



World Bank Administrative Tribunal

2012

Decision No. 462

**L.T. Mpoy-Kamulayi (No. 4),
Applicant**

v.

**International Bank for Reconstruction and Development,
Respondent**

**World Bank Administrative Tribunal
Office of the Executive Secretary**

**L.T. Mpoy-Kamulayi (No. 4),
Applicant**

v.

**International Bank for Reconstruction and Development,
Respondent**

1. This judgment is rendered by the Tribunal in plenary session, with the participation of Judges Stephen M. Schwebel (President), Florentino P. Feliciano (Vice-President), Mónica Pinto (Vice-President), Jan Paulsson, Francis M. Ssekandi, and Ahmed El-Kosheri.
2. This Application, the Applicant's fourth before the Tribunal, was received on 7 July 2011. The Applicant was represented by Stephen C. Schott of Schott Johnson, LLP, and the Bank was represented by David R. Rivero, Chief Counsel (Institutional Administration), Legal Vice Presidency.
3. The Applicant challenges his Overall Performance Evaluation ("OPE") covering the period 1 April 2008—31 March 2009 ("the OPE period") and his 2009 Salary Review Increase ("SRI") as unfair, an abuse of power, in violation of relevant Staff Rules and influenced by a conflict of interest on the part of his manager.

FACTUAL BACKGROUND

4. The Applicant joined the Bank in 1984 and worked for most of his career in the Africa Unit ("LEGAF") of the Bank's Legal Vice-Presidency ("Legal VPU"). He was promoted to Lead Counsel (Level GH) in LEGAF in 2001. In the first half of the OPE period, the Applicant acted as counsel for Nigeria from the Bank's headquarters, undertaking monthly missions to Nigeria. In the second half of the OPE period, he acted as resident counsel in Abuja, Nigeria. His supervisor during the OPE period was the Chief Counsel of LEGAF ("the Chief Counsel"), who had been appointed to that position in 2007.
5. On 16 April 2009, the OPE process for the Legal VPU was launched by the Bank's General Counsel ("the General Counsel"). In an e-mail message to the Legal VPU, she stated, among other things:

As you know the performance management process was formally launched last week covering the period April 1, 2008 - March 31, 2009. ... The schedule for this year's OPE process and Management Review meetings is attached. It is very important that we all meet these deadlines in order to enable the Management Team to have a substantive and constructive discussion about performance, expectations for the coming year and the learning and development activities we need to put in place. The OPE system will be closed at the end of September, with no further changes possible to OPEs, whether they are complete or not.

6. The attached schedule provided, among other things, for supervisors and individual staff to "meet for one-on-one feedback and performance discussion, covering the previous year and the year ahead" by 27 May 2009, and for supervisors to complete their OPE comments by the end of May 2009.
7. On 21 May 2009, the Applicant sent his draft OPE to the Chief Counsel. On 25 May, the Chief Counsel returned the draft OPE to the Applicant.
8. On 18 June, the Applicant made a formal complaint of professional harassment and bullying by the Chief Counsel. The General Counsel asked a Deputy General Counsel to look into the Applicant's complaint.
9. On 24 June, the Applicant sent the Chief Counsel another draft of his OPE. On 30 June, and again on 3 July, the Chief Counsel sent reminders to the Applicant's OPE feedback providers. Two of the feedback providers did not oblige, but the others eventually did send confidential comments to the Chief Counsel.
10. On 6 July, the Legal VPU Management Review Meeting took place, at which Chief Counsel discussed OPE ratings of, and assigned SRIs to, each staff member of the Legal VPU, including the Applicant. According to the applicable procedures, staff members at the same grade level were discussed in the same group in order to allow benchmark comparisons. On 26 July, the Chief Counsel informed the Applicant that his "SRI rating" was "3.10," representing "Partly Successful performance," and that his salary increase would be 0.60%. The Applicant's salary increase had been calculated by the Human Resources Compensation Unit, who received the SRI ratings for each staff

member, combined the SRI rating with data about the applicable salary ranges and grade levels, and performed a calculation that yielded a corresponding salary increase.

11. On 29 July, the Applicant's Chief Counsel, along with another then Deputy General Counsel, met with the Applicant to discuss the confidential feedback received for the Applicant's OPE, as well as his OPE and SRI ratings.

