

Decision No. 201

Brian J. McCall,
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal has been seized of an application, received on November 4, 1997, by Brian J. McCall against the International Bank for Reconstruction and Development. The case has been decided by a Panel of the Tribunal, established in accordance with Article V(2) of its Statute, composed of Robert A. Gorman (President of the Tribunal) as President, A. Kamal Abul-Magd, Bola A. Ajibola and Elizabeth Evatt, Judges. The usual exchange of pleadings took place. The case was listed on September 21, 1998.
2. This case deals mainly with the Applicant's claim that the decision of the Respondent, based on the findings of an investigation that the Applicant's allegations of misconduct by his supervisor and by a colleague were unfounded, was erroneous. The Applicant also claims that he was forced to resign from the Bank and that the Respondent failed to counsel him respecting his rights regarding the signing of a Mutually Agreed Separation (MAS) agreement. In addition, the Applicant also contends that his draft 1995 performance review "contained unfounded and unsubstantiated negative allegations" regarding his performance.
3. The Applicant joined the Bank in June 1986 and, at the time of the contested decision, worked as an Operating Engineer, level 17, in the General Services Department (GSD) Facilities Operations and Maintenance Unit (GSDFO).
4. The core of the Applicant's complaint has to do with what happened during and after a meeting that took place on October 23, 1995 between the Applicant, his supervisor and other operating engineers. During that meeting, a disagreement ensued between the Applicant, his supervisor and an Operating Engineer (hereinafter "Operating Engineer X") regarding the Applicant's participation in the by-passing of one of the safety switches on the "No. 1 Chiller" in one of the buildings of the Bank. The Applicant's supervisor in a memorandum of the same date stated his criticism of the Applicant's behavior.
5. On October 25, 1995, the Applicant met with the Ethics Officer to report that he had been "verbally harassed" during the meeting of October 23, 1995 by his supervisor and by Operating Engineer X and that he had been "physically assaulted" by his supervisor after he left the meeting. On October 27, 1995, the Ethics Officer interviewed another Operating Engineer (hereinafter "Operating Engineer Y") who, the Applicant alleges, had witnessed the Applicant's supervisor "physically accost [the Applicant], grabbing him from behind, around the chest and arms; jerking and shoving [the Applicant] toward his office." According to Operating Engineer Y, the Applicant had responded "in a normal tone of voice, 'Please let me go ... just give me 5 minutes.'" The Applicant has produced an undated but signed statement from Operating Engineer Y to that effect. The Respondent claims that, during interviews with the Ethics Officer and the Applicant's Section Chief, Operating Engineer Y never mentioned any use of physical force by the Applicant's supervisor.
6. On November 2, 1995, the Ethics Officer notified the Applicant's supervisor of the allegations against him, advised him that he would be conducting an investigation under Staff Rule 8.01 ("Disciplinary Measures") and requested that a written response be provided to the Applicant's allegations.
7. In his response addressed to the Ethics Officer on November 7, 1995, the Applicant's supervisor admitted that he had raised his voice during the meeting of October 23, 1995 and that he had been wrong in doing so.

He contended that after the meeting he had asked the Applicant to come into his office a couple of times and that, as the Applicant stood there without responding, he walked up to the Applicant, put his left arm around the Applicant's left shoulder and asked the Applicant to come into his office for a discussion. Also on November 7, 1995, the Applicant wrote a letter to his supervisor rebutting his recollection of the events involving the "No. 1 Chiller" and of the meeting of October 23, 1995. He reiterated his allegations of verbal harassment and physical assault and stated that it was the Applicant's supervisor's and Operation Engineer X's behavior that was unprofessional.

8. On November 8, 1995, Operating Engineer X sent a letter to the Ethics Officer in which he asserted that his character had been attacked by the Applicant's allegations. He stated that at the meeting of October 23, 1995 the Applicant had at no time tried to explain the facts rationally and had been defensive and argumentative.

9. From November 11 through December 29, 1995 the Applicant was placed on administrative leave pending completion of the investigation by the Ethics Officer. During this period, the Ethics Officer and the Applicant's Section Chief interviewed attendees of the October 23, 1995 meeting. While the attendees acknowledged that voices had been raised during the meeting, the Respondent argues that none corroborated the Applicant's allegation of physical assault.

