

Decision No. 131

John LaVerne King, III,  
Applicant

v.

International Bank for Reconstruction and Development,  
Respondent

1. The World Bank Administrative Tribunal, composed of A.K. Abul-Magd, President, E. Lauterpacht and R.A. Gorman, Vice Presidents, and F.K. Apaloo, F. Orrego Vicuna, Tun M. Suffian and P. Weil, Judges, has been seized of an application, received on January 26, 1993, by John LaVerne King, III, against the International Bank for Reconstruction and Development. The Tribunal took a procedural decision ordering confidentiality of material in the pleadings as among the parties. There was the usual exchange of pleadings. The case was listed on September 13, 1993.

The relevant facts:

2. Through the end of 1991, the Applicant was the Section Chief of the Plant Operations Section (ITFPO) of the Information, Technology and Facilities Department (ITF). His position was graded at level 23 at the time. There was a possibility of this position being graded at level 24 and the Applicant had been given indications that, if this were done, he would be promoted to level 24 in that position.

3. As Section Chief of ITFPO, the Applicant was involved as a manager in the Bank's Main Complex Rehabilitation Project (MCRP) in which portions of the Main Complex were being renovated or demolished and reconstructed. Following the demolition of two Bank buildings, various scrap materials remained on Bank property. Among those materials was a quantity of copper from copper tubes used in air-conditioning ducts. This was the property either of the Bank or of the demolition contractor.

4. On four occasions during 1990 and 1991 some of this scrap copper was removed from the site by members of the Bank's staff in the Applicant's section and was sold to a Washington scrap merchant. The proceeds of the sale amounted to \$1,100. Part of this was used to fund the ITFPO Christmas Party in December 1990. The remainder (about \$750) was eventually paid over to the Bank.

5. On May 1, 1991, a staff member of the Applicant's section informed the Applicant of the disposal of the scrap. According to the Applicant, this was when he first became aware of the sales. He immediately ordered that they should stop and informed his superior, Mr. B, confirming this by a memorandum to the file on May 10, 1991. Mr. B in his turn immediately informed his superior, Mr. C, who instructed Mr. B to do nothing until Mr. C told him otherwise.

6. By a memorandum of July 5, 1991, the Personnel Officer of the section reminded Mr. B of the situation and asked whether a formal investigation should be carried out in accordance with Staff Rule 8.01. A copy of this memorandum was sent to Mr. B's superior, Mr. C. On August 1, 1991 the Personnel Officer sent a further memorandum to Mr. C suggesting that an independent group of three senior high level officers of ITF should carry out a formal investigation and submit their findings to the Director, ITF and the Head, Facilities Staff. Such an investigation was carried out and a report was prepared, but no action appears to have been taken on it.

7. On September 20, 1991, the Ethics officer, Mr. F, accompanied by a colleague, Ms. G, interviewed the Applicant. The notes of that interview recorded that the Applicant informed the Ethics officer that the first specific reference to the sales that he had heard was in May 1991 and that he was not aware that the

proceeds of the sales had been used for the 1990 Christmas party. Although the notes contain no record that the Ethics officer expressly informed the Applicant that the Ethics Officer was carrying out an investigation under Staff Rule 8.01, the Applicant admits that the Ethics Officer told him this but states that the Ethics officer did not tell him that his, the Applicant's, own conduct was being investigated and did not indicate that disciplinary action might be taken against the Applicant himself in this connection. The Ethics officer does not contradict this but says that "it is difficult to fathom how the Applicant failed to understand that his conduct was under investigation".

8. On November 12, 1991, the Ethics Officer sent a report of his investigation to the Vice President, Personnel and Administration (PAAVP). This indicated that certain staff members had been interviewed and included a number of criticisms of ITFPO management up to and including the Section Chief. The report stated that the Applicant was told of the sales at the 1990 Christmas party - a point that is not recorded in the notes of the interview with the Applicant and which has subsequently been strongly denied by the Applicant. The report concluded with a number of disciplinary action recommendations which, as regards the Applicant, read as follows:

Mr. King stated that his first specific knowledge of the salvage was in May of 1991, however, testimony by others indicates that he too was aware by at least Christmas 1990. Demotion to level 22, written reprimand/warning and no 1992 salary review increase also for burying his head in the sand.

9. Two weeks after this report, on November 26, 1991, the Ethics Officer informed the Applicant that the PAAVP had reached a decision.

After considering all the facts and circumstances, the Vice President, Personnel and Administration, has concluded that you should:

a) be removed from supervisory responsibilities effective January 1, 1992;

and receive:

b) no promotion to level 24 as scheduled. You will remain at level 23 for a minimum of two years and any promotion thereafter will need to meet the requirements of Staff Rule 5.05;

c) a 5% net salary reduction, effective January 1, 1992;

d) no salary increase in 1992; and

e) a written reprimand.

