

Decision No. 215

Pillarisetty Madhusudan,  
Applicant

v.

International Bank for Reconstruction and Development,  
Respondent

1. The World Bank Administrative Tribunal, composed of Robert A. Gorman, President, Francisco Orrego Vicuña and Thio Su Mien, Vice Presidents, and A. Kamal Abul-Magd, Bola A. Ajibola, Elizabeth Evatt and Jan Paulsson, Judges, has been seized of an application, received on February 22, 1999, by Pillarisetty Madhusudan against the International Bank for Reconstruction and Development. The usual exchange of pleadings took place. In addition, a filing by the World Bank Group Staff Association of an Amicus Curiae Brief was accepted by the Tribunal and both parties commented on this Brief. The case was listed on July 28, 1999.

2. The case raises issues related to the entitlements of persons having served as Long-Term Consultants. Such persons received the same benefits as Long-Term Temporary appointees (hereinafter "Temporaries"), and were collectively categorized with the latter as "non-regular staff" (hereinafter "NRS"). For that reason, the rules relevant here overlap with those pertinent to Vera Caryk (Decision No. 214), also decided on this date, which deals with the application of a Temporary.

3. The Applicant joined the Bank in March 1986, at the age of 29. His letter of appointment stated that he would be given a six-month Consultant appointment as an information technologist in the Respondent's Office of the Vice President and Controller. The letter further stated that details relating to policies concerning his appointment were contained in "Notes for Consultants/Researchers" enclosed with the letter. These Notes made clear that Consultants were not eligible for enrollment in the Staff Retirement Plan (hereinafter "SRP") or the Bank-sponsored Group Life Insurance Plan, regardless of the length of their appointment.

4. The Applicant's initial period of appointment would have expired in early September 1986, but shortly before then he was given an extension until June 30, 1987, and before the latter date he was given a further extension until June 30, 1988. He continued in the Controller's Department with the status of a Researcher during most of this time. (Even with his experience before coming to the Bank, the Applicant had not yet qualified for Consultant status because the latter required five years of experience in the specialized field in which his services were required.)

5. The Applicant was subsequently upgraded to Consultant and, effective March 15, 1988, was transferred to the Information, Technology and Facilities (hereinafter "ITF") Department for a period until March 14, 1989.

6. In all written communications relating to these extensions, the Applicant was explicitly informed that the terms of his original letter of appointment remained the same.

7. The Respondent maintains that the Applicant had been hired because of his experience with mainframes with his previous employer, Tata Burroughs. The Applicant was the primary technical staff member in charge of phasing out the Bank's mainframe Burroughs (or Unisys) computer system and of moving toward individual desktop computers. His title was Software System Specialist. The Applicant's performance review (PPR) covering the period from March 1988 to February 1989 showed that his work was well regarded by his immediate supervisor and by his manager. His review referred to his development of software tests and checks for problems which "have been reported to and/or corrected by the Unisys Corporation"; the supervisor added: "I will be looking for Mr. Madhusudan to continue with his excellent work in this area during the next year."

8. The Applicant continued working as a database specialist in the same Department, and as a Consultant, when the Department changed its name from ITF to Information and Technology Services Department (ITS) and then to Information Solutions Group (ISG). He maintains that he worked each year with Regular staff who performed similar work, and who had qualifications similar to his. He further asserts that despite the fact that he was performing equivalent work for equivalent purposes as Regular staff, without the pay or benefits of Regular staff, it was never explained to him why he was treated differently from Regular staff and why his appointment was never converted to Regular.