10. Following his return to duty in January 1996, the Applicant was reassigned to another team within the Unit. On January 17, 1996, the Applicant's supervisor provided the Applicant with a written apology for having lost his temper and for having raised his voice during the meeting of October 23, 1995. In January 1996, the Applicant met with the Ethics Officer who orally informed him that neither he nor the Applicant's Section Chief had found anyone able to confirm the Applicant's allegations.

11. On January 18, 1996, a meeting was held between the Applicant, his Section Chief and the Staff Officer of the Facilities Management Division, where the possibility of the Applicant leaving the service of the Bank with an MAS package was discussed. There is disagreement between the parties as to who initiated the discussion.

12. In a memorandum to the Division Chief, GSD, Facilities Management Division (GSDFM) dated February 20, 1996, the Applicant stated that he had discussed with his new supervisor his 1995 performance review and that, in his judgment, the performance review contained unfounded and unsubstantiated allegations regarding his performance. He expressed his belief that it would not be possible to find a satisfactory resolution with respect to either his performance review or the previous incidents of workplace harassment. To this memorandum the Applicant attached another memorandum addressed to his Section Chief and dated February 20, 1996 in which the Applicant tendered his resignation from the Bank effective March 21, 1996. Among other things, the Applicant mentioned his intention to appeal "the inconclusive action taken in regard to the unwarranted verbal harassment [he] was subjected to ... and the equally unwarranted physical assault on [him] ... shortly thereafter." He also stated that he would appeal his 1995 performance evaluation.

13. Following discussions with his Section Chief and the Division Chief of GSDFM, the Applicant retracted on March 7, 1996 the "statements" contained in his resignation letter of February 20, 1996. On March 12, 1996, the Applicant was presented with the terms and conditions of an MAS package which included provisions on the duration of the Applicant's regular work, pay and special leave status, the funding of outplacement counseling and/or special training activities and his relinquishment of his right of appeal of all claims that he had against the Bank Group. The Applicant signed the MAS agreement on March 15, 1996. On March 21, 1996, the Applicant sent a memorandum to the Manager, Human Resources Group, Institutional Team (HRGIN), stating that he had not initially fully understood the terms and conditions of the MAS document and that, after further discussion with the Human Resources Officer, HRGIN, he clearly understood the conditions of the MAS and fully elected not to accept them. He also stated that he would not retract his letter of February 20, 1996 to his Section Chief concerning his resignation and related appeals and that his resignation would be effective as of March 21, 1996.

14. On March 27, 1996, the Applicant sent a memorandum to the Ethics Officer referring him to an earlier memorandum to him of November 6, 1995, where the Applicant had requested a written response on the

progress of the investigation and on the time of an expected “resolution.” The Applicant repeated his request for a written response to his memorandum of November 6, 1995.

15. In his reply to the Applicant dated April 15, 1996, the Ethics Officer explained, among other things, that the Applicant’s supervisor had denied assaulting him and that neither the Applicant’s Section Chief nor himself had found anyone who was able to confirm his allegation. The Ethics Officer further stated that there was a report of the Applicant’s conduct in the October 23, 1995 meeting and that the report conveyed the Applicant’s “dissatisfaction with what the conductor of the meeting was saying.” The Ethics Officer concluded that in the light of the apology by the Applicant’s supervisor, the lack of support for the allegation of assault and the change in work arrangements, both the Applicant’s Section Chief and the Ethics Officer considered that the Applicant’s complaint had been fully addressed.