12. On 24 September, the General Counsel informed the Applicant that she had received the Deputy General Counsel's report on the Applicant's complaint of harassment and bullying by the Chief Counsel, and that the report concluded that no harassment had been established. The report describes in detail the investigation of the Applicant's complaint against the background of the Bank's policy document entitled "Working with Respect: Preventing and Stopping Inappropriate Behaviors" and provides extensive background for the conclusion that the Applicant's allegations of professional harassment and bullying were not well-founded. At the same time, the report concluded that there was

a workplace conflict between the Applicant and [the Chief Counsel], stemming from similar levels of seniority, differences in personality and working styles, and communication failures that has existed since [the latter] was appointed Acting Chief Counsel in March 2007 and then Chief Counsel in the middle of 2007.

The report noted that the Chief Counsel had never met the Applicant "to try to clear the air over their obvious differences."

13. On 14 October, the General Counsel requested that the Bank's Department of Institutional Integrity ("INT") undertake an independent assessment of the Applicant's complaint against the Chief Counsel. On 26 October, INT concluded, relying on the Deputy General Counsel's report, as well as e-mail communications between the Applicant and the Chief Counsel, that, rather than misconduct, the problem was "a workplace conflict between [the Chief Counsel] and [the Applicant] that can be addressed, in the first instance, through managerial intervention."

14. On 28 October, the Chief Counsel signed the Applicant's OPE. In the "Results Assessment" section of the OPE form, the Chief Counsel rated the Applicant "Fully Successful" for three work program results: (i) regular country lawyer's duties; (ii) lending operations; and (iii) teamwork, coaching and mentoring activities. In the "Behavioral Assessment" section, the Chief Counsel rated the Applicant "Partially Successful" for client orientation, drive for results, and teamwork, and "Fully Successful" for learning and knowledge sharing. The Tribunal has received copies of the confidential comments provided by six of the designated OPE feedback providers and, at the Bank's request, has reviewed them *in camera*.

15. The Chief Counsel's overall comments on the Applicant's 2008-09 OPE state, in relevant part:

During the review period [the Applicant] has not displayed the behaviors or skills reasonably to be expected of a Lead Counsel, which results overshadowed the accomplishments he was able to achieve.

There have been some positive reviews of [the Applicant's] performance, and it is important to note these include his work with the Nigerian Government, and in helping to engage with the Legal Department of the Federal [Ministry of Finance]. Some have even mentioned that he has worked well as part of their team and helped it to deliver

There have also, however, been critical comments from areas of the portfolio, notably from the [country management unit] and the Region's management. These question his delivery as a Lead Counsel – not having the strategic input into the portfolio, and creating delays and objections without offering solutions. There have been complaints that [the Applicant] is inflexible with his positions, and was reported to have encouraged staff not to exert the extra effort to drive projects quickly where there were time sensitive deadlines. Several clients complained about [the Applicant's] responsiveness, and not on only one project, but several. At the Lead Counsel level, it is expected that staff should be able to multi-task and bring a solutions orientation to bear with their clients, helping to deliver. This is not reflected in much of the feedback. It is not uncommon for individual personality conflicts to result in negative feedback. In this case, however, the feedback is regular, from varied sources and consistently vociferous. These have been discussed with him on a regular basis, in various forms: [through] discussion, e-mail and review of work products

16. The Applicant's comments on his OPE state, in relevant part:

[The Chief Counsel] has submitted to me his evaluation of my performance on October 26, 2009. This evaluation is biased and crafted after considerable efforts from [the Chief Counsel], at long last, to justify the prejudice he has held against me ever since he took his position as Chief Counsel for the Africa Practice Group in March 2007.

As the record shows it for the last 3 consecutive years, [the Chief Counsel] has granted me SRI increases which have had no bearing whatsoever with my work performance. In 2007, I challenged the SRI I was given but the then General Counsel pacified me by inviting me to focus more on my decentralized assignment in Nigeria and the rewards to be derived from it.

...

Despite my repeated requests for institutional assistance to improve my working relationship with [the Chief Counsel], nothing was ever done. Ultimately, I filed a formal complaint against [the Chief Counsel] for professional harassment; as of now, I am still awaiting ... the outcome of this complaint.

...