These measures are being imposed pursuant to Staff Rule 8. 01 because you did not try to take corrective action as soon as you learned of the removal and sale of copper.

This memorandum will be considered the written reprimand and a copy of it will be placed in the Limited Access portion of your Personnel file. This memorandum will also serve as a written warning for the future that any similar incident will be grounds for further disciplinary action up to and including separation from the Bank.

10. The Applicant went through the administrative review process without total success and then filed an appeal, dated February 19, 1992, with the Appeals Committee. The Appeals committee recommended that

(i) the Appellant's supervisory responsibility should be restored only if and when his supervisors are convinced that he has gained the degree of assertiveness required in such a role;

(ii) the copper salvage incident should be taken into account in determining the Appellant's 1992 salary increase to the extent it affects the assessment of his managerial performance in general and not as a disciplinary action;

(iii) the written reprimand should be withdrawn from the Appellant's Personnel File, as should any reference

to this matter in his Performance Review; and

(iv) the Appellant should no longer be denied his scheduled promotion, which is tantamount to a demotion, provided it is still warranted and does not require supervisory responsibility until the condition in sub-paragraph (i) above has been met.

11. By letter, dated October 29, 1992, a Managing Director of the Bank informed the Applicant that

Having reviewed the report (of the Appeals Committee), I have decided to accept the Committee's recommendations except the part of the recommendation contained in paragraph 26(iii) relating to the deletion of "any reference to this matter in his (your) Performance Review." The wording of your performance review for 1992 will, therefore, not be changed.

The Committee also recommended that the incident be taken in account in determining your 1992 salary increase to the extent that it affects the assessment of your managerial performance. I believe my decision on your appeal, as outlined above, is consistent with this recommendation.

The Applicant's main contentions:

12. The Respondent violated the provisions of Staff Rule 8.01 and did not observe due process because the allegations against the Applicant were not communicated to him.

13. The Applicant was prejudiced by the violation of Staff Rule 8.01 and the non-observance of due process.

14. The Applicant was not informed of the testimony of others so that it could not be rebutted and hostile witnesses could not be confronted.

15. The Ethics Officer was prejudiced and did not conduct a fair inquiry because, prior to investigating, he had read the report of the departmental investigating officer.

16. The Respondent had found the Applicant guilty by association because it did not want to send lower level staff the wrong message.

17. Denial of promotion to the Applicant, which was one of the sanctions imposed, was not among those listed in Staff Rule 8.01.

18. The Applicant was not given the Ethics Officer's report till after the proceedings before the Appeals Committee had been initiated. Thus, he did not have a fair opportunity to defend himself.

19. Insofar as the Appeals Committee considered together the appeals of several appellants including the Applicant, there was a violation of Staff Rule 9.03 which requires consideration by the Appeals Committee of appeals on a case-by-case basis.

20. There is no evidence that the action taken against the Applicant was in response to institutional needs as a penalty for mismanagement, independent of the finding of misconduct.

21. The compensation of \$200,000 claimed for the losses sustained by the Applicant is based on accurate calculations.

22. The Applicant requested the following relief:

(i) compensation in the amount of \$200,000;

(ii) reinstatement in the position of Section Chief, ITFPO, or such other position of equal or greater rank as may be eventually acceptable to the Applicant and the Respondent;

- (iii) promotion to level 24, with corresponding net salary increase of 5%, retroactively from January 1, 1992, or in the event that the Applicant should already have been so promoted, implementation of such promotion and corresponding salary increase retroactively from January 1, 1992;
- (iv) revision of the Applicant's 1992 salary review increase to 6.3% from 4.05%;
- (v) recalculation of any other salary adjustments consequent upon the measures described in (iii) and (iv) above, such that the Applicant's salary is properly and chronologically compounded;
- (vi) amendment of the Applicant's 1992 Performance Review (PPR) such that any and all references to the copper salvage matter or any actions, processes, ramifications or recommendations pertaining thereto are removed; and
- (vii) expurgation of any and all references to the copper salvage matter from the Applicant's personnel file, including removal of the Ethics officer's memorandum, dated November 26, 1991, and replacement of the Applicant's 1992 PPR with the amended version described in (vi) above.

#### The Respondent's main contentions:

- 23. Because the Applicant was informed that the subject of the investigation concerned the removal and sale of scrap copper, there was no violation of due process or the provisions of Staff Rule 8.01.
- 24. Though the Ethics Officer may have read the report of the ITFD group that conducted the preliminary investigation, he conducted his own investigation.
- 25. In any event, there was no prejudice to the Applicant resulting from any technical violation of Staff Rule 8.01 or any denial of due process.
- 26. Because managers must take responsibility for the misdeeds of lower level staff, the disciplinary measures taken against the Applicant involving his removal from supervisory responsibility without loss of grade were not an abuse of discretion.
- 27. The other actions taken, namely the denial of a promotion which had been expected, the reference in his PPR to the copper sales and the rating of fully satisfactory rather than above average for the purposes of his salary review increase, were the result of the assessment of managerial performance and were not disciplinary.
- 28. Monetary damages could only be awarded if the promotion expected and the salary increase sought were not given. Even so, the claim for \$200,000 is excessive.