16. In a letter to the Vice President of Human Resources dated June 21, 1996, the Applicant requested an administrative review of the decision communicated to him by the Ethics Officer’s letter of April 15, 1996. On July 17, 1996, the Vice President, Human Resources, responded to the Applicant’s request by stating that he had no right to an administrative review in this case because he could not appeal the findings on the degree of guilt by another. On August 16, 1996, the Applicant filed an appeal with the Appeals Committee against this decision. In its Report, issued on August 12, 1997, the Committee concluded that there was no abuse of discretion in the decisions challenged in the appeal but that there were serious lapses in procedure, both in terms of the process of the Ethics investigation, and in the lack of “proactive management” that contributed to an unfortunate outcome in the case. The Committee recommended that relief be granted in the amount of \$10,000 as redress for the procedural shortcomings that led to a significant loss of income and benefits by the Applicant. The Acting Vice President, Human Resources, accepted the Committee’s recommendation and issued a check for \$10,000 to the Applicant.

17. The relief sought by the Applicant before this Tribunal includes immediate reinstatement of employment with the Bank under conditions that would preclude continued harassment and breach of conditions of employment. The Applicant also requests the payment of compensation for lost wages and benefits, for injuries resulting from the alleged verbal and physical assault of October 23, 1995 and for loss of professional standing and wages occasioned by the Applicant’s forced resignation. He further requests the payment of costs.

18. The Tribunal first notes that the Applicant contests the “decision” of the Appeals Committee as stated in its Report, dated August 12, 1997, and requests its rescission under Article XII, paragraph 1, of the Tribunal’s Statute. The Tribunal considers the application to be misdirected. As the Tribunal has ruled in the past, the Appeals Committee is not a judicial body rendering decisions, and “there is no such thing as an Appeals Committee’s ‘decision’ which could be challenged before the Tribunal.” (Carter, Decision No. 175 [1997], para. 22.) The Tribunal is “not a court of appeal from the Appeals Committee and does not review the manner in which the Appeals Committee has dealt with a case before it.” (de Raet, Decision No. 85 [1989], para. 54.) The Tribunal’s task is to pass judgment upon whether the Bank has violated the contract of employment or terms of appointment of the Applicant. (Lewin, Decision No. 152 [1996], para. 45.) It is not its function to review the Report of the Appeals Committee. (*Id.* para. 44.) On the basis of the above jurisprudence, the Respondent asserts that the application should be dismissed for failure to state a claim cognizable by the Tribunal.

19. The Tribunal, however, has also ruled that “it is its duty, as it is the duty of every international tribunal, ‘to isolate the real issue in the case and to identify the object of the claim...; this is one of the attributes of its judicial functions’ (*Nuclear Tests (Australia v. France)*, *Judgment of December 20, 1974*, *I.C.J. Reports 1974*, p. 262).” (McNeill, Decision No. 157 [1997], para. 26.) It appears from the Applicant’s pleadings that his application is directed against the decision of August 15, 1997 of the Acting Vice President, Human Resources, who accepted the recommendation of the Appeals Committee to deny the Applicant’s requests for relief and to award him \$10,000 for procedural errors. The Acting Vice President’s decision confirmed the earlier decision of the Respondent conveyed to the Applicant in the Ethics Officer’s memorandum of April 15, 1996 that the Applicant’s complaints had been fully addressed. It is this decision that the Tribunal will now review.

20. The Respondent argues that staff members who bring allegations of misconduct against other staff

members and who then disagree with the outcome of the Bank's investigation do not have the right to challenge the manner in which the investigation was conducted or its outcome and that to allow such challenges would lay open the Bank to a multitude of claims from dissatisfied staff. On this point, the Tribunal has held that the Bank has a duty to an accusing staff member "to refrain from acting arbitrarily, capriciously or discriminatorily, or without due process of law, when considering his or her accusations against another staff member, in any event when in the setting of a formal investigation." (*McKinney (No. 2)*, Decision No. 194 [1998], para. 11.) "Just as an accused is entitled to an investigation that does not amount to an abuse of discretion, the same is true for an accuser. It would make a mockery of the requirements set forth in Staff Rule 8.01 if the Bank were allowed to discharge [the investigation] without affording due process to both the accuser and the accused..." (*Id.* para. 12.) Although, there is no obligation for the Bank always to adopt the course of action urged by a complaining staff member, a review of an investigation or a report of an investigating officer for arbitrariness or lack of due process "is appropriate and can properly take account of the needs of the investigating officer for flexibility, confidentiality and the like. There is no reason to believe that allowing such review will seriously impede the operations of the Bank." (*Id.* para. 13.)