It is against this visibly charged backdrop that this OPE is conducted. So, for the record, I would like to state formally the following:

1. during the period under review, I have not had any single performance review meeting to discuss my performance with [the Chief Counsel] contrary to the requirements established under paragraph 2.02 of Staff Rule 5.03. I specifically requested to meet with [the Chief Counsel] each time I visited Washington; he consistently evaded each of my requests. ...

17. In November 2009, the Applicant submitted a request to review his SRI and salary increase to Peer Review Services ("PRS"). A PRS hearing was held on 18 October 2010. On 10 November 2010, the PRS panel issued its Report. It concluded that there was a reasonable basis for Applicant's 2009 OPE ratings, his SRI ratings, and the level of his salary increase. It also concluded that the Applicant's performance review was not retaliatory. On 9 December 2010, a Managing Director of the Bank accepted the recommendation of the PRS panel.

18. In this Application, the Applicant seeks rescission of his 2008-09 SRI rating and salary award, and their substitution with a higher rating and salary award. Alternatively, as he is scheduled to retire from the Bank in June 2012, he seeks “equivalent damages” of around \$112,000, comprising lost salary and its impact on his pension entitlement. He requests that the Bank provide an impact report on which to base damages. In addition, he seeks moral damages of three years’ net salary for the stress caused by the Bank’s actions, and his legal costs of \$34,949.

THE CONTENTIONS OF THE PARTIES

The Applicant’s main contentions

19. The Applicant challenges his OPE and SRI on three main grounds. First, the Applicant contends that his OPE was biased, unfair and the result of an abuse of discretion and abuse of power. He states that his SRI and salary award place him “at the bottom of his award category reflecting a very low assessment of his performance relative to other staff.” He argues that “on the basis of his workload and accomplishments he should at the minimum have been in Performance Category ‘4’ with a salary award in the range of 4.5-6% considering his very extensive portfolio of projects and legal advice ... and considering the difficulties encountered in 2008-09 managing Africa’s largest legal portfolio and a very heavy workload while moving from headquarters to Abuja.”

20. The Applicant claims that the Chief Counsel informed him that colleagues providing confidential feedback for his OPE had criticized his performance on projects in Nigeria. He complains that the specifics of these comments “were not disclosed to him” and that he “had no opportunity to defend” himself against them. The Applicant surmises that certain regional staff “may resent the role of the lawyer who is duty bound to provide sometimes inconvenient legal advice.” In particular, the Applicant says that he was informed that a regional manager and a Task Team Leader (“TTL”) “who appeared to harbor prejudices or a dislike” for him had been “particularly vocal in their criticism.”

21. In the Applicant’s view, his SRI lacks any “observable basis.” He submits that the burden of proof in establishing a basis for his SRI falls on the Bank “including the failure

to rate him in the ‘Superior’ and ‘Outstanding’ categories considering his heavy workload in Nigeria ... his difficult working conditions and his admitted experience and legal competence.” According to the Applicant, the Bank also bears the burden of showing that its actions did not violate his due process rights.

22. The Applicant offers a variety of explanations for negative opinions that may have been expressed about him by those who provided feedback for his OPE. He speculates that the Country Director for Nigeria had previously been rejected as Country Director for the Democratic Republic of the Congo by the Congolese authorities and that this was the reason he showed hostility towards the Applicant, a Congolese national, on at least three occasions when he expressed himself unsatisfied with legal advice given by the Applicant.

23. The Applicant also claims that the Bank’s Vice President for Africa blamed him for a decision to proceed with the signing of a certain loan when in fact the decision had been made by the Country Director for Nigeria, and complained about the Applicant because he had rightly noted, in reviewing a trade and transport project, that consultations with affected persons had not taken place as required by the Bank’s rules. He believes that he was “selected to serve as the scapegoat” for the subsequent delays in presenting the project to the Bank’s Board.

24. The Applicant argues that his performance evaluation was based only on “hearsay,” “undisclosed negative feedback” and “a biased exploitation of routine emails exchanged between Applicant and 2 TTLs ... in the course of Applicant’s discharge of his normal duties as a lead counsel for the Bank and not a legal scribe for TTLs.” The Applicant asks the Tribunal to note that, despite requests made on three occasions by other members of staff, the Chief Counsel “never overruled any of the legal advice given by Applicant ... as being either unsound or ... inconsistent with any Bank policy.”