#### Considerations:

- 29. The Tribunal will begin by setting out the procedural requirements laid down in Staff Rule 8.01. This Rule is intended to give expression to the basic principles of due process of law with respect to disciplinary measures. It contains a number of essential components - none of which can be neglected if it is to be properly applied.
- 30. (i) First, it contains, in paragraph 3.01, the following basic provision:  

Disciplinary measures may be imposed when personal or professional misconduct occurs, when such behavior adversely reflects upon the reputation or integrity of the Bank or IFC, or when a staff member fails to observe the duties of employment....

The Tribunal observes that, as one would expect, disciplinary measures may be imposed only when the misconduct in any given case can be precisely specified and responsibility for it can be attributed to the particular staff member who is charged with misbehavior.

- 31. (ii) The paragraph next identifies the conduct to which sanctions may be attached and lists the various

kinds of disciplinary measures that the Bank may take.

32. (iii) The procedure to be followed in disciplinary cases is then set out and is, of course, particularly important.

(a) The initiation of disciplinary measures by the Bank takes place when misconduct “is observed or reported to a manager or the Vice President, Personnel (VPPER)”.

(b) Then come the central features of the procedure:

5.02 [Initial Notification of Staff Member] Where a staff member is alleged to have engaged in conduct for which disciplinary measures may be imposed, an investigation to determine the substance and circumstances of the matter will take place. When supporting evidence of the alleged behavior has been obtained, the staff member’s manager, the VPPER, or a designated official, shall notify the staff member that the matter is being investigated and the allegations warrant an explanation from the staff member....

5.03 [The Right to Respond] A staff member’s response may be oral. The staff member will be permitted and may be required to answer the allegations in writing....

5.04 [Decision - making Procedures] In less serious cases, the manager of the staff member shall determine whether the alleged conduct has occurred and, if so, may censure the staff member orally or in writing. The manager will consult with the VPPER, or a designated official, in making such determinations. In more serious cases, these decisions will be made by the VPPER, or a designated official, considering, where appropriate, recommendations from the staff member’s department director or vice president. The VPPER may assemble a committee consisting of representatives of the concerned Bank or IFC departments, the Legal Department and the Office of the VPPER, convened for the particular case, and [sic] recommend a course of action to the VPPER, or a designated official ....

5.05 [Notification regarding Disciplinary Measures] A staff member will be notified of the disciplinary measures that will be taken and the reasons for their imposition by the person who determined what the measures will be, or by a designated official. Except where the measure is oral censure, the notification will be in writing.

5.06 [Retention of Record Regarding Disciplinary Measures] Except for oral censure, the Bank and IFC will retain in a staff member’s personnel records information regard disciplinary measures taken in his case....

33. The procedure thus prescribed contemplates certain specific steps which have to be related, it should be emphasized, to the particular staff member whose conduct is being impugned. They may be summarized as follows:

(i) Observation or report to a manager or VPPER of conduct for which disciplinary measures may be imposed (para. 5.01).

(ii) An allegation that a staff member has engaged in such conduct (para. 5.02).

(iii) An investigation to determine the substance and circumstances of the matter (para. 5.02).

(iv) when supporting evidence of the alleged matter has been obtained, notification to the staff member that the matter is being investigated and that the allegations warrant an explanation from the staff member (para. 5.02).

(v) Response by the staff member (para. 5.03).

(vi) Decision, in serious cases, by the VPPER or a designated official (para. 5.04).

(vii) Notification to the accused staff member of the disciplinary measures and of the reasons for imposing them (para. 5.05).

34. In view of what has arisen in the present case, three aspects of the procedure outlined above require emphasis.

35. First, as regards the requirement of notification: It needs to be appreciated that this requirement necessarily implies not some general notification but one which informs the staff member that as a result of the investigation some specific alleged conduct of the staff member may be punished. In other words, the notification must in substance be an accusation or a charge. Moreover, it must be expressed in such terms that the accused staff member is made aware from the outset of the scope of the possible default alleged against him. The notification must be reasonably exact in the specification of the wrong alleged. If it is not so expressed, and is not set out in sufficient detail, then the staff member cannot know of what he is being accused, may remain unaware of considerations material to the allegation as it affects him and can thus be left unable to make a properly directed or considered response. Such a situation would evidently be inconsistent with the basic rule of due process that an accused person should be confronted with a specific charge and be given an opportunity to reply to it.

36. Second, as regards the requirement of response by the staff member: It follows that the entitlement of the staff member to respond presupposes an exact knowledge of the charge made against him and extends to the right to give a properly considered answer to, or comment upon, every aspect of the case made against him.