21. The Tribunal, therefore, will in this case examine whether the Respondent's decision constituted an abuse of discretion. It appears that after the Applicant reported his allegations, the Ethics Officer and the Applicant's Section Chief interviewed the individuals concerned and a number of attendees at the meeting. Operating Engineer X denied the verbal harassment charge; in fact, he even denied that he made statements that the Applicant attributed to him. The Applicant's supervisor stated that he merely raised his voice during the meeting of October 23, 1995 and that he was wrong in doing so. He apologized to the Applicant in writing for this misbehavior. Both the Applicant's supervisor and Operating Engineer X also claimed that the Applicant was defensive and argumentative. In his memorandum of October 23, 1995 (*i.e.*, the day of the incident), the Applicant's supervisor described the behavior of the Applicant as "insubordinate, unprofessional, and not acceptable to the continued well being of our unit." The attendees at the meeting have verified that voices were raised at the meeting, including that of the Applicant. Under Staff Rule 8.01, paragraph 3.01, harassment is an incident of misconduct justifying the imposition of disciplinary measures.

22. The Tribunal cannot find, on the basis of the evidence before it, that the behavior of the Applicant's supervisor and of Operating Engineer X constituted verbal harassment amounting to misconduct under Staff Rule 8.01, especially since their comments were made in an atmosphere of a heated discussion in which many, including the Applicant himself, were apparently vigorous participants.

23. Physical assault is also another form of misconduct under Staff Rule 8.01 that allows for the imposition of disciplinary measures. The Applicant's supervisor has denied the accusation of physical assault, admitting only to putting his arm around the Applicant's shoulder to guide him into his office to discuss their disagreement. Despite the Applicant's assertions that he was assaulted by his supervisor after the conclusion of the meeting, there appears to be no corroboration of this allegation by any of the attendees of the meeting of October 23 except for a letter written by one of the attendees, Operating Engineer Y. This letter is signed but is not dated. The parties do not dispute the fact that Operating Engineer Y was interviewed by the Ethics Officer on October 27, 1995. Although the Applicant claims that Operating Engineer Y provided the Ethics Officer with this undated statement at the time of their meeting on October 27, 1995, the Respondent denies that this undated statement was made available to the Ethics Officer or the Applicant's Section Chief during the investigation and asserts instead that it was submitted only after the investigation had been completed as an attachment to the Applicant's request for administrative review.

24. The Tribunal notes that the Ethics Officer did not refer to Operating Engineer Y's statement in any of his communications to the Applicant, including his letter of April 15, 1996 conveying the outcome of the investigation. On the contrary, he clearly stated that both he and the Applicant's Division Chief were unable to find "anyone who was able to confirm [the Applicant's] allegation." If the Ethics Officer had had at the time of his investigation a corroborating statement from Operating Engineer Y, he would not likely have stated that they were unable to find "anyone" to confirm the Applicant's allegation of physical assault. Moreover, it appears that at no time before filing for administrative review did the Applicant assert that such a corroborating statement from Operating Engineer Y existed. The Tribunal has no evidence indicating that the Ethics Officer and the

Applicant's Section Chief had this document in their possession during the course of the investigation or, if they did, failed to take it into consideration.

25. The Tribunal finds, therefore, that it has not been established that there has been an abuse of discretion by the Respondent with regard to the investigation of the Applicant's allegation of verbal harassment and physical assault.

26. The Tribunal will next examine whether there was any procedural irregularity during or after the investigation. As explained below, the Tribunal concludes that a procedural irregularity has indeed occurred.

27. In response to the Applicant's allegations, a preliminary inquiry into the matter was undertaken pursuant to Staff Rule 8.01, "Disciplinary Measures," paragraph 5.02. This inquiry was conducted by the Ethics Officer who was acting in conjunction with the Applicant's Section Chief. The record indicates that up to the end of December 1995, when the investigation was presumably concluded, the Respondent acted in accordance with the requirements of a proper disciplinary process as spelled out in both Staff Rule 8.01, Section 5, and in line with the Tribunal's decisions on cases relating to disciplinary proceedings. (See King, Decision No. 131 [1993], para. 33.)

