RSMTs had before them a roster prepared by the Personnel Department listing all incumbent division chiefs, assistant directors who had not been selected for positions at their current level and who wished to be included in the division chief selection process, advisers, persons cleared for promotion and persons grandfathered at the 25/26 level. In addition, regional rosters, position descriptions and criteria, performance records and the views of former supervisors were taken into consideration. In the Asia Region, in those instances in which the RSMT's tentative selections were not incumbents, the RSMT reviewed the qualifications of incumbents against those of the staff members tentatively selected. All tentative selections in Operations, Bank-wide, were then reviewed collectively by the Senior Vice President, Operations, and the Regional Vice Presidents.

6. The Applicant was not among those tentatively selected by the RSMT to fill a Division Chief position. Before the Region finalized its list of tentative selections, the Vice President for the new Asia Region, called the former VP, SAR, to obtain his views on the performance and qualifications of all staff who had held the position of Division Chief in the South Asia Region. With specific reference to the Applicant, the former VP, SAR, said that as a result of interviews he had conducted with staff of the Applicant's Division, at the Applicant's request, he had concluded that the Applicant's management capabilities were better than he had indicated on the Performance Review, and that he intended to record that conclusion.

7. After the RSMTs reached conclusion on their tentative selections, the Regional Vice Presidents met with the Senior Vice President, Operations, to review all level 26 positions in the Operations complex and the proposed selections. Final selections for Division Chief positions were made in a Bank-wide meeting on June 4, 1987 attended by all Vice Presidents, Department Directors reporting directly to Senior Vice Presidents and Chief Personnel Officers, with the Vice President, Personnel, as Chairman. Non-selected level 26 staff were reviewed again with the Vice President, Personnel. The selections were subsequently reviewed by the President of the Bank. The Applicant was not among those selected for a Division Chief position.

8. The new Vice President, Asia Region, (VP, AR) and the Chief Personnel Officer for the Region met with the Applicant on June 5, 1987. The VP, AR, reviewed the selection process, emphasizing that it had been collegial, and explained that the Applicant's record of performance up to the time of the reorganization, including the period of his assignment as Division Chief in the West Africa Regional Office, was not as strong as that of other candidates. He said that he had known, before final selection, of the former VP, SAR's, intention to amend the assessment of the Applicant's managerial capacity. The Applicant indicated that he was not entirely surprised at the outcome, but expressed disappointment with the selection process, particularly with the fact that he had not been interviewed.

9. The Applicant then inquired about the possibility of a Technical Specialist position at level 26. In a memorandum, dated June 9, 1987, to the VP, AR, the Applicant outlined his interest in and qualifications for such a position. However, after consulting with the Director of the Asia Region's Technical Department, the VP, AR, concluded that the Applicant was not then a suitable candidate for a level 26 Technical Specialist position.

10. By memorandum, dated June 23, 1987, the Asia Region's Chief Personnel Officer confirmed to the Applicant that he had not been selected for a position at level 26, and informed him that under Staff Rule 5.09 he could elect (a) to be considered for a position in the Round 1 staff selection process, in which case he should express a preference for a particular vice presidential or departmental unit; (b) to accept the Enhanced Separation Package, no later than one week after the close of Round 1 of the staff selection process; or (c) to be listed in the Redeployment Roster for possible assignment at a lower level. The Applicant was asked to

indicate his choice in writing as soon as he was able.

11. The Applicant did not take the Enhanced Separation Package and elected to enter the selection process for staff at large. On July 14, 1987, he was offered a position as Principal Economist in the Agriculture Division of the Technical Department of the Asia Region at level 25. The Applicant accepted the position on September 25, 1987, subject to his right to pursue a claim to maintain his level 26 grade. The Applicant was grandfathered at level 26 for a period of two years ending September 30, 1989.

12. On June 30, 1987, the Applicant filed a request for administrative review of the decision not to select him for a position as division chief. By memorandum, dated July 24, 1987, the Vice President, Personnel, stated that he was unable to find that the Applicant's candidacy had been irreparably harmed by the statement of the former VP, SAR, and that he would not grant the Applicant's request for relief.

13. On July 22, 1987, the Applicant also filed an application with the Tribunal, requesting relief on his own behalf and on behalf of other staff members. On October 27, 1987, the Tribunal held the Applicant lacked standing to seek relief on behalf of other members of the staff and that his own claims were not properly before the Tribunal because he had failed to exhaust his internal remedies, Klaus Berg, Decision No. 51 [1987]. On December 6, 1987, after receiving notice of the Tribunal's decision on November 6, 1987, the Applicant filed an appeal with the Appeals Committee.