9. The Respondent explains that the Applicant was among many staff members within ITF holding Consultant appointments. The Respondent points out that a significant portion of the technical information technology work within the Bank had been performed by Consultants. The Respondent asserts that while the Applicant did in fact work alongside some Regular staff in his division, these individuals were supervisory staff, possessed essential skills, had greater seniority or had been provided a Regular appointment before such positions became limited. According to the Respondent, two-thirds of the non-supervisory professional staff in ITF/ISG historically held Consultant appointments. The reasons for that were: (a) information technology specialists were plentiful in the U.S., and there was little reason for the Bank to recruit internationally for these positions; (b) the Bank placed less of an emphasis on international recruitment for non-operational administrative positions involving little interaction with member country clients; (c) although there were demands on ITF to meet institutional system needs, it was not granted authority to add many Regular or Fixed-Term positions unlike the operational units; and (d) the computer field had been undergoing rapid technological change and it was expected that the Bank's skills needs in the technology area would also change rapidly, a development that did not favor indefinite appointments of staff.

10. A communication which the Tribunal considers to have been of particular significance took place on October 9, 1991, when the Acting Director, ITF, addressed a memorandum to the Applicant directly addressing his career prospects within the Bank. The content of this memorandum merits quotation in extenso:

On August 1, 1991, the President asked that a special effort be made to provide regular or fixed-term positions to non-regular staff who meet the following criteria:

- (1) they have had an uninterrupted assignment in the same job for four years or more;
- (2) they meet the Bank's normal recruitment standards;
- (3) they are carrying out work of a permanent nature; and
- (4) regularization makes sense from the point of view of business needs.

As you had less than four years in your current assignment as of September 30, 1991, a final decision on your case cannot be taken at this time. You should be aware, however, that it is unlikely that you will be considered for regularization even if you do accumulate the necessary service. Your manager can share the details of this assessment with you.

This does not alter your eligibility to apply for positions advertized in the VIS [Vacancy Information Service] which continues to be the most likely means of achieving a change in your appointment status.

Arrangements for contract renewal remain unchanged and will continue to be based on the ongoing need for your services.

11. In the Applicant's PPR covering the period from March 1991 to March 1992, his valuable contribution to the division's program was commended by both the Section Chief, ITF Computing Technology Center 1, and the Division Chief, ITF Communications Division. In the Section of the Applicant's PPR dealing with the Development Plan for the coming year, it was indicated that "Mr. Madhusudan desire[d] to remain in the Bank and [would] require reassignment from the Unisys Technology Center before the termination of the Unisys mainframe service (currently targeted end of FY94)."

12. The Applicant's PPR covering the period from March 1992 to November 1992 noted that the Applicant had taken "bold" steps to change and broaden his support capabilities, as a result of the anticipated demise of the Unisys Mainframe Service in the Bank. It concluded that "[a]lthough Mr. Madhusudan has gone through a time of much change in his responsibility areas, especially considering the destiny of the Unisys mainframe service, he has faced and handled them well. He is definitely an asset to keep in the Bank." The Acting Section Chief, ITF Unisys, provided a supplemental review in which he highly praised the Applicant's performance.

13. It is the Respondent's position that the Applicant's appointment was not subsequently converted because his managers did not determine that his skills would be needed indefinitely. In this respect, it notes that two of the four criteria for regularizing Consultant appointments referred to in the Acting Director's memorandum of October 9, 1991, were that the incumbent should be "carrying out work of a permanent nature" and that "regularization makes sense from the point of view of business needs." It therefore concludes that the statements in the Applicant's performance review pertaining to the impending termination of the Applicant's work program, coupled with the memorandum, can only be reasonably interpreted as a decision not to convert the Applicant's appointment. The Applicant, it further states, was satisfied to remain in the Bank as a Consultant and his managers saw a need for his services in that capacity in the short term.

14. The Respondent further claims that in the final years of the Applicant's employment with the Bank (from mid-1994 until the Applicant's resignation in early 1998), Regular and Fixed-Term positions in information technology became available in the Bank, particularly in regional Vice Presidencies because some office technology functions were decentralized. It asserts that there is no evidence that the Applicant applied for such positions and speculates that the Applicant explored career opportunities elsewhere.

