Decision No. 150

Juliet Nkojo,
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal, composed of E. Lauterpacht, President, R.A. Gorman and F. Orrego Vicuña, Vice Presidents, and P. Weil, A.K. Abul-Magd, Thio Su Mien and Bola A. Ajibola, Judges, has been seized of an application, received on August 21, 1995, by Juliet Nkojo, against the International Bank for Reconstruction and Development. The usual exchange of pleadings took place. The case was listed on April 2, 1996.

The relevant facts:

2. The Applicant joined the Bank as Secretary, level D in the Europe, Middle East and North Africa Projects Department (EMPRP) on July 16, 1979. In her interim evaluation, dated January 15, 1980, her Division Chief commented that, although the Applicant had an extremely positive and cooperative attitude and displayed a willingness to learn, she had not fully reached the high standard set in his division. A similar statement was made in her annual performance evaluation (AER) for her first year, dated September 25, 1980, where her Division Chief recommended that her probationary period be extended for six months at level C. By memorandum, dated October 8, 1980, to the Applicant the Personnel Officer (PO) indicated that her position had been reclassified as a level C position, effective September 1, 1980, and her probationary period had been extended by six months to February 28, 1981.

3. In an evaluation, dated March 20, 1981 and completed at the end of the Applicant's probationary period, it was noted that except for a few shortcomings, she had made considerable efforts to improve her performance and had succeeded in making her performance consistent with the criteria laid down for a C level Secretary. It was recommended that she be confirmed in her post as secretary at level C and be given a norm salary increase. This recommendation was implemented effective February 1, 1981.

4. The following four annual performance evaluations of the Applicant starting from July 1981 and ending March 1985 were mainly positive. However, it was noted that there was a need for better integration in the department, and a further need for improvement, particularly in reducing typographical errors, proof reading and work organization.

5. During the 1987 Reorganization the Applicant was selected for a position in the Asia Technical Department (AST) in the Industry, Trade and Finance Division (ASTIF) at level 13. The Applicant's first annual performance evaluation in this division covered the period of her assignment to ASTIF through June 1989 where she provided secretarial support to three high-level staff, was in charge of the division's circulation tray and was the back-up Time Recording System (TRS) coordinator. It was noted that her job performance had been less than satisfactory at times and needed improvement. She had a weak sense of priority and organization and paid insufficient attention to details. During that evaluation, the Management Review Group (MRG) agreed to the Applicant's request for another evaluation of her work in three months. By memorandum, dated November 20, 1989, the Applicant's Division Chief reported that in this three month period her performance had progressed to fully satisfactory.

6. In her annual performance evaluation (PPR), dated June 14, 1990, it was stated that the Applicant's

performance was fully satisfactory and consideration for further promotion would depend on demonstrated ability to sustain this level of performance. In her June 1991 PPR the MRG, basing its review on the Applicant's sustained good performance, endorsed the recommendations of her supervisors to promote her to level 14, effective July 1, 1991.

7. In 1992, the Applicant worked as part of a "pool team" providing secretarial and administrative tasks for ASTIF. In her PPR, dated June 5, 1992, the MRG, over the Applicant's objections, noted the Applicant's less than satisfactory performance in the last year and recommended that in the coming year the Applicant's performance be closely monitored by the divisional management and that she be given a detailed work program and regular monthly feedback. It was also noted that an evaluation of her performance would be done after six months.

8. By memorandum, dated September 2, 1992, from the Applicant's Division Chief to the Applicant, she was given a work program according to which she was to provide secretarial and administrative support to two higher level staff and possibly share support to other higher level staff in the unit and to act as the Office Technology Coordinator (OTC) for the unit. Her performance was to be evaluated at the end of February 1993. By note, dated October 7, 1992, to the Division Chief, one of the Applicant's supervisors assessed her performance as consistently unsatisfactory in several areas such as, among others, typing and report production, administrative support, getting information about callers and dealing with visitors. He suggested that the Personnel Department explore with her whether there might be some other job in the Bank for which she would be more suited. By memorandum, dated January 22, 1993, to the Applicant her PO recorded their discussion regarding the three month assignment of the Applicant to the Human Resources Development Division in AST (ASTHR), beginning in early 1993, according to which the Applicant would provide secretarial and administrative support to three of the four Resettlement Specialists. The monitored work program of the Applicant was extended by several months because of the "unusually high turnover of support staff in ASTIF in the summer of 1992 and the reorganization."