25. Second, the Applicant contends that his SRI was decided in violation of the relevant Staff Rules. He refers to Staff Rule 5.03 and says that he did not have any performance feedback or discussion with the Chief Counsel during the OPE period, and that his SRI was issued before he had an opportunity to discuss his performance with the Chief Counsel.

26. With regards to his 29 July 2009 meeting with the Chief Counsel and a Deputy General Counsel, the Applicant states that there was no discussion of performance feedback since “no feedback whatsoever had been brought to [his] attention.” He recalls that he made a “last ditch effort” in that meeting to request that his SRI be reconsidered, but that he was told that “his request would not be considered favorably by the General Counsel who had already made up her mind about Applicant and that her decision was final.” He contends that he “has had no opportunity to defend against” the allegedly negative OPE feedback. He argues that “[i]n the absence of any supporting evidence which can corroborate undisclosed complaints from unnamed and possibly disgruntled colleagues who might have been motivated by their own personal agendas, the Tribunal should find that there is no observable basis upon which partially successful ratings” can be justified. In his view, the “partially successful” ratings in his OPE are “contradicted” by the higher ratings in his 2007-08 OPE “when there was no open conflict with [the Chief Counsel]” and in his 2009-10 OPE, which was completed by a different Chief Counsel.

27. The Applicant further contends that the decision on his SRI could not have been based on his OPE since his OPE was not completed until 28 October 2009, long after the management review meeting in July 2009. In addition, the Applicant contends that his Chief Counsel’s OPE comments, and evidence given in the PRS hearing of his request for review of his OPE and SRI, in part related to disputes over a road project which took place in September 2009, that is, outside the 2008-09 performance review period. He alleges that the Bank solicited written feedback from a TTL who the Bank “knew to be harboring unambiguously hostile feelings against Applicant as a result of Applicant’s loyal discharge of his duties on the Abidjan-Lagos Project” and that this feedback was “not related to the relevant 2009 OPE period.” He argues that OPE procedures “stipulate that the list of feedback providers must be agreed upon by the staff member and his Manager” and the Bank “chose to violate its own OPE procedures as a means to disguise the vindictive motive which had driven [the Chief Counsel]” to solicit “tainted and biased feedback based on work interactions falling squarely outside the 2009 OPE period.” The Applicant claims further that his Chief Counsel failed to act fairly in failing to request responses from the feedback providers until six days before the July 6 Management Review Meeting.

28. Third, the Applicant argues that his performance evaluation “was mired in a conflict of interest resulting from an investigation on charges of bullying and professional harassment” made by him against the Chief Counsel on 18 June 2009. He claims that the Chief Counsel failed to show “colleagues the proper degree of respect”; “failed to address Applicant’s concerns about discrimination impeding his mobility [within the Legal VPU] and his below norm compensation vis-à-vis his peers”; and caused his concerns about harassment and prejudice. The Applicant mentions in particular his offense at what he perceived as the Chief Counsel making light of the Applicant’s perception of a pattern of racial discrimination against him.

29. The Applicant refers to the 2009 staff survey in which he says that LEGAF diverged negatively from the Legal VPU as a whole on areas such as “understanding the direction of senior management,” “treating individuals with respect and dignity and openness and trust,” and “the climate in which diverse perspectives are valued.” He also states that the Chief Counsel received relatively lower scores in categories such as “[d]emonstrates the people management skills to effectively lead the group,” “honesty and integrity” and “providing performance feedback.”

30. The Applicant considers that the Bank’s submissions to the Tribunal demonstrate “an exaggerated sense of self-righteousness,” arguing that the Tribunal “cannot ignore the fact that in a 28-year career with the Bank, it is only when [he] lodged a formal complaint against his manager that he has received the only negative OPE of his entire career.” He asserts that his salary increase was “vindictive and retaliatory as a result of his longstanding unresolved conflicts” with the Chief Counsel.

31. He argues that an SRI of 3.1 is a “marginally satisfactory rating and an award of 0.6% given the circumstances is clearly retaliatory and an abuse of the [Bank’s] discretion.” He goes on to say that it is “extraordinary that someone of Applicant’s caliber, known competence and work ethic would be given an SRI and salary award that most probably places Applicant at the absolute bottom of the salary award scale of the Legal Department.”