15. In an affidavit dated June 22, 1999, the Applicant indicates that despite an assertion by the Respondent that it did not offer him regularization because the Unisys mainframe on which he had been instrumental was being phased out in 1991-92, the Respondent itself conceded that during this phase-out the Applicant was able to prepare himself for a smooth redeployment into full-time administration and technical support. The Applicant points out that he was employed for more than six years after a 1991 notification that he would not be regularized due to the transition. The Applicant reiterates that he was instrumental to the transition to desktop computers from the Unisys system, and long thereafter.

16. He further asserts in his affidavit that he was told, on several occasions, by managers in ITF that the number of predetermined slots for regularization was limited, despite the growing number of NRS. It was implied, he states, that the appealing of his non-regularization would not have helped since no more than the official number of slots would have been regularized. Lastly, the Applicant notes that he supervised two to three Long-Term Consultants and that he conducted the performance review of a Regular staff member. The Applicant stresses that he worked each year with Regular staff who performed similar work and who had similar qualifications, but who earned more base pay than he did.

17. On January 15, 1998, the Applicant sent a letter of resignation to his manager, stating that the time had come for him to continue the development of his career and professional interests elsewhere. He indicated that he had accepted an offer with another firm and that his last day of work would be January 30, 1998. The Applicant's resignation was accepted and became effective on January 30, 1998. The Applicant was 40 years old at the time of his resignation. In its pleadings, the Respondent notes that the Applicant's compensation and benefits improved consistently over the duration of his employment with the Bank.

18. The Applicant submitted a request for administrative review to the Chief Information Officer, ISG, in which he claimed past pension credits under the SRP for his entire past service with the Bank. He submitted, in similar words, a request to the Manager, Pension Administration, for participation in and pension credits under the SRP for his entire past service with the Bank.

19. The Applicant's request for administrative review was forwarded by the Chief Information Officer, ISG, to the Vice President of Human Resource Services, who wrote to the Applicant on May 28, 1998, stating that for a number of reasons he could not accede to the Applicant's request for retroactive participation in the SRP, but

suggesting that he might have his request considered by the Pension Benefits Administration Committee (hereinafter "PBAC").

20. The Applicant submitted his request to the PBAC on August 17, 1998. In the request, he denied that he had received the Notes for Consultants at the time he was hired in 1986 or any time thereafter. He claimed entitlement to benefits under Section 2.1(b)(iii) of the SRP on the basis that it included Consultants as participants. He claimed that he had performed equivalent functions and duties, under equivalent conditions of work, as Regular staff, and that he was therefore entitled to the same pension benefits as Regular staff under Principles 2.1 and 6.1 of the Principles of Staff Employment. He also invoked the decision of the Asian Development Bank Administrative Tribunal (hereinafter "ADBAT") in Amora v. ADB (ADBAT Decision No. 24 [1997]), which proscribes, or so he contended, *détournement de procédure*. The Applicant further stated that when he initially joined the Bank, he understood that he would not be entitled to pension benefits that year. He added, however, that he did not know that he would perform the equivalent work as Regular staff for close to 12 years and yet still be denied Regular status "by the Bank's improper conduct of repeatedly using successive contracts of short duration to deny [him] pension benefits that equivalent regular staff receive." The Applicant further maintained that he timely filed his request within 90 days of his separation from the Bank.

21. His request was denied by a decision of the PBAC, notified by a letter dated November 24, 1998, from the Manager, Pension Administration, who informed the Applicant that he had not held "an appointment type that would have made you eligible for participation under [Section] 2.1 at any time during your Bank employment."

22. Before this Tribunal, the Applicant contests the denial of SRP participation, the denial of credit for all Bank service under the Bank's SRP, and the denial of all other benefits from March 1986 until his resignation.

23. The Respondent has raised a number of jurisdictional objections before the Tribunal, contending broadly that the right of action has lapsed due to the Applicant's failure to exhaust internal remedies in a timely fashion. This would imply that there was a particular moment when there was a misclassification which the Applicant could, and should, have challenged. There is, however, a difficulty in positing that the relevant date of the *détournement de procédure* is that of the alleged misclassification, because it is a central tenet of the Applicant's case that the wrongfulness of the Respondent's conduct must be evaluated retrospectively, to see if an initial ostensibly innocent appointment ultimately matured into an impermissible retention of the Applicant in an inappropriate classification. As the Applicant puts it in his reply:

Mr. Madhusudan does not claim that he was improperly treated by a single decision at a single point in time denying him regularization. Rather, he claims that over the course of his career, he met all the functionally justifiable criteria for being regular staff, yet was cumulatively mistreated and never granted pension participation and benefits that regular staff receive.