9. The evaluation of the Applicant's performance took place in her PPR for 1993. Her Division Chief commented that despite her demonstrated positive attitude, the Applicant's performance had not shown a consistent level of improvement during the last year and, on the whole, her performance had remained unsatisfactory. He concluded that formal invocation of Staff Rule 7.01, para. 11.02, would be appropriate. Despite the Applicant's disagreement, the MRG endorsed her Division Chief's recommendation and proposed proceeding under the provisions of Staff Rule 7. 01 with a work program to be carried out in the Procurement Unit of the Public/Private Sector and Technology Development Division of AST (ASTTP), which succeeded ASTIF after a reorganization of AST in late 1992. The reassignment had been requested by the Applicant. It was stated that failure in the three-month work program could lead to termination. The Applicant was given a "2" (less than satisfactory) merit rating for the 1993 annual salary review increase.

10. By memorandum, dated June 25, 1993, to the Applicant, the Applicant's Division Chief defined the work program for the period of assignment to the Procurement Unit. The Applicant would provide secretarial and administrative support to two Procurement Specialists. Beginning on July 12, 1993, she would meet with her immediate supervisor and the PO on a weekly basis to review her performance in relation to the requirements of the work program; minutes of these meetings would be prepared; and during her initial two week period she would be trained to become familiar with the Procurement Unit.

11. In a memorandum, dated September 30, 1993, the Applicant's immediate supervisor noted that at the final meeting held on September 24, 1993, attended by the Applicant, her immediate supervisor and her PO, concern was express, inter alia, at the fact that the Applicant stayed overtime even though the summer months were slow for the unit, at the fact that certain transparencies which were part of a presentation were placed in the wrong order and at formatting difficulties in relation to some draft documents. By memorandum, dated October 22, 1993, the Applicant responded by objecting to these concerns.

12. By memorandum, dated November 3, 1993, to the Director, AST, the Division Chief, ASTTP, concluded in his performance evaluation of the Applicant, based on the views of her supervisors, that the Applicant's

performance as Staff Assistant remained unsatisfactory and below Bank standards, despite all the guidance and close supervision provided during the three-month period; and the evaluation reports of her supervisors made it evident that they had no confidence in the Applicant's capability to serve as their support staff, although her general behavior was the best that one could expect from a Bank staff member. Finally, the Division Chief, ASTSP, requested removal of the Applicant from his Division, pursuant to Staff Rule 7.01, para. 11.02.

13. By memorandum, dated November 4, 1993, to the other Division Chiefs in AST, the Director, AST, asked if a position for a level 14 Staff Assistant, where the Applicant could perform satisfactorily, existed. In memoranda, dated November 4, November 8 and November 9, 1993, from the Division Chiefs to the Director it was stated that no such position could be found.

14. Then the Director, AST, by memorandum, dated November 17, 1993, requested the Vice President, East Asia and Pacific Region (VPEAP) and the Vice President, South Asia Region (VPSAS) to determine whether there was a level 14 position in the Asia Regions to which the Applicant could be assigned with good prospects for satisfactory performance. Both the Applicant's PO and the Applicant continued to search for alternative assignments. No suitable position was found.

15. By memorandum, dated January 11, 1994, the VPSAS, informed the Director, Personnel Management Department (PMD), that the Asia Technical Department and the East and South Asia Regions had exhausted the search for an alternative assignment for the Applicant and had concluded that there was no position in the Regions to which the Applicant could be reassigned with good prospects for satisfactory performance. He, furthermore, requested the Director's assistance "as specified under paragraph 11.02(b) of Staff Rule 7.01."

16. By memorandum, dated February 2, 1994, the Applicant requested the VPSAS to conduct an administrative review of the decision of the Director, AST, to accede to the Applicant's Division Chief's request to remove the Applicant from his Division. By memorandum, dated March 3, 1994, the VPSAS informed the Applicant that an independent review he had requested from the Chief Personnel Officer (CPO) relating to mismanagement in the case had revealed no mismanagement and of the conclusion of the VPSAS that the administrative decision by her Director was neither capricious nor arbitrary. He stated that he saw no reasonable alternative than to proceed under the provisions of Staff Rule 7.01, Section 11.02, and that the matter rested with the Director, PMD. By memorandum, dated March 8, 1994, the Deputy Director, PMD, advised the VPSAS that after due consideration there was no alternative position to which the Applicant could be reassigned with good prospects for satisfactory performance and that she should be given notice of separation, in accordance with Staff Rule 7.01, para. 11.03.

