

Decision No. 377**Yves-Coffi Prudencio,
Applicant**

v.

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

1. This judgment is rendered by a Panel of the Tribunal established in accordance with Article V(2) of the Tribunal's Statute, and composed of Jan Paulsson, President, and Judges Stephen M. Schwebel and Zia Mody. The application was received on 2 May 2007.

2. The Applicant's career with the Bank, which began just over a decade ago, has according to his own description involved a number of difficult episodes with his managers. His present application to the Tribunal arises in large part from his negative Overall Performance Evaluation for Fiscal Year 2005 ("FY05 OPE"), which coincided with his placement on a Monitored Work Program ("MWP") and then a Performance Improvement Plan ("PIP"). The Applicant challenges the FY05 OPE and his placement on the PIP, alleging that he has been the victim of retaliation, discrimination and various other forms of unfair treatment.

Relevant Facts

3. The Applicant obtained a three-year Fixed-Term contract as an Agriculturalist starting on 3 August 1997. In 1999, he was given an Open-Ended appointment as a Senior Agriculturalist.

4. In 2000, the Applicant claims that he was marked out as an "outspoken and non-submissive" staff member after a debate with his then-manager before the latter's peers. The Applicant further claims that in 2000 he escaped, through "internal political pressures," an attempt to have him declared redundant.

5. As a result of reforms in June 2001, the Applicant's unit (AFTR3) within the Environmentally and Socially Sustainable Development ("ESSD") Technical Department of the Africa Region was closed and he was transferred to AFTR1 (hereinafter "the Unit," which later became AFTR2). Ms. Karen McConnell Brooks served as Lead Specialist/Acting Manager of the Unit, and was in November 2001 promoted to the position of Manager.

6. Beginning in May 2002, the Applicant claims that Ms. Brooks denied him work as a Task Team Leader and as a Level G staff member. He further states that she did not sign any Results Agreement for him with respect to his FY03-FY05 OPE periods. The Applicant claims that Ms. Brooks proceeded to "progressively spoil" his OPEs by underrating his performance in the FY03 OPE period onward, by not holding appropriate meetings with him, and by reducing his training program. The Applicant believes that Ms. Brooks was "fram[ing him] for exit."

7. In November 2002, according to the Applicant, Ms. Brooks tried to replace him by hiring and giving tasks allegedly within his competence to one of her friends. The Applicant alleges that he was placed on the Western Kenya Integrated Ecosystem Management Project ("WKIEMP") by Ms. Brooks to mentor this friend.

8. In December 2002, the Applicant began to write a series of personal opinion papers about the Bank's operations in Africa that he entitled "Food for Thought" and disseminated to colleagues. He acknowledges that they were controversial.

9. On 27 April 2004, after the Applicant – as he explains – objected to Ms. Brooks’ critique of his work, Ms. Brooks solicited from certain Bank staff members external to the Unit (identified as a Quality Assurance Group (“QAG”)) their reviews of and recommendations for a project document (a “PAD”) produced by the Applicant for the WKIEMP and provided to Ms. Brooks via her alleged friend. The review was largely negative, but questioned whether “uncertain elements” in the criteria required by the Unit for projects had led to differences of opinion there.

10. On 15 July 2004, Mr. John McIntire became Sector Director of the ESSD Africa Region, and thus Ms. Brooks’ superior and the Applicant’s Reviewing Manager. Mr. McIntire had known the Applicant for approximately 25 years, was familiar with his past work, and was briefed upon his arrival by his predecessor that the Applicant was not living up to his potential. The Applicant claims that he informed Mr. McIntire of his difficulties with Ms. Brooks, and that Mr. McIntire agreed to intercede to seek a solution.

11. On 29 October 2004, the Applicant met in Dar es Salaam with Mr. McIntire and Ms. Brooks to discuss his performance and the possibility that a PIP would be initiated. The Applicant claims that Mr. McIntire and Ms. Brooks pressed him at this meeting to sign off on his FY04 OPE, and that Ms. Brooks stated that any further work for the Applicant commensurate to his level would occur only as part of a PIP.