The Bank's main contentions

32. The Bank argues that there is no reasonable basis on which the Tribunal may step in to change the discretionary decision of the Bank's management on the Applicant's SRI rating or salary increase. In the Bank's view, the process and the result were "fair and rational, and there is no evidence of any improper motivation" during the process. The Bank submits that the only issues raised in this case are "whether there is evidence that Applicant was improperly awarded a ... SRI rating of 3.1" as a result of his 2008-09 performance, and "whether the corresponding salary adjustment was unjustified."

33. The Bank argues that the Applicant's SRI rating was reasonable and based on objective criteria. According to the Bank, it was "based foremost on [the Applicant's] OPE ratings, which were then compared to his peers during the Management Team meeting." The Bank states that the OPE ratings themselves "were based on the feedback provided to [the] Chief Counsel during the OPE process, and the Chief Counsel's own impressions and experiences." The Bank argues that that "feedback, as well as the assessment of the Chief Counsel amply justified the OPE ratings provided to" the Applicant. The Bank points out that the Chief Counsel "honestly acknowledged Applicant's technical competence and his achievements during the year" while noting his "legitimate concerns about certain aspects of Applicant's performance ... including 'client orientation' and 'teamwork.'" The Bank adds that the Applicant "complains about prejudice and provides some excuses for the performance problems, including his move to Abuja, but does not deny that he had difficulties."

34. The Bank states that, in the OPE period, the Applicant "did not display the behaviors or skills that were reasonably to be expected of a Lead Counsel with his experience" and that "negative incidents overshadowed the results that Applicant was able to achieve." The Bank submits that the Applicant's OPE indicates a "mixed assessment" of his behaviors and skills, and that this reflects the fact that there were "some positive reviews of the Applicant's performance" but also "critical comments." The Bank states that these comments noted that the Applicant "did not have any strategic input into the region's portfolio, and the fact that he often created delays and asserted objections to proposals without offering any possible solutions." According to the Bank, the Applicant was also "reported to have encouraged staff not to exert the extra effort to

drive projects quickly even in the face of time-sensitive deadlines” and several “feedback providers complained about Applicant’s lack of responsiveness ... not only for one project but several.” The Bank goes on to note that much of the feedback received noted that “he was not fulfilling the expectations for Lead Counsel” and that negative feedback concerning the Applicant was “received even outside the OPE process, more than occasionally, from varied sources, and in consistently strong terms.” In the Bank’s view, the Applicant’s OPE ratings reflect the mixed feedback obtained from the providers.

35. In addition, the Bank states that feedback received about the Applicant was “relayed to and shared with Applicant on numerous occasions during the fiscal year 2009, including in discussions, email and during the customary work product quality control reviews.” The Bank argues that it is clear that the Applicant was made aware of instances in which his clients and peers felt that his performance could be improved and that the “Applicant often responded, providing reasons or explanations about the problems.” The Bank goes further, saying that “[n]o email from his manager to Applicant goes unanswered. Applicant vigorously disagrees with every negative observation concerning his performance, in writing.” The Bank continues, saying that the Applicant “had every opportunity to present his opinion concerning his performance, and to ... explain or excuse the performance problems identified to him.” The Bank acknowledges that the “right to be heard is a fundamental requirement of due process.”

36. The Bank says further that the Applicant was informed during 2009 that his “performance relative to the other Grade H level staff member” in LEGAF “compared poorly.” The Bank notes that the other Grade H level staff member received notably higher OPE ratings than the Applicant and says that “in comparison with other H level staff across the legal department, Applicant’s OPE ratings fairly justify placing him in the lower part of the spectrum.”

37. The Bank argues that there were “numerous communications” between the Applicant and his manager during the performance review period and argues that “[w]hile they may not have been formally labeled ... ‘interim performance discussions,’” the Applicant “was appraised of the performance problems at a time when it would have been possible to address them.” It states that the Applicant “was fairly on notice, during the relevant time period, that his performance was being criticized, and that his clients

were complaining about his behaviors.” According to the Bank, “[c]onsidering Applicant received a generally positive review, the level of informal feedback is appropriate. No performance improvement plan needed to be instituted here, for example.” The Bank adds that the July 29 meeting between the Applicant, his Chief Counsel and the Deputy General Counsel was “lengthy and substantive.”

38. In response to the Applicant’s claim that performance outside the relevant performance period was allowed to influence his OPE, the Bank states that while some e-mail messages that document criticism of the Applicant’s performance during the OPE period “are dated later than March 31, 2009, they refer to conduct and problems encountered during the evaluation period.”