37. Third, as regards the decision: Again, it follows that if the decision is that the staff member is guilty of some dereliction of duty, that dereliction must be identified in terms which correspond reasonably closely to the allegation communicated to the staff member in the original notification.

#### Consideration of the application of the procedural requirements to the facts of the present case

38. For the purpose of considering whether the procedural requirements set out above were properly applied in the present case, one must first recall the conclusion of the process, namely, the decision communicated to the Applicant on November 16, 1991, that certain disciplinary measures were to be taken against him because he had not tried to take corrective action as soon as he had learned of the removal and the sale of copper. If this was the fault for which the Applicant was being disciplined, it is necessary to see at what point, if any, during the process leading to that decision the Respondent had identified that particular fault to the Applicant. In so doing one must, of course, treat the establishment of the facts relating to the sale of the scrap copper as part, though not all, of the indictment. Without those facts, there could be no charge. But once they had been established, it would still be necessary to show that the Applicant knew of them, that he was responsible for ensuring that the activity was stopped, that he failed in that duty and that it was in respect of that failure that the disciplinary proceedings were taken against him.

39. The Tribunal will now review the procedural requirements in the order set out paragraph 33 above.

(i) observation or report to a manager or the VPPER of conduct for which disciplinary measures may be imposed and

(ii) Allegation that a staff member engaged in such conduct

40. These two stages can conveniently be considered together.

41. An allegation that some staff members were engaged in the improper activity of selling scrap copper was made, when on May 1, 1991, Mr. A, a member of the Service Orders Section, informed the Applicant, and on May 2, 1991, when the Applicant informed Mr. B, his immediate superior, of the matter and followed it up with the memorandum of May 10, 1991. The information thus conveyed to Mr. B did not suggest that the Applicant himself had been engaged in the copper salvage operation. Mr. B immediately informed his supervisor, Mr. C, even though he had reason to believe that Mr. C had already learned of the copper salvage directly from Mr. A. Within a week to ten days following May 2, 1991, Mr. C told Mr. B to do nothing pending his further instructions. Mr. B was reminded of the matter on July 5, 1991, by Mr. D, the Personnel Officer to ITF, who described the



report as “a serious allegation” and asked Mr. B to look into the matter and let him (Mr. D) know “if a formal investigation should be carried out in accordance with Staff Rule 8.01.” Up to this point, then, no specific allegation had been made that the Applicant had been involved in questionable conduct.

(iii) The investigation to determine the substance and circumstances of the matter

42. On August 1, 1991, Mr. D addressed a memorandum to both Mr. C and Mr. B suggesting that “an independent group of, say, 3 senior HL [high level] staff from within ITF be assembled to carry out a formal investigation and submit their findings/ recommendations to the Director, ITF (Mr. J) and Head, Facilities Staff.” Such a group, headed by Mr. E, a staff member in ITF, completed its review and produced its report on August 28, 1991.

43. Of the proceedings before Mr. E’s committee, the Applicant has said:

On April 23, 1991, I was questioned by the ITF Panel headed by [Mr. E].... and then on September 20, 1991, by [Mr. F], the Ethics officer.... During each interview, my assumption was that the first item on the questioner’s agenda was to determine whether there was any substance to [Mr. A’s] allegation; I thought that I was being questioned with regard to what knowledge I might have of the alleged actions of my subordinates. Nothing said by the ITF panel....revealed what can now be seen as a much larger agenda.

44. The Respondent has not argued that the ITF Panel investigation constituted the formal investigation required by Staff Rule 8.01, para. 5.02. Instead, it has invoked as the official investigation required by this Rule a process that was carried out by Mr. F, the Ethics officer, accompanied by a colleague (Ms. G). This process was the subject of an extensive report by Mr. F to the Vice President, PA on November 12, 1991.

45. The Report begins by noting that sixteen individuals were interviewed, including the Applicant and his superiors, Mr. C and Mr. B. The Report found that

the proceeds of the sale were used to fund the 1990 ITFPO Christmas party .... No records were kept of the purchases for the party and no donations were requested by it which appears to have made it common knowledge that the reason no donations were requested was because of the copper salvage proceeds.

46. The Report continued:

ITFPO management was passive, and could even be considered derelict, in carrying out its responsibilities in general, with these activities condoned by managers and supervisors up to and including the Section Chief....

ITFPO’s managers expressed little or no knowledge even yet as to the extent of salvaging activity, the dollar amounts, the Bank’s policies....and other information I believe a manager should have pursued at the first indication of wrongdoing. Their ignorance is disturbing and was perceived as condonation of the activity....

It appears that all the managers from Mr. King down knew by December 1990 of three of the four copper sales....Mr. King was told of it at the Christmas party but alleged that since he had been told this by one of the blue collar workers, he ignored it. Only in May 1991 did Mr. King direct [Mr. H] .... to ensure that the copper salvage should cease. This was done at [Mr. B’s] instructions after this matter came to his attention via Mr. King.