12. On 29 November 2004, the Applicant circulated to all staff of the Africa Technical Families, ESSD Front Office (“AFTSD”), a paper entitled “Food for Thought: Why Is the Bank, and Development Assistance in General, Failing in Africa? – Theory of Institutional Mutation,” which he says was written during his free time. The Applicant therein developed the notion of a group of “mutants” defined as

individuals who put personal career goals, personal economic, political and power goals or ambitions ahead of development/poverty reduction goals of the development assistance institutions they are working for. A shift from development missionary attitude towards a development treasures [sic] seeker attitude. The negative “bad”/evil instincts taking over the positive “good” instincts (yin vs. yang, etc.)

The paper asserted that the diversion of international development institutions’ work from “noble and humanitarian objectives” toward the “personal and political goals of staff and interest groups within and outside the institutions”

begins with the development of collusive behaviors within the institution, with the emergence of groups, clubs or networks of professionals, the “mutants,” who, upon realizing that succeeding in development eventually means getting out of the development business, and losing current and potential gains, affect the principles and *modus operandi* of the institution so as to maximize personal gains by attempting by all means to make development assistance a long-lasting or never ending process. Eventually some external economic and political interest groups (including political parties and multi-nationals of former colonial powers) interested in commanding and controlling the nature and pace of development on the continent (Africa) so as to maximize their gains, enter into alliances with the internal mutant groups, infiltrate them and eventually take over some of them.

The Applicant went on to state his view that while in some cases the concepts applied are merely outdated,

[i]n other cases we apply fallacious concepts consciously or unconsciously designed by mutants to slow down development in the third world, particularly in Africa to avoid killing the milking cow, to maintain jobs, to stay in business, but we are too busy trying to deliver on tasks and operations, too brain-washed to stop, think, question and realize ... [Ellipsis in original.]

The Applicant concluded his paper by stating that “[n]o one should feel targeted. This is just a theory. Test it against the facts you witness yourself, and adopt it or reject it.”

13. Soon thereafter, Ms. Brooks obtained the advice of the Office of Ethics and Business Conduct concerning the Applicant’s dissemination of this “Food for Thought” paper. The written response, dated 2 December 2004, was to the effect that the Applicant had used the Bank’s e-mail system inappropriately and that he had violated the Bank’s harassment policy; his “blanket statements about ‘mutants’ can create an environment of suspicion

and uncomfortableness for some or maybe all staff. It is possible staff's trust of each other will be affected and their ability to speak honestly about their views can be limited for fear of being labeled a 'mutant.'" The Office of Ethics and Business Conduct concluded that this was "a serious matter" showing "poor judgment on [the Applicant's] part, a disregard for Bank policies and a disregard for his colleagues."

14. On 10 December 2004, apparently in light of this advice, Mr. McIntire e-mailed the Applicant, stating that he had read the "Food for Thought" paper, and that "[b]ecause the paper is not related to your work program, I must ask you not to circulate it any more within the Bank. (If you want to publish it in some forum outside the Bank then that would follow the usual channels for work done by Bank staff; however, any further work on this paper, or on anything outside your agreed work program, must be done on your own time)."

15. On 3 January 2005, apparently at the recommendation of the HR Manager for Africa, and after discussion with a management team consisting of Mr. McIntire and four other sector managers, Ms. Brooks e-mailed the Applicant to propose a "three month period of monitored performance" (i.e. an MWP) from 3 January 2005 to 31 March 2005. Ms. Brooks stated that she hoped that this course of action would preclude a PIP, and proposed that she and the Applicant establish benchmarks that "will constitute acceptable performance." Ms. Brooks offered the Applicant monthly written feedback on whether the benchmarks were being met, and stated that at the end of the three months the management team would determine whether a formal PIP was necessary.

16. On 12 January 2005, the Applicant responded by e-mail to Ms. Brooks, denying that his performance had been inadequate and that a "formal MWP" was needed. He alleged that "foul play" was involved, requested leave to present to an "independent committee," prior to the finalization of his FY04 OPE, a report seeking to prove that the issue was not as one "of performance but rather an issue of [a] deliberate and premeditated attempt to target, isolate, weaken and frame for exit a francophone and non-submissive African staff member." He further stated that the MWP could not be undertaken on the basis of his FY04 OPE until Mr. McIntire had signed off on it as the Reviewing Manager. The Applicant suggested that he be given a new manager, and requested a modification of the draft Results Agreement allegedly sent to Ms. Brooks but not signed by her.