28. The investigation was conducted by the competent persons, *i.e.*, at the initiative of the Applicant's Section Chief in conjunction with the Ethics Officer. It also appears that the requirements of due process were complied with during the course of the investigation. The Ethics Officer gave proper notice to the Applicant's supervisor of allegations against him and gave him an opportunity to respond in writing to the Applicant's allegations, which the supervisor did. The Applicant was given the opportunity to rebut his supervisor's version of events and he did so in writing. In addition, Operating Engineer X gave in writing his account of the facts, although he was not given official notification by the Ethics Officer to do so. This was presumably because, after the preliminary inquiry, no supporting evidence of possible misconduct on his part had been established to warrant a further investigation under Staff Rule 8.01, paragraph 5.02. The record also indicates that both the Ethics Officer and the Applicant's Section Chief interviewed a number of attendees of the October 23, 1995 meeting, including Operating Engineer Y who, as the Applicant alleges, had witnessed the incident of "physical assault" against him.

29. Notwithstanding the above, it is the view of the Tribunal that requirements of due process were not adhered to following the investigation. The requirements of the decision-making procedures to be followed in cases where misconduct is found, and of the notification of the imposition of disciplinary measures upon the accused staff member, are spelled out in Staff Rule 8.01, paragraphs 5.05 and 5.06. This Staff Rule does not explicitly provide the procedure to be followed in a situation where a finding of misconduct has not been established and where a determination is made not to impose disciplinary measures. It only provides at paragraph 5.05 that "[w]here the manager of the staff member has conducted the inquiry, the manager shall determine whether the alleged conduct has occurred" and that "the manager will consult with the Ethics Officer in making such determinations." In the present case, according to the Ethics Officer's letter to the Applicant of April 15, 1996, the Applicant's Section Chief, in consultation with the Ethics Officer, made such a determination.

30. The Applicant, however, did not receive prompt and written notification of this determination. The Applicant was notified only orally and at his own initiative upon his return to office when his administrative leave ended. The Respondent has argued that the Staff Rule did not require a written notification in these circumstances. The Tribunal finds that the decision that there was no corroboration of the alleged misconduct and, therefore, no need to impose disciplinary measures upon the accused, was an administrative decision which affected the rights of a staff member (*i.e.*, the Applicant) and, as such, it should have been communicated promptly to him and in a manner that would have left no doubt as to its consequences. This should be the case even absent such a provision in the Staff Rules, as it is a prerequisite of due process.

31. In the present case, the Applicant received oral notification by the Ethics Officer in January of 1996 that no one had confirmed his allegations of misconduct. The Applicant was evidently still uncertain as to the final outcome of the investigation and this is precisely why he requested a written response by the Ethics Officer on

March 27, 1996. The Tribunal finds that the absence of a timely written notification to the Applicant of the outcome of the investigation and of the final decision of the Respondent constituted a procedural irregularity and that the Respondent abused its discretion in this respect.

32. It remains to be determined whether the Applicant was prejudiced by such procedural irregularity at this late stage of the proceedings. After the Applicant had a discussion with the Ethics Officer, during which discussion he was orally informed that nobody had corroborated his allegations, and while awaiting final written notification on the matter, he took a series of actions. These actions betrayed a sense of uncertainty or confusion on the part of the Applicant. First, the Applicant submitted his resignation from the Bank indicating therein his intention to appeal “the inconclusive action taken” in regard to his complaints. In this letter, addressed to the Division Chief, GSDFM, the Applicant stated:

I have given my situation considerable thought over the past few days, and with regret, have concluded that further discussion with either [my current supervisor] or [my Section Chief] would be fruitless. Given the outcome of similar discussions with [my Section Chief] over the past several months, I have no confidence that a satisfactory resolution could be found either with respect to the Performance Review, or to previous incidents of workplace harassment. Even should a resolution be found, I simply have no confidence that [my Section Chief] would honor it.