39. In the Bank’s view, there is no evidence of “improper bias, or consideration of improper factors, in Applicant’s evaluation” and argues that the Applicant’s “vague and often contradictory arguments about bias and conspiratorial motivations are no substitute for any actual facts that might evidence improper bias.” Nor does the Applicant, in the Bank’s view, present “evidence that would link his historical grievances against his management with the procedures or outcome involved in his 2009 performance evaluation.”

THE TRIBUNAL’S ANALYSIS AND CONCLUSIONS

40. The gravamen of the Applicant’s case is that he was awarded a low SRI rating based on a faulty OPE evaluation, resulting in a minute salary increase, without adequate justification. He argues that since the SRI rating is based on the OPE, the Legal VPU management team cannot have arrived at the appropriate SRI rating when the OPE had not yet been concluded by the Chief Counsel. The Tribunal notes that the Chief Counsel signed the Applicant’s OPE on 28 October 2009, long after the 6 July management team meeting. The Applicant further complains that when his SRI was fixed, his Chief Counsel had not met with him to discuss the OPE or communicated to him the outcome of the feedback and his evaluation. This, he says, only occurred when they met with the Deputy General Counsel on 29 July 2009, again long after the management team meeting. The Tribunal notes that the Bank has confirmed that the SRI rating was based “foremost on his OPE ratings, which were then compared to his peers during the management team

meeting.” As the Applicant’s SRI was based on his OPE, this case rightly turns on the validity of the OPE and the process followed by the Applicant’s Chief Counsel in completing the OPE.

41. The Bank has provided the Tribunal with a voluminous quantity of e-mail correspondence, annexed to the Respondent’s Answer, some of which are duplicated and others immaterial to the disposition of the case, but which it describes as a “representative sample” of feedback provided to the Applicant during the OPE period. At the Tribunal’s request, the Chief Counsel submitted a statement responding to specific questions relating to the e-mail messages and the occasions when he met with the Applicant to discuss his performance as required by the Staff Rules. In that statement he identifies some of the relevant messages and reiterates the Bank’s position that the e-mail exchanges amounted to adequate feedback under the Staff Rules.

42. The Bank has also provided the Tribunal two annexes containing the comments received from what it calls a “representative sample” of the Applicant’s OPE feedback providers. At the Bank’s request, the Tribunal agreed to review this feedback *in camera*, which is to say, that it was not shared with the Applicant. The Tribunal acceded to the Bank’s request having regard to: (i) its judgment in *Yoon (No. 6 and No. 7)*, Decision No. 390 [2009], para. 84, where it stated that confidential OPE feedback about the Applicant would be reviewed *in camera* “to protect the integrity of the [OPE] system and to ensure that feedback providers are not afraid to express their opinion candidly”; (ii) the fact that the Applicant’s Chief Counsel accurately summarized the feedback received in his comments on the Applicant’s OPE; and (iii) that the General Counsel provided the Applicant with a detailed summary of the negative feedback received about his performance in an e-mail of 14 October 2009.

43. The Tribunal confirms that the OPE feedback furnished by the Bank concerning the Applicant is fairly described as “mixed,” with some generally positive comments and some generally negative comments. Positive comments are made about the Applicant’s legal skills, and there is a mix of positive and negative comments regarding the Applicant’s teamwork and responsiveness to the needs of his institutional clients. The Tribunal does not, however, find a basis for the sweeping statement by the Chief Counsel that, while it is not uncommon for individual personality conflicts to result in negative

feedback, “in this case, however, the feedback is regular, from varied sources and consistently vociferous.”

44. Staff Rule 5.03 (“Performance Management Process”), effective 1 February 2003, applies in this case. Staff Rule 5.03, paragraph 2.02(a), states

At least once in a twelve month period, the Manager or Designated Supervisor and that staff member shall meet and discuss the staff member’s performance, achievements, strengths, areas for improvement, and future development needs.

45. In *Yoon (No. 6 and No. 7)*, para. 88, the Tribunal held that the purpose of the meeting between the staff member and his supervisor, required by Staff Rule 5.03, paragraph 2.02(a), was to discuss the supervisor’s comments and is

intended to promote an open and honest discussion about concerns, promotions and the like. The supervisor and staff member should discuss work performed during the period in review and future work, review the information provided by the staff member and ascribe ratings (making comments where desired), and provide overall assessments on areas of particular strength and those in need of improvement.