17. On 28 January 2005, Ms. Brooks e-mailed the Applicant, expressing regret that he was upset, and stating that management had decided to establish an MWP for the Applicant "based on the areas for improvement identified for your performance, as recorded in the last two OPEs [i.e. the FY03 and FY04 OPEs]." Ms. Brooks provided a table setting out proposed areas of focus, key dates for deliverables, and standards for evaluation and expectations. She further proposed that the three-month MWP evaluation period would run from 1 February 2005 through 30 April 2005.

18. On 1 February 2005, the Applicant wrote to Ms. Brooks to state that as there was no issue of performance, there should be no MWP but rather only a Results Agreement. He complained that he had not had either a Results Agreement or a Learning Plan for the past two fiscal years. He made suggestions with respect to his tasks, agreed to Ms. Brooks' suggested criteria for assessing his behavior, and requested a daily starting time of 10 or 11 a.m. due to an alleged sleeping disorder.

19. On 3 February 2005, Ms. Brooks wrote in an e-mail to the Applicant that the "issues related to the [FY04] OPE have been resolved, and that this is now complete." She also discussed the tasks listed in the Applicant's MWP, and stated that the MWP terms would serve as the Results Agreement for the "remainder of this review period, and we can formalize this in the Results Agreement section of your OPE for this year [i.e. the FY05 OPE]." Ms. Brooks explained that she had not approved the Applicant's request for further training in communications because this would have involved significant expense and would have been duplicative of earlier training. She expressed willingness to consider if additional training would be useful and consistent with the Unit's budget limitations.

20. On 8 February 2005, the Applicant participated in his first MWP feedback meeting with Ms. Brooks and the Unit's Office Manager. According to minutes taken and sent by the Office Manager to Ms. Brooks and the Applicant on 11 February 2005, the Applicant complained about not getting enough work and assistance from the Unit, and Ms. Brooks explained that the "results agreement for the period of the [MWP] constitutes a full

work program for that time.” Ms. Brooks also suggested that a member of HR facilitate future MWP feedback discussions and keep them to their intended purpose. The Applicant and Ms. Brooks disagreed on the need for prior internal clearance of concept notes before their presentation to clients. Ms. Brooks agreed to assist the Applicant with obtaining input from certain staff members. After the meeting, Ms. Brooks identified the agreed steps for the Applicant’s concept-note work as being: “1) [a] draft concept note, including input from [certain staff members], 2) internal discussion and suggestions for revision, if needed, 3) as part of [the] internal discussion, [a] decision on how to carry the concept forward.”

21. On 23 February 2005, the second MWP feedback meeting took place. An HR officer joined the group at this time. According to minutes prepared by the Unit’s Office Manager, there was disagreement over the Applicant’s asserted need to visit the relevant Country Office to obtain materials, but it was agreed to let the Applicant travel as part of an existing mission in Africa. Permission to replace concept notes for Uganda and Tanzania with a project in Mauritania was granted on the condition that the Applicant’s involvement in the latter project could quickly be arranged and thereafter completed by the end of the MWP period (i.e. 30 April 2005). The Applicant was also asked to participate in an identified training program in communications when he returned from the mission. The Applicant stated that he was slowly getting used to the agreed working hours, but had not seen a doctor to treat his sleeping disorder.

22. On 7 March 2005, an HR officer informed the Applicant by e-mail that since he had not heard from the Applicant regarding the required approval for the proposed change of tasks, the original MWP plan stood as agreed.

23. On 5 April 2005, the third MWP meeting took place. According to the minutes of the meeting, the Applicant’s work on the Uganda and Tanzania concept notes was continuing. Ms. Brooks commented on the notes. It was agreed that the Mauritania project would not be admitted as a substitute, as arrangements for the Applicant’s participation had not been made in time. Ms. Brooks expressed “her concern that the cooperative commitment to making the MWP work does not seem to be in place, and as a consequence the exercise does not appear to be very productive.”

24. On 11 April 2005, the Applicant suggested in his comments on the draft minutes of the third meeting that one of the tasks be considered as delivered. He also stated with respect to “the West Africa project” that he had “good working relationships” with two relevant staff members, and asked that Ms. Brooks not request comments from them on his behalf, as “it would be preferable that there be no intervention that would give them a wrong impression.” His comments were incorporated into the minutes.