17. By memorandum, dated April 6, 1994, to the Applicant, the Applicant's PO advised the Applicant that a notice of termination of her employment would be issued. However, in this memorandum, the Applicant was offered the alternative of a period of leave without pay through December 31, 1994, in order to provide the Applicant time to make visa arrangements for herself and --other family members. In that case the Applicant should voluntarily resign from Bank service. The Applicant was given until April 20, 1994 to respond. The Applicant did not respond and, as a result, by memorandum, dated April 21, 1994, the Director, AST, gave the Applicant 60 calendar days notice of separation from the Bank.

18. The Applicant filed a Statement of Appeal, dated April 1, 1994, against several decisions of the Bank and requested provisional relief. The Committee denied the Applicant's request for provisional relief and asked the Applicant to reconsider her decision not to accept the Respondent's offer of leave without pay until December 31, 1994. By letter, dated June 6, 1994, to the Applicant's Counsel, the Deputy Director, PMD, informed him that the Bank would proceed under the notice of termination, dated April 22, 1994.

19. The Appeals Committee in its report, dated May 22, 1995, concluded that the Applicant's professional performance had been unsatisfactory, that the decision to place her on a work program, in accordance with Staff Rule 7.01, para. 11.02, did not constitute an abuse of discretion, that the Applicant had been provided with several opportunities to improve her performance but her performance remained unsatisfactory, that the problem was technical performance, and, that, therefore, the decision to remove her from her division in

accordance with Staff Rule 7.01, para. 11.02, did not constitute an abuse of discretion. The Committee also found that the search for a position where the Applicant might have been able to perform satisfactorily had taken place but was fruitless; therefore, the decision that there was not alternative employment in the Bank in which the Applicant could perform satisfactorily did not constitute an abuse of discretion. Finally, it found that the decision to terminate the Applicant's employment did not constitute an abuse of discretion, that due process had been observed and that there was no evidence of discrimination. The Committee recommended that the Applicant's request for relief be denied. By letter, dated May 24, 1995, the Acting Senior Vice President, Management and Personnel Services (MPS) informed the Applicant that he accepted the Committee's recommendation.

The Applicant's main contentions:

20. Adverse comments by the Applicant's supervisors on her performance, which led to its being characterized as unsatisfactory, were trivial, not supported by adequate evidence or made with improper motivation.

21. The initiation of the process leading to termination only months after the Applicant had been promoted indicates that there was no coherence in the reviews of the Applicant's performance, which raises suspicions that external factors led to her termination.

22. The conclusion reached in the Management Review in the Applicant's 1992 PPR were based on an unfair and irregular procedure, because – the Applicant was not given the opportunity of rebutting the evidence, nor was she given appropriate warning of her inadequate performance.

23. Some evidence which was to the Applicant's advantage disappeared without explanation.

24. A memorandum written by her Director which would have enabled the Applicant to take early remedial action was not made available to her until it was too late.

25. The monitored work program designed for the Applicant after her 1992 PPR was ill-conceived and was not carried out under normal working conditions with the result that she was not given a fair opportunity to demonstrate good performance.

26. The transfer of the Applicant to a new assignment was a very poor exercise of judgment because it did not really provide her with good prospects to improve her performance.

27. The Respondent has not shown on a logical and fair basis that the Applicant failed to perform satisfactorily after she was placed on probation.

28. The Applicant was not offered a mutually agreed separation but was invited to resign from the service of the Respondent on the basis of leave without pay and the surrender of her right to full severance payments.

29. The Applicant made the following plea: reinstatement in her secretarial position or three years net salary for wrongful termination.

The Respondent's main contentions:

30. Although the Applicant's performance before she was placed on a monitored work program was unsatisfactory and could have justified termination of service, her managers decided to give her a chance by placing her in such a program.

31. One of the Applicant's supervisors alleged to have been prejudiced was not motivated by prejudice in describing her performance as less than satisfactory but had sufficient evidence on which to base such a conclusion; nor was there discrimination against her as an African.

32. The Applicant's transfer after the 1992 PPR was not ill-considered, hasty or unfair.

33. The Applicant's level of performance during the monitored work program was not satisfactory, although she was given every opportunity to succeed, she was not moved frequently and her unit was not unsettled.

34. There was no absence of due process in the Applicant's termination for unsatisfactory performance, she was given all relevant documents at the appropriate time and she was apprised of each step as it was taken.