24. The Tribunal does not, however, need to resolve whether these difficulties with respect to the Respondent's objections are decisive as a matter of jurisdiction. The Tribunal considers it to be of overriding importance that the Respondent did not raise them before the PBAC. It should be noted first of all that Section 10.2(f) of the SRP gives an exceptionally broad definition of the authority of the PBAC, to

decide all questions of interpretation of the Plan provisions relating to participation, retirement, elections, and benefits, and any claim of any person for benefits or other payments under the Plan. (Emphasis added.)

The PBAC decided the claim on the merits without having any reason to consider jurisdictional impediments which were only articulated thereafter. That the Applicant initiated his action before this Tribunal in a timely fashion, by reference to the date of the PBAC's decision, is beyond dispute. Moreover, the PBAC clearly rejected the Applicant's contention that he was entitled to retrospective regularization under the Amora principle and did so on the merits. Not only did the Respondent not challenge the PBAC's authority to decide this issue, but it had indeed referred the Applicant to the PBAC in the first place.

25. As to the merits, the Applicant contends, in effect, that because he rendered services for close to 12 years that were in substance the equivalent of those rendered all about him by Regular staff, he is entitled now to be

accorded a variety of financial benefits – particularly, pension benefits – that attach to such staff members. The Applicant has relied to a considerable degree on the Amora case, which was rendered by the ADBAT. As such, the Amora decision is not binding on the present Tribunal. On the other hand, the Tribunal considers that a harmony of views of similar international jurisdictions is to be welcomed, if possible, and of course the Tribunal will be influenced by persuasive analysis whatever its source.

26. The Tribunal does in fact find the Amora decision persuasive, but clearly distinguishable from the present case as the facts here are quite different.

27. The applicant in the Amora case was a clerical worker; he operated copying machines for 16 years. During all that time, the ADB treated him as an “independent contractor” until he was offered regular appointment 22 months before his 60th birthday. He was then required to retire from service at age 60 (in accordance with Staff Regulations, and against the applicant’s desire to continue to age 65) with the result that he ended up with an extremely small pension.

28. In the Amora case, two features appear salient. First, the applicant was an essentially unskilled office laborer whose tasks could readily have been performed by practically anyone. To consider someone in that position to be an “independent contractor” seems an abuse of language. His work was routine and fungible, not a specific task in the framework of a mission limited in time or expected to be terminated with the achievement of particular goals. The ADBAT properly refused to accept a characterization which did not reflect the true relationship between the parties. Secondly, Mr. Amora was never offered a regular position until a time when it was almost too late to be a practical benefit to him, given the decision to retire him within less than two years.

29. In the Amora case, there appeared to be no valid reason for having treated the applicant as an “independent contractor” and denying him the benefits of a regular staff member. Indeed, the Respondent ADB practically admitted as much in portions of its pleadings quoted in the judgment, when it spoke of “expediency” and “efficient functioning.” An authority which seeks to justify its miscategorization of persons subject to its power on such grounds is likely to be found guilty of abuse.

30. The Applicant relies on the Amora decision for its invocation of the doctrine of *détournement de procédure*. *Détournement de procédure* (broadly, abuse of procedure) is a subcategory of *détournement de pouvoir* (abuse of power). *Détournement de pouvoir* is extant whenever the authority in question exercises its power for a purpose different from that for which its power was attributed to it, or whenever there appears to be no valid reason for the exercise of the power (which therefore is challengeable for arbitrariness). The ADBAT held in its Amora decision that if a label given to a relationship was merely a device to deny the employee regular staff benefits, it should be disregarded.