25. On 29 April 2005, a draft OPE was produced for the Applicant for the period 1 April 2004 to 31 March 2005 (i.e. the FY05 OPE). No ratings were given for his Results Assessment or Behavioral Assessment sections at this point. Nor did the draft include any comments by the Applicant or his managers. The Applicant was, however, given “Fully Accomplished” rankings for his Development Actions Assessment (i.e. for a “Unit Retreat in Tanzania” and for “Rural Week 2005”). Ms. Brooks coordinated the preparation of this OPE with an HR officer.

26. On 30 April 2005, the MWP evaluation period ended. The Bank delayed its evaluation of the results in order to take account of the last deliverable under the MWP, namely a concept note which the Applicant submitted in July 2005.

27. On 21 July 2005, a second draft FY05 OPE was produced. It contained ratings for the Results Assessment and Behavioral Assessment sections, as well as supervisor comments, but no comments by the Applicant. On 5 August 2005, a third draft FY05 OPE was prepared. It included accusatory comments by the Applicant.

28. It appears that at a meeting between the Applicant and Ms. Brooks on 8 August 2005, the Applicant inquired whether: (1) an independent review of an OPE was possible where a manager and a staff member disagreed about ratings; and (2) a Staff Association attorney could become involved in such a case.

29. On 9 August 2005, Ms. Brooks relayed to the Applicant the response from HR that a lawyer could intervene in a formal appeal to the Appeals Committee, although it was “normally recommend[ed]” that OPE-related disagreements be “resolved at the lowest possible level ... before formal avenues such as Mediation or Appeals are pursued.” Ms. Brooks informed the Applicant that Mr. McIntire was willing to meet with him, and that the HR officer who had been involved in the MWP feedback discussions might also be willing to join in. Ms. Brooks requested that the Applicant schedule this meeting, but it apparently did not occur.

30. On 14 September 2005, the Applicant e-mailed the Regional Vice President for Africa to elaborate on concerns he had raised at a Town Hall meeting two days previously. While the Applicant referred in passing to his “Food for Thought” paper in the e-mail, he did not mention his institutional mutation theory. The next day, the Applicant forwarded this e-mail to all Africa staff, stating that “[t]here is nothing to hide.” Before the Appeals Committee, the Applicant stated that “[r]ight after [the Town Hall meeting], everything started falling down on me,” including with respect to his MWP assessment. Mr. McIntire stated to the contrary that the Town Hall incident had “[a]bsolutely no” impact on matters.

31. On 11 October 2005, the Applicant e-mailed Mr. McIntire with respect to his FY05 OPE, stating his preference that HR assess the comments of the “other reviewers listed in the OPE,” and that he be allowed to read these comments (once anonymized) prior to “any final decision” on the OPE, if Mr. McIntire had no objection. The Applicant also reminded Mr. McIntire that the OPE period ran only through 30 March 2005 (i.e. a month before the MWP ended).

32. On 20 October 2005, Ms. Brooks signed the Applicant’s FY05 OPE. She also informed him by e-mail that Mr. McIntire had reviewed the OPE and concurred with the ratings and feedback given to the Applicant. Ms. Brooks invited the Applicant to add or amend his own comments, and then sign the OPE or indicate that he would not sign it. Ms. Brooks stated that if the Applicant did not sign the OPE by 27 October 2005, she would suggest that HR apply an electronic override signature so that Mr. McIntire could complete the OPE.

33. The same day, the Applicant e-mailed Ms. Brooks to state that he was waiting for the steps he had suggested to Mr. McIntire on 11 October 2005 to be “accomplished” before he proceeded with respect to the OPE.

34. On 23 October 2005, Ms. Brooks confirmed to the Applicant by e-mail that Mr. McIntire had reviewed and concurred with the ratings and feedback provided in the Applicant’s OPE. Ms. Brooks stated that HR advises on “process,” but that the content of an OPE is established through “dialogue and discussion” between management and the staff member. Ms. Brooks stated that this process had been completed with Mr. McIntire providing an “additional review,” and she reiterated that the process would be completed either through the Applicant’s signature or his refusal to sign and the consequent appending of an overriding “electronic signature.”