Thereafter, the Applicant retracted the statements included in his resignation letter and signed an MAS agreement which provided him with financial benefits in exchange for the relinquishment of his right to appeal his previous claims to the Appeals Committee, the Job Grading Appeals Board and the Tribunal. A week later, he rescinded his acceptance of the MAS agreement on the basis that he had not fully understood its terms and because, as he indicated, he wanted to pursue his appeals as stated in his original resignation letter. The Respondent, indeed, allowed the Applicant to rescind his acceptance of the MAS agreement and accepted his resignation.

33. It is evident that the Applicant was determined from the moment he received oral notice of the possible outcome of the investigation to appeal “the inconclusive action taken” in regard to his allegations even though he had not been given written notification. It appears, however, that the Ethics Officer ought to have supplied the Applicant with a written notification of the outcome of his investigation at least in January 1996, instead of delaying it until April 15, 1996 and even then only at the repeated requests of the Applicant – a delay of about three months. The Tribunal finds that this irregularity did cause the Applicant injury worthy of some compensation, yet not serious enough to warrant the rescission of the Respondent’s decision.

34. The Applicant further alleges in his pleadings that he was forced to resign because he had been presented with a draft performance evaluation for 1995 which contained unfounded and unsubstantiated negative allegations regarding his performance; he also asserts that “it was inferred that the evaluation would be filed” unless he “voluntarily resigned.” The Tribunal finds that the Applicant has produced no evidence whatsoever to support his claim of the existence of such draft evaluation or any evidence of duress in his decision to resign. Furthermore, as the Respondent alleges, even if such a draft evaluation existed, it would be of no relevance since no formal action would have been taken based merely on a draft.

35. The Applicant further states that the MAS agreement was offered at the last minute, that there was no time to study it carefully, nor was counseling regarding available options afforded to him. The record shows that discussions regarding an MAS agreement had started as early as January 1996, although it is unclear who had initiated these discussions. The record further indicates that the Applicant had drafted a letter on March 7, 1996 to the Division Chief, GSDFM, in which he retracted the statements contained in his original resignation letter of February 20 and his intention to request administrative review of the actions described therein. A week later the Applicant signed the MAS agreement foregoing his right of appeal, only to rescind it on March 21, 1996. In this last letter the Applicant preceded his rescission of the acceptance of the MAS with the phrase: “After careful thought and consideration...”

36. Although these actions of the Applicant indicate an indecision on his part, the fact remains that the

Applicant voluntarily decided not to forego his right to appeal his claims against the Bank and this is precisely why he decided to rescind his acceptance of the MAS, as he admits in his pleadings. The Tribunal also concludes that the Respondent had no obligation to counsel the Applicant regarding the options available to him, and, even if it did counsel him, the final decision rested with the Applicant. In any event, the Respondent did allow the Applicant to rescind his acceptance of the agreement even after he had signed it. Hence, the Applicant was not in any way adversely affected by the signing of the MAS agreement.

37. The Tribunal must finally address the question of remedies. The Applicant has already been granted an amount of \$10,000 by the Bank, following a recommendation of the Appeals Committee, as redress for procedural fault of the Respondent. Reinstatement of the Applicant to his original position is unwarranted in this case in view of the fact that there exists no evidence of forced resignation on his part. Furthermore, it appears that the Bank's decision in this case not to discipline others for harassment would not have been different even if the proper procedures had been followed and the Applicant had been given timely written notification as to whether the alleged misconduct had occurred. Therefore, the rescission of such decision is not tenable. The appropriate remedy is to award to the Applicant compensation for the intangible injury suffered as a result of the procedural irregularity in the Respondent's decision. The Tribunal concludes that the \$10,000 already proffered to the Applicant by the Bank constitutes adequate compensation.

DECISION

For the above reasons, the Tribunal unanimously decides that:

- (i) no further compensation in addition to the \$10,000 already proffered to the Applicant need be awarded; and
- (ii) all other pleas be dismissed.

Robert A. Gorman

/S/ Robert A. Gorman
President

Nassib G. Ziadé

/S/ Nassib G. Ziadé
Executive Secretary

At Washington, D.C., October 19, 1998