31. The instant case does not, however, present such a pattern. An immediately obvious difference is that while Mr. Amora was treated as an “independent contractor,” the Applicant had a staff appointment and was subject to the provisions of the Principles of Staff Employment and the Staff Rules. These texts entitled the Applicant to a range of standards by which to verify that he was treated correctly, and to a mechanism by which he could seek redress if these standards were neglected or violated. Moreover, the Applicant had special skills of particular relevance to requirements on the part of the Respondent which were reasonably conceived as being of a transitory nature, namely a discrete program of conversion of information technology. Although the Applicant states that he performed work similar to that of Regular staff members whose qualifications were similar to his, the word “similar” covers a vast range of possibilities. The Applicant has not proffered a meaningful analysis in this respect, and the Respondent has pointed out that two-thirds of non-supervisory professional staff in ITF/ISG historically held Consultant appointments. The Respondent has explained plausibly that it perceived the computer field as one of rapid technological change, that it expected its requirements in terms of skills in this area to evolve apace, and that it was therefore a domain particularly well-suited to NRS appointments.

32. The Tribunal finds this position persuasive. It is consistent with Personnel Manual Statement No. 2.05, which had been issued in February 1983 (i.e., well before the Applicant’s initial appointment) and which in



Section 4 defined Consultants (and Researchers) as persons “holding an appointment ... to supplement the regular staff by providing specialized knowledge and experience needed in particular activities.” Moreover, it corresponds to facts of the marketplace which are well-known to professionals in the information technology area – and ones which do not necessarily work against their interests.

33. As observed above, the Applicant’s PPR for 1991-92 specifically noted that he wished to “remain in the Bank,” a remark which would hardly be made with respect to someone who understood himself to be a de facto permanent employee. Any doubt in this respect is dispelled by the fact that the same PPR referred to the need to find other tasks for the Applicant “before the termination of the Unisys mainframe service” – the conversion of which had been the focus of the Applicant’s work.

34. Noting that he continued to work on the installation of the desktop system now in place for a number of years after the phase-out of the mainframe system, the Applicant stresses in his reply the point that “the work he was performing continues to this day.” This may be so – although it cannot be said that the Applicant has sought to make a substantiated demonstration of this fact – but it is wide of the mark. The crucial element is whether it was inevitable, or at least plainly foreseeable, that the Consultant’s tasks would extend into what for all intents and purposes was the indefinite future. This was the case with Mr. Amora (copying will always be necessary); but not with respect to Mr. Madhusudan. By the standards applied in the Amora case, Mr. Madhusudan has not shown that his successive appointments were “made only to deny employees security of tenure or other conditions and benefits of service.”

35. The Tribunal is not impressed by the Applicant’s contention that his original letter of appointment (see *supra* para. 3) was not in fact accompanied by the relevant Notes for Consultants/Researchers. These Notes were referenced in the letter, so even if perchance it were true that they were omitted from the envelope the Applicant has only himself to blame if he did not procure a copy. Nor is the Tribunal impressed with the Applicant’s complaint to the effect that he did not know in 1986 that he would end up doing work equivalent to that of Regular staff and yet not have Regular status. This was undoubtedly true as a matter of literal fact, but equally it must be allowed that the Respondent did not know that such would become the history of the Applicant’s association with the Bank – let alone have harbored the intention of depriving him of Regular status by a subterfuge.

36. The Respondent additionally points out that the Applicant could at any time after March 1992 have requested to be converted prospectively under Staff Rule 4.01, Section 7, and then requested administrative review if his request had been denied. (Certainly this ought to have been his emphatic approach if he believed that NRS of Indian nationality were the object of discrimination, as he now unpersuasively suggests.) The Applicant concedes in his reply that “his initial appointment type was rational and permissible at the time of his appointment.”

37. The Respondent has also noted that a number of Regular and Fixed-Term positions offering full pension benefits in information technology became available from mid-1994 until the Applicant’s resignation. This is not denied by the Applicant, who not only does not seek to demonstrate that he applied for any such position, but affirms that he did not do so in the alleged belief that it would have been futile. The Respondent affirms positively in its rejoinder that it can find no record of the Applicant ever seeking an alternative position.