35. On 24 October 2005, the Applicant stated that if his requests to Mr. McIntire were not granted, he would “elect to exercise [his] right not to sign.” The same day, the Applicant added to his comments in the Results Assessment section of the OPE the following text: “Slippage, if any, was due to factors *under ESSD management responsibility that I could not control.*” (Emphasis added.) He also rewrote his Overall Comments, stating notably: “I believe that the ratings of this OPE are biased downward and reflect more what my manager want[s] them to be, rather than what other reviewers think they should be. I would like them to be revised through an independent review involving HR of the feedbacks from other reviewers listed in the OPE, and that I also be shown anonymous copies of such feedbacks to convince me of the fairness of the ratings. If this request is rejected, I prefer not to sign off [on] the OPE.”

36. On 25 October 2005, Ms. Brooks sent to the Applicant her “Summary Assessment of the Monitored Work Program and Establishment of a PIP,” in which she informed the Applicant that the management team had decided to institute a PIP pursuant to Staff Rule 5.03. Ms. Brooks noted some positive feedback with respect to the Applicant’s deliverables, and noted that the Applicant had “made efforts to interact better with peers.” Ms. Brooks found, however, that the Applicant might still need to improve his interactions with clients, that feedback

indicated he had a “tendency to go it alone,” and that he had failed to show an “ability to work harmoniously and to good effect with supervisors.” Ms. Brooks also found that the Applicant’s attitude had rendered unsuccessful their interactions to evaluate the course of the MWP. Ms. Brooks further noted that the year had ended with the Applicant leaving on a mission for which he had not received an approved travel request.

37. On 27 October 2005, the Applicant and Mr. McIntire exchanged e-mails. Mr. McIntire referred the Applicant to the Conflict Resolution System (“CRS”) after accusing him of making false statements and accusations against Ms. Brooks. The Applicant responded that Mr. McIntire could not determine the statements’ falsity as he had not been a witness to the events in question and had not analyzed the underlying facts.

38. On 7 and 8 November 2005, the Applicant discussed with Ms. Brooks the possibility of mediating certain issues, and of extending his MWP in combination with a reassignment. Ms. Brooks agreed to mediate the PIP work program, but not (in the Applicant’s words) the “[r]oot causes of [their] difficult working relationship,” or the necessity of the MWP and PIP.

39. On 9 November 2005, with the encouragement of Mr. McIntire, the Applicant inquired with the Mediation Office as to whether mediating the PIP issue would affect his ability to appeal the PIP. Mr. McIntire for his part urged the Applicant to accept Ms. Brooks’ “proposal for mediation, to sign your OPE and to do well under the PIP.” The Applicant did not so agree.

40. On 14 November 2005, Ms. Brooks e-mailed the Applicant to set out his work program under the PIP. This involved two tasks, i.e. the “Cape ICR” project and the “Miombo Woodlands” project. Ms. Brooks also warned the Applicant that “[f]ailure to achieve a sustained level of satisfactory performance may result in termination of service at the end of the performance improvement period.” This period was to run from 14 November 2005 (the date of the e-mail) through 14 May 2006, a period of six months. The PIP period was eventually finalized as running from 23 November 2005 through 14 May 2006.

41. In her e-mail, Ms. Brooks noted that the Applicant’s “expected behaviors” included: (i) “Continuing to maintain working hours as agreed so that interaction with other colleagues is facilitated”; (ii) “Maintaining high professional standards of communication with colleagues”; (iii) “Refraining from actions or statements that contribute to creating a hostile working environment”; (iv) “Adhering to departmental and unit procedures regarding clearance for travel and other matters”; (v) “Focusing exclusively on assigned tasks as agreed unless given clearance to deviate by me as manager of the PIP and by the relevant SM managing the assigned task”; and (vi) “Interacting appropriately with clients; i.e., showing professional decorum, ability to listen, responsiveness to needs of the client.” Ms. Brooks wrote that the “standards for evaluation” to be applied were: (i) “Review by line manager plus peer reviewers”; (ii) “Timeliness of delivery”; and (iii) “Structured and broadly solicited feedback from colleagues and clients involved in the various tasks.” She foresaw that she would provide the Applicant with a written evaluation of the PIP within 14 working days after 14 May 2006, and that she would discuss this evaluation with the Applicant.