35. Performance had been a recurring issue from the Applicant's earliest days in the Bank. There was no sudden turnaround in the approach of her supervisors. Her promotion was based not on superior but on fully satisfactory performance.

36. There was adequate evidence on which the Respondent could conclude that the Applicant's performance had been unsatisfactory so as to justify termination of service.

37. The Applicant was not entitled under the Staff Rules to be placed in another position before her employment was terminated.

38. The Applicant was offered the alternative of being separated from the Bank on the basis of mutual agreement rather than for unsatisfactory service, an alternative she was not forced to accept or reject. She freely decided to reject it.

39. The Respondent observed all its obligations in terminating the Applicant's service on the ground of unsatisfactory performance.

Considerations:

40. The Applicant's employment was terminated on June 30, 1994 for unsatisfactory performance. She alleges non-observance by the Respondent of her terms of employment and contests the validity of this decision as well as a series of other measures and decisions leading up to it taken by the Respondent. These include:

a) singling her out for probation and placing her on a closely monitored program;

b) removing her from her Division on the basis of alleged less than satisfactory performance;

c) failure to offer her a mutually agreed separation and inviting her instead to resign from the service of the Respondent.

41. The disputed decisions are all related to the Applicant's professional performance and the Respondent's evaluation thereof. The Tribunal has on many occasions recognized the discretionary nature of such an evaluation, but has at the same time stated that it may review such evaluations to ensure that they are not vitiated by any abuse of discretion by reason of "being arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure" (Saberi, Decision No. 5 (1983) para. 27, and Durrant Bell, Decision No. 24 (1985) para. 25).

42. Although the contested evaluations of the Applicant's performance are those made in 1992 and thereafter, the Tribunal notes that from the time of her entry into employment with the Bank in 1979 certain defects and weaknesses in her performance were repeatedly recorded and made known to her.

43. In the initial interim evaluations of the Applicant's performance made in January 1980, it was stated that she "is not yet fully up to the high standard set in the Division" and reference was made to the Applicant's frequent mistakes, and to the need that she "further improve her concentration and take more care in her work."

44. The first annual performance evaluation of the Applicant covering the period July 1979 to June 1980 registered some improvement but added that she had not yet reached the high standards the Bank demanded

for confirmation in her post. This resulted in the extension of her probation period to February 28, 1981, and in downgrading her from level D to level C.

45. The Applicant's annual performance evaluations for the periods 1981 to March 1985 also indicated that her performance was never fully satisfactory. The report for the period July 1, 1982 to June 30, 1983 is most revealing of the Applicant's mixed record. Although her personality and positive attitude were highly commended by her supervisors, most of them agreed that her performance left much to be desired, particularly in that she was reluctant to show initiative and that she required detailed instructions and supervision and that some of the work she produced was "rich in typo errors." Again, the Applicant's Performance Review (PPR) for the period February 28, 1986 to June 30, 1989 was unequivocal in recording her less than satisfactory performance. Her Division Chief stated that she "has a weak sense of priority and organization, and pays insufficient attention to details." This, of course, affected the quality and timeliness of her output and required a high degree of supervision from her supervisors. As a result of these negative remarks made by her supervisors, the Applicant requested to be re-evaluated in three months. The requested evaluation was done by the Applicant's Division Chief on November 30, 1989. He found that the Applicant's performance had improved considerably.

46. From the above examination of the Applicant's record the Tribunal draws the conclusion that, in spite of occasional improvements, the Applicant's performance even prior to the alleged deterioration had always been mixed. The same specific deficiencies and weaknesses had been repeatedly pointed out by many of her supervisors.

47. The decisive period of the Applicant's service started in 1992 and ended with the decision of March 8, 1994, to terminate her employment. The Tribunal identifies the PPR of the period from July 1, 1991 to March 15, 1992 as the measure responsible for triggering the chain of events that led to the contested decision terminating the employment of the Applicant. In that review, the Applicant's "less than satisfactory performance'' was noted. It was stated that "at times the quality and timely delivery of some tasks have not been satisfactory. As a result, her work needs scrutiny and follow-up." The Management Review Group recommended that an evaluation of her performance be done after six months.

48. The criticism by the Applicant of the outcome of the above evaluation on the basis that one source of the poor assessment was a supervisor with whom the Applicant had worked only for four and a half months is far outweighed by the fact that the Management Review Group that evaluated her performance was composed of five unprejudiced members. The Applicant has not been able to substantiate any abuse of discretion on their part, and it was not improper for the Respondent to rest its decision on their evaluation of her performance.