14. The Appeals Committee found, inter alia, that:

The facts of this case are in many ways unique, but also quite disturbing. During the massive job selection process that was occurring during the months of April through June 1987, Appellant had a paper record that contained a current and severely damaging assessment of his career by a newly promoted Senior Vice President. Any manager reading the comment of [the VP, SAR] would, without hesitation, turn to other more attractive candidates. Of course the Appellant's file is much more comprehensive than the one comment by the [VP, SAR], and even conceding that there are several less than positive comments in the record, the straightforward, unqualified, negative comment by [the VP, SAR] has to have had a major effect upon any reviewer. In addition, Appellant did not have any spokesman to talk to the new managers and present a balanced picture.

As relief, the Committee recommended that the Applicant be given priority in the selection process for level 26 positions; that the former VP, SAR's, negative comment be completely expunged from the Applicant's record and that the former VP, SAR, prepare a new evaluation consistent with his comments on June 9, but without reference to his earlier remarks; that the Applicant be treated at least as fairly as other staff who have been grandfathered in their grade, noting that he had been downgraded through no fault of his own; and that if no level 26 position was forthcoming within a reasonable time, that arrangements be discussed with the Applicant concerning his retirement with a separation package appropriate to the circumstances of his case.

15. In a letter dated March 13, 1989, to the Applicant, the Senior Vice President, External Relations and Administration, stated that a bona fide effort would be made to help the Applicant regain a level 26 position and assured him that the Appeals Committee's other recommendations would be followed. At the time the application was filed efforts were being made by the Respondent to find the Applicant a position at level 26.

16. At the end of May 1989, counsel for the Applicant proposed to the Respondent that, in view of the undertaking to make efforts to place the Applicant in a level 26 position, the parties stipulate that the Applicant had not yet exhausted his internal remedies, notwithstanding the Senior Vice President's decision, so that the period prescribed by Article II(2) of the Tribunal's Statute for the filing of an application had not begun to run. The Respondent declined to enter into such an agreement.

The Applicant's main contentions:

17. The failure of the Respondent to make available the requested documents and information demands that

the Tribunal draw the inference that these documents are not being produced because they are detrimental to the Respondent's case. Therefore, it should be concluded that positions at the Applicant's level for which he was qualified were filled by lower level staff members.

18. The Respondent illegally caused harm to the Applicant by creating an inaccurate and baseless performance evaluation and failing to take timely action to cure its admitted defects. The Applicant's non-selection for a level 26 position was undoubtedly influenced by the criteria of the inaccurate performance review which had not been formally corrected.

19. The Applicant's demotion without cause resulted in the violation of an essential element of the Applicant's conditions of employment. An essential element of the Applicant's conditions of employment is that he not be demoted solely to permit the promotion of the incumbent of a lower level position. Staff Rule 5.09 which has been violated provided that first incumbents of positions graded at the same or higher level would be considered for available positions, and that only if no staff members in that group possessed the requisite skills, or could have obtained them in a reasonable period of time through training, could staff members occupying lower level positions have been promoted to fill the vacant higher level positions. In any event Staff Rule 5.09 could not abrogate an essential right of the Applicant, even if it was intended to provide otherwise.

20. The Applicant has also been injured by mistreatment at various stages of the process of the reorganization because he was required to remain virtually unoccupied.

21. There was an absence of due process in that the Applicant was not informed of the reason for his non-selection to a level 26 position until after he had filed an appeal with the Appeals Committee.

22. The Applicant requests:

- (i) rescission of the decision not to select the Applicant for a level 26 position;
- (ii) that he be maintained at this grade level since there was no cause for demotion;
- (iii) that in lieu of rescission of the contested decision and specific performance of the above obligation he be paid six years' net salary;
- (iv) in addition, payment of one year's net salary as compensation for mistreatment and for the intangible injuries suffered; and
- (v) payment of attorneys' fees and costs incurred in pursuit of relief.

The Respondent's main contentions:

23. Production of the information or documents requested is not required for the Tribunal's consideration of the issue which is involved in this case, namely whether the Applicant's non-selection for a level 26 position and the application of the selection process to the Applicant violated the conditions of his employment. In any event the Respondent's answer provided detailed information on the selection procedures and on the considerations applicable specifically to the Applicant's qualifications that managers might properly have taken into account in concluding not to select the Applicant.