38. The memorandum of October 9, 1991, informed the Applicant before he had reached the four-year mark of his work with the Respondent that “it is unlikely that you will be considered for regularization even if you do accumulate the necessary service.” It noted – as seen in paragraph 10 above – that the Applicant’s manager could “share the details of this assessment” with him, and that he remained eligible to pursue positions advertised in the Vacancy Information Service (hereinafter “VIS”).

39. This was an important message. The Applicant was being told with considerable emphasis (“you should be aware”) that he would not be regularized within his department even if he stayed on. The Applicant has offered no evidence of any reaction on his part to this memorandum. He does not allege that he sought to inform himself further as to the “details” of this “assessment” of his prospects (whether they pertained to his person, to

the limited duration foreseen for his tasks, or to policy in relation to information technology Consultants in general) – let alone that he sought to convince the department to modify this assessment. Nor does he allege that he applied himself to utilizing the VIS. To the contrary, the Applicant's attitude seems to have been one of passivity, as he continued to work in the same department without demur. His annual percentage salary increases from 1991 onward do not seem an irrelevant consideration in this connection: 8.4%, 9.3%, 4.5%, 2.2%, 10%, 4.6%, and 6.2%.

40. The Applicant's explanation that he did not seek regularization because "[i]t was implied that any regularization appeal would be futile, since no more than the official number of slots would be regularized" is, in the Tribunal's view, entitled to no weight. It would be impossible for the Respondent to operate an effective internal grievance procedure if it could be disregarded by applicants who affirm that they were dissuaded from using it by inferences they make from alleged comments by managers. An applicant who proves that he or she has in fact been dissuaded from seeking internal redress will be listened to with the greatest seriousness by the Tribunal, because such acts could constitute a subversion of the system, but vague assertions such as the one made in this case will not do. This is all the more so in a setting where staff members are in a position to seek legal advice; to seek the views of the Staff Association; or to take the matter up with the Ombudsman or an Appeals Committee counselor. There is no shortage of discreet ways to assess the viability of a grievance.

41. The Tribunal finds that the allegation of abuse of power has not been substantiated.

42. In addition to asserting a claim to benefits under the SRP based upon an alleged de facto regularization over the course of his service, the Applicant has sought to rely on Section 2.1(b) of the SRP, which defines the "persons who have not reached their normal retirement dates [but] shall also be participants in the Plan," and includes among the listed categories:

- (i) the President of the Bank;
- (ii) an Executive Director, an Alternate Executive Director, an Advisor to an Executive Director and an Executive Director's Assistant; and
- (iii) a person employed by the Employer on a Fixed-Term appointment or on a Part-Time appointment of indefinite duration or for a specified term of one year or more.

The Applicant urges the Tribunal to conclude that the Plan should be interpreted to provide for participation by NRS, as a person employed "for a specified term of one year or more."

43. In the Tribunal's view, the plain language of this provision commands a different conclusion, namely that the phrase "or for a specified term of one year or more" does not constitute an autonomous definition of the personnel covered by this provision. In its context, the phrase is plainly relevant only to staff holding Part-Time appointments. This reading is confirmed by the consideration that any other interpretation would render redundant the references to other appointment types in Section 2.1(b). The Tribunal therefore agrees with the position taken by the PBAC in its letter of November 24, 1998, that Section 2.1(b)(iii) identifies two categories only, and not a third one "consisting of persons employed by the employer 'for a specified term of one year or more.'"

44. By way of confirmation, the Tribunal notes that even if there were an ambiguity in this regard, NRS were on notice that the Respondent has always read this provision as the Tribunal now does by the following accessible documents:

- Paragraph 3 of the Personnel Manual Statement No. 3.26 (issued as early as May 1977) stated flatly: "Temporary Staff and Consultants are not eligible to participate in the Plan."
- The World Bank Group Staff Retirement Plan Handbook (in the May 1993 version submitted to the Tribunal) in its section on "Eligibility" lists the personnel as identified in Section 2.1(b), and then states

clearly: "Participation in the SRP is not allowed for a staff member on any other type of appointment."