42. On 15 and 16 November 2005, the Applicant and Ms. Brooks exchanged a number of e-mails in which the Applicant stated both his intent to appeal the PIP and his preference that a certain task (the “Cape ICR” project) be replaced in his PIP and given to another staff member since it was “already [a] red-flagged task [to be undertaken] on short notice,” and also due to a “security related reason that [the Applicant] prefer[red] not to disclose at [that] time.” Ms. Brooks noted that the appeal would not “defer or delay” the PIP, and that when the Applicant declined the “Cape ICR” project, both it and the “Miombo Woodlands” project had to be reassigned, thus posing for the Bank an “immediate challenge to develop an adequate work program for [the Applicant], since at present [he was] underprogrammed.” The Applicant proposed alternative tasks.

43. On 22 November 2005, an HR electronic override was applied in lieu of the Applicant’s signature given the Applicant’s refusal to sign his FY05 OPE. Mr. McIntire signed as Reviewing Manager on 24 November 2005, and responded to the accusatory comments which the Applicant had entered in the draft OPE.

44. Meanwhile, on 23 November 2005, Ms. Brooks informed the Applicant by e-mail of the new PIP “tasks

assigned to you for the period starting immediately through May 14, 2006,” namely a Uganda concept note, supervision of the “ALWI” projects, and task team leadership of the “Northern Uganda PSIA.” To the “expected behaviors” list was added “[p]articipation in monthly meetings with me, [an HR officer], and [the Unit’s Office Manager] to discuss progress in completing the assigned work.”

45. The Applicant replied the same day, stating that he would have preferred a different program (i.e. the West Africa Sustainable Land Management Program). He also suggested *inter alia* that each assigned task: (i) be a Level G “task in line with my job description and qualifications”; (ii) have a clearly defined internal client who would approve the task and receive and evaluate the final result; (iii) have “clearly defined objectives and success indicators that can be objectively evaluated by any external reviewer”; and (iv) have “peer reviewers within the department and from outside the department, whom we all agree on.” He further suggested that a “mutually agreed neutral reviewing manager (preferably from outside the department) be allowed to review achievements and give an opinion in case we disagree on your final written evaluation of the PIP,” and that a maximum number of days be agreed for “random tasks not in the program” that had been described. The Applicant stated that “[f]or the moment, I will start with the assigned tasks and if you agree we could discuss with the help of HR to reach agreement on the above mentioned items.”

46. On 8 December 2005, the Applicant sent to the Director of the Diversity Program and to the Vice President of Human Resources a document entitled “NOTE to HR/Diversity Programs – Patterns of Racial Discrimination in AFTS2 and in the Africa-ESSD Department of the World Bank.” In this document, the Applicant alleged that “white staff with blonde hair” were favored in his Unit. The Applicant provided tables of staff members listed by time period of service, race (i.e. Asian, Black or White), hair color and current Bank employment status.

47. On 17 February 2006, the Applicant filed a Statement of Appeal with the Appeals Committee, contesting *inter alia* his FY05 OPE, his MWP assessment and his placement on the PIP. He requested the rescission and withdrawal of the FY05 OPE and PIP, as well as the removal of negative assessments from his FY03 and FY04 OPEs. He further requested a recommendation for promotion, approximately 36 months of salary in financial and intangible damages, and legal fees.

48. The Appeals Committee determined that it lacked jurisdiction to decide on the issues of the Applicant’s FY03 and FY04 OPEs, the requested promotion to Grade H, any salary increases (i.e. SRIs) prior to 2005, and the Applicant’s “general claims of harassment since 2003.” The Appeals Committee nevertheless stated that it would consider these alleged acts and decisions insofar as they were probative of timely claims (i.e. those concerning the FY05 OPE, the MWP assessment and the issuance of the PIP), or evidenced a pattern or practice of managerial abuse. The Bank ultimately withdrew its objection to jurisdiction with respect to the Applicant’s claim concerning his 2005 SRI, although this claim does not appear to have been considered by the Appeals Committee. The Appeals Committee denied the Applicant’s request for provisional relief in the form of a six-month extension of his administrative leave and consequent change in the last day of his employment.

49. Meanwhile, the Applicant states, on 24 April 2006 he filed a misconduct complaint against Ms. Brooks with INT for alleged harassment and discrimination. He adds that the Director of INT informed him that INT would not conduct an investigation because the issues raised by the Applicant were pending before the Appeals Committee.