24. The non-selection of the Applicant was the result of a proper exercise of managerial discretion. The former VP, SAR, was not the only supervisor who expressed doubts about the Applicant's capabilities. Doubts had been expressed and questions raised about his performance for some time. The personnel files of candidates were available to selecting managers and were considered by them. In any event there is no evidence that the Applicant's candidacy would have been advanced had the VP, SAR's, assessment not been made or been effectively retracted before the selection process began.

25. The Applicant was not demoted without cause. Incumbency was a factor in the selection process but not an

overriding one. The Applicant was measured against the wide field of candidates that included those who were eligible for promotion only after he had been considered but not selected at the initial stage. His qualifications were not seen to be as strong as those of other candidates.

26. The Applicant is not entitled to permanent grading at level 26 or to permanent grandfathering of his salary at that level, since his salary at the end of the prescribed two-year grandfathering period was not at the top of the range of salary for level 25.

27. That the Applicant was inactive for a short period after he was given a level 25 appointment was a temporary feature and inevitable in the circumstances of the reorganization.

28. There is no compensatable injury, since there was no absence of due process or any other abuse of discretion.

29. The claim for attorneys' fees and costs should be denied because there are no exceptional circumstances warranting the award of such fees and costs.

Considerations:

30. The Applicant contends that the Respondent failed to observe the terms of his appointment and the conditions of his employment by:

1. Demoting him without cause from the post of a Division Chief at Grade 26 which he occupied prior to the 1987 Reorganization to that of a Principal Economist at Grade 25, thus violating his right to security in employment which he considers to be an essential element of his conditions of employment.
2. Creating an inaccurate and baseless performance evaluation which resulted in his non-selection for a Division Chief position or for any other grade 26 positions.

31. The essence of the first contention is that paragraph 5.03 of Staff Rule 5.09 should be invalidated because it undermines an essential element of staff member conditions of employment in that it permits "individual staff members identified by the VPP as ready for promotion to be selected". The Applicant contends that the Articles of Agreement, the Principles of Staff Employment and the Staff Rules promulgated thereunder, and the past practice of the Bank, all create an obligation on the part of the Bank to secure to each staff member continued employment at his grade level, unless there is some fault on the part of the staff member which renders him unfit for continued service.

32. In Fernandes, Decision No. 90 [1990], the Applicant invoked Principle 2.1(d) of the Principles of Staff Employment providing that the Bank shall "provide staff members security in their employment consistent with the terms of their appointment, their satisfactory performance and conduct, and the efficient administration of the Bank," and Principle 6.1 providing that "the basic objectives of the [Bank's] compensation policy shall be to ... enable the [Bank] to recruit staff of the highest caliber appropriate to job requirements," which the Applicant also invokes in this case. The Tribunal there concluded:

... these two principles do not justify inferring a staff right to priority of assignment over a lower graded staff member, when in the course of a comprehensive reorganization the Bank, within the range of its allowable discretion, determines that the promotable employee is in fact more qualified to perform the job. (para. 28)

33. In application of the decision in Fernandes the Tribunal concludes that by eventually selecting a lower grade staff member to occupy positions at the level of the Applicant's previous position, but after first considering the Applicant for those positions, the Respondent had acted within the requirements of all pertinent Principles and Staff Rules. Para. 1.06 (6) of Staff Rule 5.09 cannot properly be invoked to question the validity of the Applicant's non-selection. Para. 1.06 provides that in the selection process, candidates occupying positions graded at a level higher than that of the position to be filled are to be "considered" first; it does not

provide that such candidates are also to be “offered” the positions in preference to lower graded promotable staff members. It, therefore, becomes unnecessary to determine whether any such right should properly be regarded as an “essential element” of the conditions of employment, as claimed by the Applicant.

34. The Tribunal, therefore, concludes that the selection of a lower grade staff member to occupy a position graded at level 26 in preference to the Applicant, and the non-selection of the Applicant to a level 26 position, do not violate his conditions of employment.

35. The second contention of the Applicant goes to the circumstances surrounding his non-selection during the first stage of the Reorganization. He attributed his initial non-selection for a Division Chief position, which eventually resulted in his non-selection for any level 26 position, to the unfounded negative written comment made on the Applicant’s PPR by his previous supervisor, the then Vice President, South Asia Region (SAR).