45. The Staff Association, as Amicus Curiae, has raised more general concerns relating to the Bank's employment policies. It has explained, in its Brief, that Temporaries and Consultants are not offered pension participation and certain other benefits and that such appointments were appropriate only for work of a limited, short duration. Moreover, it affirms that during a number of years an unhealthy practice developed on the part of the Bank to make hundreds of indiscriminate appointments to such positions in a manner that degenerated into a de facto circumvention of established development policies.

46. These points are worthy of consideration, and have been extensively discussed in the pleadings before the Tribunal, but are not conducive to the assessment of individual cases. By their general nature, they militate in favor of the reform of relevant rules – and in this respect they already appear to have prevailed. As of 1990, Consultants and Temporaries having served for 18 months were allowed to apply for vacancies on equal footing with Regular or Fixed-Term staff. A four-year limit was applied to new Consultants and Temporaries – it being recognized that then existing Consultants or Temporaries were anxious not to be cut off. Shortly thereafter, the Director, Personnel Policy Department, informed all staff that data had been collected from departments where Long-Term Consultants and Temporaries had been working in the same assignment for at least four years with the objective of identifying areas where the work done by Consultants would be more appropriate for Regular appointees, and that as a result a number of offers of Regular appointments had been extended.

47. In August 1991, the Bank's President issued a memorandum specifically addressing the issue of regularizing NRS. He stated that a special effort was to be made to provide Regular status to NRS who met the four criteria reiterated by the Applicant's manager in the memorandum sent to the Applicant two months later (see *supra* para. 10):

- (i) uninterrupted assignments in the same job for four years;
- (ii) fulfillment of normal recruitment standards;
- (iii) assignment of tasks of a permanent nature; and
- (iv) regularization consistent with a rational business purpose.

48. A report prepared by an NRS Work Group in 1994 explained that a new proliferation of Long-Term Consultants could be explained by "a highly decentralized recruitment practice" and by "dollar budgeting." It cautioned that "acquired employment rights" could become a serious issue with NRS who have served for many years. On the other hand, it noted that fees for Consultants sometimes include a margin for the lack of retirement and other benefits, and recommended that such margins should be made more explicit and transparent.

49. These examples of policy initiatives or studies from the later periods of the Applicant's association with the Respondent are not exhaustive. They show that the Respondent, far from being involved in a *détournement de pouvoir* and *détournement de procédure*, was sensitive to a wide range of different, and occasionally conflicting, factors. The task of the Tribunal cannot possibly be to judge whether the Respondent could have been wiser.

50. To determine whether individual applicants have a legitimate grievance, then, the circumstances of their particular cases must be examined. They may prevail not because the rules which governed their activity had *generally* deleterious effects, but only if they have suffered a *détournement de procédure* and *détournement de pouvoir* in the particular instance of application. This has not been demonstrated.

51. The Tribunal thus observes that when the Respondent's Director of Personnel referred to the fact that the use of Consultants, in lieu of Regular staff and without offering them pension benefits, had by 1988 become an "anomaly," this meant that there was an anomaly at the macro level of rules and policy – it did not mean that



every case under the rules was itself necessarily anomalous.

52. The record in this case does not reflect a pattern of abuse amounting to a *détournement de procédure* in its dealings with the Applicant. This conclusion is entirely consistent with the fact that in 1998 the Respondent decided to phase out NRS, and to allow continuing NRS to join the pension scheme of the SRP.

### **Decision**

For the above reasons, the Tribunal unanimously decides:

(i) to dismiss the application; and

(ii) to order the Respondent to pay to the Applicant costs in connection with the jurisdictional phase of the proceedings in the amount of \$4,000.

Robert A. Gorman

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President

Nassib G. Ziadé

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Executive Secretary

At Washington, D.C., October 1, 1999