47. The conclusions relating to the Applicant were as follows:

20. Mr. John L. King, III, e.o.d. 4/15/85, Chief, Plant Operations, Level 23. Mr. King stated that his first specific knowledge of the salvage was in May of 1991, however, testimony by others indicates that he too was aware by at least Christmas 1990. Demotion to level 22, written reprimand/warning and no 1992 SRI also for burying his head in the sand.

[Mr. J] recommends two months LWOP, no consideration for promotion (as planned) to level 24 instead of a demotion by one level, unsatisfactory SRI rating, and removal from supervisory responsibilities. He (Mr. J) concurs with the written reprimand and warning.

21. I believe [Mr. J's) recommendations regarding these individuals are based on his wishes to send a very strong and clear message about the inappropriateness of their actions....

48. As can readily be seen from the sequence of events, the report by the Ethics Officer was produced in implementation of the Respondent's duty to "investigate" the matter, in accordance with Staff Rule 8.01, para. 5.02.

(iv) When supporting evidence of the alleged matter has been obtained, notification to the staff member that the matter is being investigated and that the allegations warrant an explanation from the staff member; and

(v) Response by the Staff Member

49. It will also be convenient to examine these two stages together, though their separation in Staff Rule 8.01 serves to emphasize their individual importance and the need for the staff member to be clearly notified of the charge against him and to be given an opportunity to reply thereto.

50. The Applicant has complained that "the Respondent has denied me my fundamental right to respond to the charges by never making any charges" and also that "the Respondent denied me my fundamental right to confront hostile witnesses by never revealing the names or the nature of the 'testimony by others' relied upon to draw conclusions regarding my role in this matter."

51. The key document in this connection is the three-page manuscript note taken by Ms. G, who assisted the Ethics officer. Although these notes can be read as notes of an 'investigation', including in particular the activities of the Applicant, there is nothing in them to indicate that the Ethics officer at any point in the discussion suggested that any specific charge or accusation was being levelled against the Applicant in respect of which the latter should prepare a specific response. The Ethics Officer has stated that he told the Applicant that he (the Ethics Officer) was conducting an investigation under Staff Rule 8.01 and suggested that the Applicant should read it. The Applicant admits this, saying: "I read the rule both before and after my interview with [the Ethics officer]" but goes on to state that "[I] was therefore convinced that I was not under investigation, neither having heard any allegations regarding my conduct, nor having heard the slightest indication that my conduct was a subject of the investigation". The Applicant's assertions in this connection are supported by the notes taken by Ms. G.

52. These notes record the Applicant's statements that the first specific reference he had heard to the copper salvage sales was in "May 91," that "at that time he [the Applicant] was unaware" of prior copper sales, that he was "unaware of falsified logs and that logs should be properly kept", that he was not aware that the proceeds of the copper sale were also used for the 1990 Christmas party, and that he had spoken with Mr. B and Mr. C and that "it was the first time [Mr. B] heard of it". But the notes contain no indication that the Applicant was told that others had said that he knew of the copper sales at the time of the 1990 Christmas Staff Party. Nor do the notes convey any suggestion that the Applicant was told that the Ethics Officer was contemplating recommending the disciplinary measures indicated in paragraph 20 of his report to the VPPER and, in particular, that the Applicant might be, punished for "sticking his head in the sand". Likewise, there appears to have been no discussion between the Ethics Officer and the Applicant of why the latter should be disciplined in this respect but not his next immediate superior, or the officer next in line above Mr. B, who had been informed of the matters, it seems, even before the Applicant was.

53. In short, the essential ingredients of due process - the precise formulation of an accusation, the communication of the precise accusation to the Applicant, the giving to the Applicant of an opportunity to rebut in detail the specifics of the charge and the opportunity to invoke all pertinent factors - all these were missing from the procedure followed by the Respondent.



54. The Tribunal does not accept the contention of the Respondent that the Ethics officer had provided the notice required by the Staff Rule simply by telling the Applicant that he (the Ethics Officer) was conducting an investigation into the copper salvage matter, that the investigation could result in the imposition of disciplinary measures and that the Applicant was advised to read Staff Rule 8.01. These assertions do not satisfy the basic requirements of due process which underlie Staff Rule 8.01.

55. The cardinal consideration that must govern this phase of the proceedings is that if disciplinary action is to be taken against a staff member he must know what he is being charged with and must have an opportunity properly to respond specifically to that charge and to deal with the evidence adduced against him.