49. The weaknesses of the Applicant's performance were again highlighted and commented upon in the Applicant' s PPR for the period February 28, 1992 to February 28, 1993 in which her Division Chief concluded that on the whole her performance during the past year had remained unsatisfactory and recommended invoking Staff Rule 7.01, para. 11.02. The Management Review Group endorsed the recommendation of the Division Chief stating that the work program for the Applicant should be carried out from June 28, 1993 to September 30, 1993, and that "Failure at the work program could lead to termination."

50. In the light of the above reports of the level of the Applicant's performance, the Tribunal finds that the decision to place her on a closely monitored work program was not vitiated by any abuse of discretion.

51. The Tribunal does not accept the Applicant's argument that the start, ten months after her promotion to level 14, of a process leading to termination is inconsistent with the finding that her performance was satisfactory at the time of her promotion. Promotion to level 14 must naturally have been based on the Applicant's performance as a grade level 13 secretary. The process leading to termination was based on the Applicant's performance in her new grade level 14.

52. The Applicant's reference to a report prepared in the Bank on the exercise of prejudice against Africans cannot by itself lend any support to the accusation by the Applicant that one of her supervisors who was critical

of her work was motivated by prejudice against Africans. The Applicant's allegation of prejudice is supported by no evidence at all.

53. The record also shows that throughout the period of the monitored work program during probation the Respondent properly implemented the requirements of Staff Rule 7.01, para. 11. 02. The details of the work program were given to the Applicant by a memorandum dated June 25, 1993. It was agreed that the Applicant would meet weekly with her immediate supervisor and the Personnel Officer to review progress. Seven such meetings took place and the minutes of those meetings indicate that the Applicant was regularly made aware of her shortcomings and deficiencies. The Division Chief, in his evaluation report of November 23, 1993, concluded that the Applicant's "performance as a Staff Assistant remains unsatisfactory, and despite all the guidance and close supervision provided to her during the three-month period, she has been unable to maintain her performance at a level consistent with Bank standards." The Tribunal finds no basis on which this conclusion can be said to be unreasonable or unjustified.

54. The Tribunal concludes, therefore, that the decision to terminate the employment of the Applicant subsequent to her failure to improve her performance during the probationary period was a proper exercise of a managerial discretion provided for in Staff Rule 7.01, para. 11.02.

55. The record also shows that, subsequent to the Applicant's Division Chief's request that she be removed from the Division, the Director of AST contacted other Division Chiefs to see whether a position existed elsewhere in AST where the Applicant might be able to perform satisfactorily. Subsequently, the same Director of AST requested the Vice President, East Asia and Pacific Region, and the Vice President, South Asia Region, to determine whether there was a level 14 position suitable for the Applicant in the Asia Region. The Applicant was aware of these efforts and both she and her Personnel Officer continued to search for alternative suitable positions. The fact that no such position could subsequently be identified cannot be regarded as a failure by the Respondent to discharge its obligations vis-à-vis the Applicant.

56. The Applicant also complains that she was treated unfairly by the Respondent when she was offered the option of being placed on leave without pay through the end of year 1994 and then resigning voluntarily rather than being terminated for unsatisfactory performance. The record, however, shows that the offer was made to allow the Applicant some time to rectify her visa status for herself and one of her children and, in any case, the Applicant turned down the offer, apparently on the advice of her counsel, preferring to maintain her rights of appeal. Moreover, contrary to what the Applicant seems to have hoped for, the Respondent was not under any obligation to offer her a mutually agreed separation with the financial package that comes with it. Failure to make such an offer does not violate any right of the Applicant under her contract of employment and terms of appointment.

57. The Applicant alleges that the Respondent's handling of her case was vitiated by certain violations of due process. She maintains that there has been a "history of secretiveness and deception" in her case and that parts of the process were kept hidden from her. The record provides no support for these allegations. The negative remarks concerning the Applicant's performance were communicated to her throughout the PPRs which, in turn, made reference to other documents pertaining to her supervisors' assessment of her performance. Throughout this process she was made aware of what was going on and had adequate opportunity to comment.

Decision:

For the above reasons, the Tribunal unanimously decides to dismiss the Application.

Elihu Lauterpacht

/S/ Elihu Lauterpacht
President

C. F. Amerasinghe

/S/ C. F. Amerasinghe
Executive Secretary

At London, England, May 14, 1996