46. In several other cases, the Tribunal has considered the import of this rule, which appears as paragraph 2.01 in the most recent version of Staff Rule 5.03. Most recently, in *Yoon (No. 6 and No. 7)*, at para. 92, the Tribunal indicated that the OPE should be a process marked by “dialogue.” In *Prasad*, Decision No. 338 [2005], para. 25, the Tribunal noted that Staff Rule 5.03, paragraph 2.02 “mandates that the manager or designated supervisor and the staff member ‘shall meet and discuss the staff member’s performance’” The Tribunal went on to note, at para. 27, that “no specific performance discussions were held in the instant case ... and no adequate feedback was provided during the period reviewed.” The Tribunal held that “[d]iscussions of a general nature, or those held before the actual OPE process” are not sufficient to meet the requirements of the Staff Rules. In *Yoon No. 5*, Decision No. 332 [2005], para. 67, the Tribunal drew an express distinction between “informal feedback sessions” during the year and “the year-end formal discussion.”

47. When asked by the Tribunal to specify the dates on which the Applicant's performance was discussed with him as part of the 2008-09 OPE process, the Chief Counsel stated that the Applicant's "performance was constantly being discussed with him throughout the entire performance year." He also referred to the OPE process whereby the Applicant "initially drafted his results assessment in the system, [the Chief Counsel] provided comments, and [the Applicant], as the final step, provided voluminous comments after [the Chief Counsel] had already signed the OPE." The Chief Counsel maintains that the Applicant's OPE was not completed until after the 29 July 2009 meeting between the Applicant, the Chief Counsel and the Deputy General Counsel. In its Answer, the Bank contends that if the Applicant "had provided evidence of errors in the OPE ratings at that time, there would still have been an opportunity to change the information in the system at that time."

48. In his account of the 29 July meeting with the Chief Counsel in the presence of the Deputy General Counsel, the Applicant states that the Chief Counsel "handed out to me the OPE form bearing only the ratings given to me as follows: (i) results assessment: [Fully Successful]; (ii) behavioral assessment: [Partially Successful] for client orientation, drive for results and teamwork, and [Fully Successful] for learning and knowledge sharing." He adds:

I inquired from [the Chief Counsel] whether he was prepared to change his assessment of my performance and the ratings he had given in light of the discussion we have had. [The Chief Counsel] responded that he had not seen any need to do so. He indicated to me that the next step is for him to write up his comments and then to send back the OPE form to me so that I could input my own comments and then sign the OPE form if I wished to or not sign it if I chose that.

49. On the evidence before the Tribunal, the 29 July meeting appears perfunctory. The LEG management team had already acted on the Applicant's purported OPE on 6 July, setting the Applicant's SRI rating and salary increase which his Chief Counsel communicated to him on 26 July, that is, three days *before* the 29 July meeting. In these circumstances, it is not clear to the Tribunal what the Applicant could have done to change the decisions already taken.

50. Having regard to its previous jurisprudence, the Tribunal is unable to conclude that the discussions held with the Applicant about his performance comport with Staff Rule 5.03. The Tribunal finds that no “one-to-one feedback and performance discussion,” as envisaged in the General Counsel’s directions of 16 April 2009, took place between the Applicant and the Chief Counsel during the relevant OPE period. Such a meeting is required by Staff Rule 5.03, paragraph 2.02(a). In his OPE comments, the Applicant stated that he had not had such a meeting, notwithstanding that he had asked to meet with the Chief Counsel each time he visited Washington. The Deputy General Counsel’s September 10 investigation report also states that the Chief Counsel confirmed that he had not met with the Applicant, albeit in the context of an attempt to “clear the air” rather than the OPE process specifically.

51. The instances of performance-related feedback discussed with the Applicant during the year, and before the OPE process began, are not sufficient to replace the performance discussion required by Staff Rule 5.03. Neither does the exchange of drafts of a Results Assessment amount to a process of dialogue as required by the Staff Rules. In these circumstances, the Tribunal finds that the 29 July meeting with the Chief Counsel and Deputy General Counsel took place after minds had already been made up and decisions made, without the Applicant having had the opportunity to respond specifically to the negative feedback received about him as part of the OPE process.