56. In emphasizing the importance of the distinction between investigating a matter and confronting a staff member with an accusation, the Tribunal must not be seen as insisting on formality for its own sake. Whether the matter is pursued informally, as it may be in less serious cases, or formally, as is desirable in more serious cases, the officer conducting the investigation on behalf of the Bank should not draw conclusions or make positive recommendations for the imposition of disciplinary measures before the staff member whose conduct is impugned has been clearly so informed. When looking into an allegation that conduct has occurred for which disciplinary measures may be imposed, the investigating officer should consider what allegations should be formulated against which staff member, convey those allegations to the individual concerned, with an indication of the nature of the supporting evidence, and give that staff member a full opportunity to answer the allegations orally or in writing, or both. And if, finally, disciplinary measures are imposed upon the staff member, they must be strictly related to the allegations actually formulated and clearly perceived to be in issue in relation to that particular staff member.

57. The Respondent has argued that "it is difficult to fathom how the Applicant failed to understand that his conduct was being investigated"; and that the "Applicant has never stated what additional information or arguments he would have conveyed to the Ethics Officer had he not, as he alleges, failed to understand that his conduct was the subject of the investigation".

58. The answer to these contentions must lie in the fact that at no point does it appear that the Ethics Officer ever put to the Applicant the point that the Applicant had not tried to take corrective action as soon as he learned of the sale of the copper. The question of when the Applicant had first learned of the sales was never conclusively resolved. There were only two possibilities: either, as the Applicant asserts, he did not know of the matter until May 1, 1991, in which case he certainly cannot be charged with having failed to take immediate corrective action, because he then immediately directed that the practice be stopped and informed his superior, Mr. B; or he heard about the matter at some earlier date - which is the only basis on which the disciplinary measures could be justified. But in the latter event the finding against him is unsatisfactory. There is no specific or sufficient proof that the Applicant did so hear at an earlier date. The treatment of the subject in the report of the Ethics officer to the PAAVP is, to say the least, equivocal. Even the Respondent's Answer concedes that "Respondent had no convincing evidence to establish that he [the Applicant] heard any earlier than [May 1, 1991]."

59. The Respondent has suggested that even if the procedure followed in respect of the Applicant is defective, the Applicant still has not been prejudiced. The Applicant, it was contended, has not shown the use to which he would have put any opportunity that he might have been given to respond to a properly formulated accusation. Such an argument is misconceived. It is enough that there has been a serious departure from the requirements of due process. As was said in Gyamfi, Decision No. 28, WBAT Reports [1986], paragraph 47, "The Tribunal cannot be sure that, if the requirements of procedural due process had been followed, the result of the investigation would have been the same...."

60. In any case, it does not require much consideration of the facts to appreciate that if the Applicant had been aware that he was being accused of knowledge of the salvage episode prior to May 1, 1991 and of having failed to take appropriate corrective action, he would have wished to probe in depth the allegation that he knew of the matter as early as Christmas 1990 and to deal with the question of the attribution of responsibility for any

subsequent inaction as between himself and his superiors.

(vi) Decision and

(vii) Notification of the disciplinary measures and of the reasons for imposing them.

61. The actual communication of the decision occasions no difficulty. However, it is clear from what has been said above that a decision taken after a procedure that does not satisfy the requirements of due process cannot be a valid decision. Likewise, a notification which describes the conduct of which the staff member has been accused and found guilty in terms that do not correspond with the substantive content of the case charged against the staff member cannot be a valid notification.

### Substantive Aspects of the case

62. The conclusion thus reached that the procedure followed in this case is so defective as to render null and void the decision taken against the Applicant and to lead the Tribunal to order its rescission is by itself sufficient to dispose of the application and to support the remedial measures which the Tribunal will order. However, since the Tribunal is also empowered to consider the substance of the case made by the Bank against the Applicant, it does not wish to leave any impression that, although the disciplinary measures taken against the Applicant are being quashed on procedural grounds, there remains any basis on which the Applicant can still be thought to have committed the misconduct alleged against him.

63. The Tribunal finds that the Applicant cannot be responsible for a failure to take corrective action as soon as he learned of the removal of the copper when there is no proof that he heard of the matter before May 1, 1991, when there is proof that he reported the matter to his superior, Mr. B, virtually immediately and when there is also evidence that in all likelihood Mr. C had been informed of the matter even before May 1 and within a week or ten days of May 2 and had directed Mr. B to do nothing pending further instructions.

64. There is, moreover, another feature of this case which troubles the Tribunal. The basis on which the Applicant and, it seems, others have incurred disciplinary measures arising out of the sale of the scrap copper is that the metal was disposed of in breach of the provisions in the Bank's Administrative Manual relating to "Asset Disposal". But the Tribunal notes that for the purposes of the relevant sections of that Manual assets are defined as "all tangible property owned by the Bank Group, except for financial instruments and real estate". Yet, the documents before the Tribunal emanating from the Bank state that the question of title to the scrap copper remains unresolved; it could have belonged to the Bank or it could have belonged to the contractors. And though it was indicated at an early stage in the unfolding of the matter that that question would be looked into, there is no subsequent indication that such an examination in fact took place or of what its outcome may have been. In pointing to this aspect of the matter, the Tribunal does not condone the conduct of those who disposed of the scrap, for clearly the material did not belong to them and, unless it was known to have been abandoned, they had no right to deal with it. But as the material could quite possibly have belonged to the contractors, and they having made no complaint regarding the loss (of which, if the material had been theirs, they could hardly have been unaware), it seems strange that the Bank should have reacted so emphatically without first establishing the extent of its own rights in the material disposed of.