36. The Respondent tries to minimize the impact of that negative comment on the selection for a Division Chief position, by referring to the collegial nature of the selection process, and by insisting that the managerial skills of the Applicant were the subject of doubt on the part of his supervisors during the preceding years. The Respondent also maintains that the Vice President, SAR, informed his successor of his changed conclusion as to the Applicant’s management capabilities, and that such correction took place before the Region finalized its list of tentative selections.

37. The Tribunal does not share the Respondent’s view of the impact of the negative written comments by the Vice President, SAR, and though corrected subsequently, such correction was never recorded in writing and made available to those making the selection for Division Chief positions. Those negative comments were made at the very time when the selection process was at its first stage. Moreover, as noted by the Appeals Committee report of January 21, 1989, when decisions about Division Chiefs for the new Asia Region were about to be made (by June 4, 1987), “Appellant’s immediate supervisors who could have given some balance to the Vice President’s comments, were not available.” Equally important is the fact that information of the modification of the Vice President, SAR’s, initial negative evaluation of the Applicant’s capabilities as Division Chief was only made orally to the new Vice President; no written modification on the file occurred until June 9, 1987, several days after the selection process for Division Chief was concluded, by which time much of the damage had been done.

38. The Tribunal concludes that, although the strongly worded negative comments by the previous Vice President may have only been one of several negative aspects in the Applicant’s file, and although it is impossible to ascertain that had it not been for that negative comment, the Applicant would have been selected for the post of a Division Chief, the Tribunal infers that the strong negative comment must have had considerable influence in shaping the impression of the selecting individuals as to the Applicant’s capabilities and qualifications, and must have contributed to his non-selection at the initial stage of the Reorganization. Moreover, the Respondent did not act reasonably when it failed to record the Vice President, SAR’s, modified evaluation of the Applicant in due time and to make it fully and immediately available to all the selecting individuals. The impact of such a negative comment is considerably magnified when it is made at the time when the Applicant’s capabilities and qualifications are being measured against the capabilities of others who are equally considered for selection to the same positions. As the Tribunal said in Robinson, Decision No. 78 [1989] “when the Bank owes a duty to a staff member, it must act reasonably in the circumstances.”

39. Since in the circumstances rescission of the decisions contested or specific performance of the obligation invoked is not a remedy appropriate to the injury done, the Tribunal will order the payment to the Applicant of compensation which it equitably assesses at ten months net salary.

40. The Applicant also claims that once he is not selected for a position at his previous grade level, and is demoted to a lower level position without a fault of his own, he becomes eligible to be permanently grandfathered and to receive on an indefinite basis the compensation and related benefits of his former higher grade. The Applicant argues, in particular, that the effect of his downgrading on his salary is not eliminated by the fact that his present salary does not exceed the ceiling of his new grade. He maintains that, because he is

much higher in his new grade than in his previous grade, his salary adjustments will be smaller in terms of percentage than they otherwise would be. To substantiate this claim the Applicant cites the Tribunal decision in Pinto, Decision No. 56 [1988].

41. The Tribunal does not find the Pinto holding to be controlling in the Applicant's case. Under de Merode, Decision No. 1 [1981], and Pinto, Decision No. 56 [1988], the staff member is entitled to periodic adjustments of his salary. He is not guaranteed a certain percentage of increase in salary. The Tribunal notes, moreover, that in order to secure some financial remedy both to staff members whose position was downgraded as a result of a job evaluation and to staff members assigned to a lower level position in the Reorganization, as informed by the Respondent, the Executive Directors on August 3, 1989 approved certain salary protection arrangements to be applicable beginning with the 1990 salary review. In consequence, even when a staff member's salary at the end of the grandfathering period is above the range of the grade of his position, he will, nevertheless, be eligible for the minimum increase available to fully satisfactory staff members. His salary will not be frozen in violation of the right to periodic adjustments.

Decision:

For the above reasons the Tribunal unanimously decides that:

- (i) the Respondent shall pay to the Applicant an amount equivalent to ten months net base salary;
- (ii) the Respondent shall pay to the Applicant as costs the amount of \$3,000; and
- (iii) all other pleas be dismissed.

Prosper Weil

/S/ Prosper Weil
President

C. F. Amerasinghe

/S/ C. F. Amerasinghe
Executive Secretary

At London, England, September 28, 1990