52. The Bank contends that the Applicant was aware that some serious concerns had been raised about him during the 2008-09 OPE period, including his style of communication with Country Team colleagues. The Bank refers to several e-mail messages in April and May 2008, for example, recording discussions between the Applicant, his Chief Counsel and the Nigeria Country Director regarding the Applicant’s apparently confrontational approach to working with Bank colleagues in the context of project negotiations with a client. At that time, the Applicant initially thanked the Chief Counsel and Country Director for their “valuable feedback on the way [he had] been interacting with the Country Team” noting that he looked forward to doing his “level best to meet your expectation ... as a member of the Nigeria Country Team.” In an e-mail message of 23 August 2008, the Chief Counsel also recorded his disappointment regarding certain aspects of the Applicant’s recent legal work. Certain other issues, including the Applicant’s approach to working with his Financial Management

colleagues and his approach to requesting several weeks of leave, were also raised with him by his Chief Counsel during the year.

53. The Tribunal is not satisfied that the e-mail exchanges cited and the discussions held prior to the OPE process constitute a substitute for the type of formal meeting required in Staff Rule 5.03. As the Tribunal noted in *Prasad*, at para. 29, it is a serious matter for a staff member not to be given the opportunity to properly defend himself or to explain issues relevant to his appraisal during the OPE stage. As the Tribunal went on to explain in the same case, at para. 30, while it is quite plausible that a number of the criticisms made in respect of the Applicant's performance were true, this "does not alter the obligation of the [Bank] to fully respect due process rights and conduct a fair and reasonable process of performance evaluation and accordingly to provide an opportunity to correct the mistakes that any staff member has made, including those in higher management." OPE discussions are an important part of the process. *Yoon No. 5*, Decision No. 332 [2005], para. 65. As the Tribunal determined in *K. Singh*, Decision No. 188 [1998], para. 21:

Staff rules are not written for the sake of formality but precisely to secure an orderly process that will be fair and ensure that the staff member affected can feel that his or her case has been properly considered. Even if the Respondent is in substance right about the decision that it took with respect to the Applicant, its departure from the relevant rules amounts to an abuse of discretion.

54. The key issue is "whether the staff member has been given the opportunity to defend himself against the criticisms of his superiors and has been granted fair treatment." *Salle*, Decision No. 10, paras. 36 and 59. In *Kisongele*, Decision No. 327 [2004], at para. 50, the Tribunal noted that:

the Staff Rules exist, and their formal requirements were invented by the Bank itself precisely in the interest of staff members. There are undoubtedly cases where the Tribunal can be satisfied that those interests have been fully respected by alternative means, e.g., feedback in a different form but serving the same function.

55. As in *Salle*, the Tribunal does not consider that to be the case here. The Tribunal is reinforced in its view that the comments in e-mail exchanges outside the OPE period

were not sufficient to substitute for a one-to-one performance discussion with the Applicant given the workplace conflict between the Applicant and the Chief Counsel clearly evidenced by the tone of the e-mail exchanges, as well the investigation report of the Deputy General Counsel. While neither that report nor the subsequent INT report of 26 October 2009 identified any misconduct on the part of the Chief Counsel, both acknowledged a workplace conflict. The Deputy General Counsel's report specifically notes that the Chief Counsel had never met with the Applicant to try and clear the air over their obvious differences. These acknowledged personal and professional differences made careful observance of the established OPE process vitally important so as to avoid the perception that the Applicant's evaluation was a foregone conclusion. In this context, a performance review meeting during the OPE period defined by the General Counsel, specifically intended to promote "an open and honest discussion about concerns, promotions and the like," to discuss the feedback from providers and "review the information provided by the staff member and ascribe ratings," is a particularly significant procedural requirement. At the same time, the Tribunal finds no evidence that the Applicant was a victim of racial discrimination or other prohibited conduct of which the Applicant complains.

56. In the circumstances, solely on the ground of the lack of due process specified above, the Tribunal awards the Applicant compensation.

DECISION

- (1) The Bank shall pay the Applicant compensation in the amount of three months' salary, net of taxes.
- (2) The Bank shall pay the Applicant's attorneys' fees in the amount of \$34,949.
- (3) All other claims are dismissed.

/S/ Stephen M. Schwebel
Stephen M. Schwebel
President

/S/ Olufemi Elias
Olufemi Elias
Executive Secretary

At Paris, France, 27 June 2012