### Remedies

65. The Tribunal now turns to a consideration of the measures to be taken to remedy the consequences of the action of the Bank.

66. Evidently, the Respondent itself has felt some uneasiness about the situation because it has gradually removed almost all of the disciplinary measures originally imposed upon the Applicant. However, the Applicant seeks, as he puts it, "quite simply to have the Respondent undo and otherwise rectify all remaining aspects and ramifications of the sanctions improperly taken against me." The Tribunal accepts this plea as a statement of the proper principle to be applied in this case. The disciplinary procedure followed by the Respondent in this

case was quite misconceived. The actions of the Respondent were, in words used by the Tribunal in Gyamfi, WBAT Reports, Decision No. 28 [1986], paragraph 47, “serious enough to warrant a finding that the substantive decisions based upon them were null and void.” The decision must, therefore, be treated as a nullity and, as far as possible, its consequences must be entirely eliminated.

67. The Tribunal must reject the Respondent’s suggestion that “to the extent that any disciplinary measures continue to be imposed upon Applicant, Respondent has not abused its discretion by continuing to impose these rather modest sanctions which did not alter the existing terms and conditions of his employment.” The suggestion that any “disciplinary measures” or even “modest sanctions” should be imposed upon the Applicant implies that his conduct properly attracts such measures or sanctions. But there is no basis for such an implication - either substantively or procedurally. The whole of the procedure taken against the Applicant is fundamentally flawed and it cannot be allowed to lead to such an implication or to such measures or sanctions.

68. In identifying the specific steps that the Bank should take to restore the Applicant’s position to what it was before the disciplinary measures were taken against him, it is necessary to recall that the Bank has already gradually accorded to the Applicant most of the remedies requested in the Application.

69. (i) As regards removal from supervisory responsibilities effective January 1, 1992, the Bank first accepted, on October 29, 1992, the recommendation of the Appeals Committee that “the Appellant’s supervisory responsibilities should be restored only if and when his supervisors are convinced that he has gained the degree of assertiveness required in such a role” and then, on June 28, 1993, reinstated the Applicant in his original position as Chief, Plant Operations, with effect from July 1, 1993. It will, therefore, only be necessary for the Bank to ensure that the Applicant has not suffered any salary loss as a result of his not having held the position of Chief, Plant Operations, for the period from January 1, 1992, to July 1, 1993, for this head of claim to be satisfied.

70. (ii) As regards the 5% net salary reduction, effective January 1, 1992, this was removed on February 4, 1992. Therefore, this head of claim will be met by a payment covering the period from January 1 to February 4, 1992, if such payment has not already been made.

71. (iii) As regards the denial of a salary increase in 1992, the ineligibility was revoked in principle on February 4, 1992, by the PAAVP’s statement that

your manager will take into account this copper salvage incident in determining a salary increase within the guidelines for the Salary Review Exercise.

On October 29, 1992, the VPPA also accepted the recommendation of the Appeals Committee that

the copper salvage incident should be taken into account in determining the Appellant’s 1992 salary increase to the extent it affects the assessment of his managerial performance in general and not as a disciplinary action.

72. The Tribunal recalls, of course, the distinction drawn in Gyamfi, WBAT Reports, Decision No. 28 [1986], between disciplinary actions and actions involving managerial discretion including, in particular, performance evaluation. In respect of the latter, “The final decision in this respect rests with the Respondent as long as the exercise of discretion is not discriminatory, improperly motivated, based on error of fact or otherwise tainted by abuse of power.” (paragraph 40) It is not, therefore, for the Tribunal to substitute its discretion for that of management in deciding the extent to which, if at all, the copper salvage episode could properly have an effect upon the Applicant’s performance rating and associated salary increase as determined by reference to managerial, in contrast to disciplinary, considerations.

73. However, the Respondent, in its Answer stated:

45. Applicant expected that he would receive a performance rating of 4.5 (and consequently a 6.3% salary increase) because this was his rating in 1990 and 1991, before the copper salvage came to light. However, in light of copper salvage, Respondent's rating of Applicant's performance for 1992 has understandably dropped, and he was rated as "fully satisfactory" performance in the middle range of "3" category. Under the 1992 salary increase matrix Applicant could have received a salary increase of at least 2.6% but no greater than 5% .... This actual 4.05% increase places him exactly in the middle of the range.

74. The Tribunal is bound to take note of the fact that this passage was written in April 1993 as part of the pleadings in this case. This was necessarily before the Respondent could have been aware that the Tribunal would hold that the disciplinary process pursued against the Applicant was fundamentally flawed and that there was therefore no sound basis on which the decision taken against him could be procedurally or substantively supported. It is clear that this holding must undermine the considerations set out in the paragraph of the Bank's Answer just quoted. While the Tribunal may not substitute its determination for that made by the Bank, the Tribunal may, and does, say that the Bank's decision regarding the 1992 rating and salary increase, in so far as it appears to have been made on the basis that the Applicant was in some way at fault in the copper salvage matter, is an abuse of discretion, cannot be sustained and must be revised upwards by the Bank.

75. (iv) As regards the written reprimand and the written warning, these have now been removed from the Applicant's file, in accordance with the letter of December 1, 1992, from the Director, ITF.

76. (v) As regards the Applicant's request that his 1992 Performance Review be amended so that any and all references to the copper salvage matter and any consequences thereof are removed, this request is granted.

77. (vi) As regards the request that all references to the copper salvage matter be expunged from the Applicant's personnel file, this request is granted.

78. (vii) There remains for consideration amongst the specific claims of the Applicant only the one regarding denial of promotion from level 23 to level 24. At the date of the original adoption of disciplinary measures against the Applicant, November 26, 1991, he held a level 23 position. Although the Applicant contends that he was entitled to promotion to level 24, there is normally no legal entitlement to promotion. This is a matter of managerial discretion. The basis on which the Applicant founds his claim is that prior to May 1991 there had been discussions between the Applicant and his immediate superior regarding such a possibility and that the Ethics Officer, in his notification of November 26, 1991, to the Applicant of the disciplinary measures imposed on him wrote "no promotion to level 24 as scheduled". The Applicant reads the words "as scheduled" as an indication that the Bank had already committed itself to such a promotion. He also points out that denial of promotion does not appear among the disciplinary measures listed in Staff Rule 8.01, para. 4.02.

79. It is sufficient for present purposes to observe that the reference to "scheduled promotion" did not create an entitlement to promotion unless and until the proper procedures were completed. The Tribunal does not find that the necessary circumstances of clear and unconditional commitment on the part of the Bank to promote the Applicant exist in this case. The claim arising out of denial of promotion must, therefore, be rejected.

80. The Tribunal must now consider, in light of the above, the payments, if any, to which the applicant may be entitled. It is clear that he is entitled to readily quantifiable sums in respect of any arrears of salary that may be due to him as well as to enhancements of future pension payments insofar as the measures adopted in November 1991 may have denied him appropriate increases of salary. The Tribunal does not accept the Applicant's calculations in this regard since they are based on assumptions which are no longer correct. Instead, it accepts the Bank's proposal that the Applicant should receive the relevant salary increases retroactively. Pension entitlements will, of course, have to be made to correspond to the increases. These payments should carry interest at the rates prevailing on the dates when payment was due, compounded quarterly.

81. In addition to the items of damages dealt with above, there remains the question of general damages which

are comprised within the Applicant's request "that the Tribunal eliminate any remaining repercussions to the terms of my employment as a consequence of the copper salvage". The Applicant continues thus:

If the Tribunal grants me this relief, it will not make me whole. Nothing can undo the humiliation, both personal and professional, associated with this matter. However, granting me the relief I seek will mitigate future professional damage to me and will, as Respondent would put it, "send a message" that the Respondent cannot violate Staff Rule 8.01 and the principles of due process, thereby unfairly sanctioning an employee, in Respondent's supposed organizational interests, or for any other reasons.

82. The Tribunal has considerable sympathy with these remarks. The approach which it adopted in Gyamfi, Decision No. 28 [1986], seems appropriate here. The Respondent should pay the Applicant damages in the amount of \$50,000 for the injury caused to him by the failure of the Bank to act in accordance with the requirements of due process and the procedural principles underlying Staff Rule 8.01. In fixing this amount the Tribunal has taken into consideration the fact that the Applicant has suffered unnecessary and considerable intangible injury as a result of the improper treatment to which he was subjected and the fact, on the other hand, that he was kept in the service of the Bank and still has the full opportunity to pursue his career therein.

Decision:

For the above reasons, the Tribunal unanimously decides:

- (i) the Bank's decision of November 26, 1991, must be rescinded;
- (ii) the Applicant shall be put in the same financial position as regards salary, salary increases, pension entitlement and performance evaluation as if the aforesaid decision had never been taken;
- (iii) the Applicant's 1992 Performance Review shall be amended so that any and all references to the copper salvage matter and any consequences thereof are removed and all references to the copper salvage matter shall be expunged from the Applicant's personnel file; and
- (iv) the Bank shall pay the Applicant \$50,000.

A. K. Abul-Magd

/S/ A. K. Abul-Magd  
President

C. F. Amerasinghe

/S/ C. F. Amerasinghe  
Executive Secretary

At Washington, D.C., December 10, 1993