50. On 13 June 2006, the Applicant wrote to the Regional Vice President for Africa and others an e-mail entitled “Why the Bank is failing in Africa – Part 2: Tales of the AFR/ESSD Department – Open Letter to the Africa VP.” In it, he: (i) alleged “abuses in my OPE as harassment and retaliatory measures by my manager to frame me for exit”; (ii) claimed to have suffered harassment specifically by Ms. Brooks and Mr. McIntire; (iii) stated that “I do not live by the standards of others. I am a free man; call me a Rebel if you wish”; (iv) noted that his cause was *inter alia* “freedom of speech for Africans”; (v) asserted that his criticisms were intended to be constructive over the long term but had been ignored; (vi) suggested that his managers had hoped he would be killed on a mission to northern Uganda; and (vii) stated that he had been forced into accepting the PIP and that he viewed it as being also a “PIP of my managers, and I will be the judge.”

51. On 15 June 2006, the Regional Vice President replied to the Applicant, stating that his e-mail, "sent around to many of us is unacceptable," and that the Applicant was "creating a hostile work environment, and I consider this a serious lack of judgment and respect, and I take very seriously your threats and slander of your managers' names and reputations and want this to stop immediately." The Regional Vice President referred the Applicant to the CRS and requested a meeting with him on 19 June 2006. The record does not indicate whether this meeting took place.

52. On 17 October 2006, a hearing before the Appeals Committee was held in the Applicant's case. Seven witnesses either denied having discriminated against the Applicant, or stated that they had not observed Ms. Brooks or other members of the management team treating the Applicant differently from his colleagues. A retired co-worker of the Applicant testified that discrimination in the Unit against Sub-Saharan Africans, including himself, had made it difficult to obtain work in the Unit, but that Ms. Brooks had not discriminated against him personally even though she was "part of" the Unit's discriminatory structure.

53. On 27 October 2006, pursuant to the Applicant's request for documents, the Applicant was provided through the Appeals Committee with redacted versions of comments and ratings submitted by feedback providers for his FY04 and FY05 OPEs.

54. On 12 December 2006, the Applicant left the service of the Bank.

55. On 21 December 2006, the Appeals Committee issued its Report and recommendations in respect of the Applicant's Appeal. The Appeals Committee found Ms. Brooks' assessment of the Applicant's performance to have been reasonable and having an observable basis, although she was faulted for not keeping sufficient written records of her conversations with the Applicant's reviewers. The Appeals Committee further found that Ms. Brooks had followed the procedures applicable to the completion of the Applicant's FY05 OPE, that she had not treated the Applicant in a discriminatory or antagonistic fashion, and that there had been no abuse of discretion in the Applicant's placement on a PIP.

56. On 4 January 2007, the Vice President of Human Resources wrote to the Applicant to inform him that he had accepted the recommendation of the Appeals Committee and therefore had denied the Applicant's Appeal.

57. The Applicant now seeks the following relief before the Tribunal:

- (i) Rescission of the FY05 OPE;
- (ii) Cancellation of the PIP and all subsequent related decisions;
- (iii) 36 months of basic salary for financial and psychological damage; and
- (iv) Legal fees.

58. The Bank requests that all of the Applicant's pleas for relief be denied.

*Contentions of the Parties
Unfairness and Discrimination*

59. The Applicant argues that his right to fair treatment was violated, that he was harassed from FY03 forward (particularly during the FY05 OPE process), and that he was discriminated against. He also says he was given tasks that were below his Level G grade, or inefficient and unnecessary.

60. The Bank answers that it did not discriminate or conspire against the Applicant, or treat him in an arbitrary manner. Precautions were taken to ensure the fairness of the assessments made of the Applicant's performance. The Applicant was not denied work, or work appropriate to his level (Level G). Nor was there an attempt to replace him.

Wrongful Imposition of the MWP and PIP

61. The Applicant contends that the MWP is not a process governed by the Staff Rules, and was arbitrarily and

improperly forced upon him as a three-month “rush program” in furtherance of a plan to get rid of him. He adds that the PIP was also a means to achieve his termination, and was arbitrarily and improperly applied to him. The Applicant asserts that he was not allowed to modify the terms of the MWP or those of the PIP.

62. The Applicant also argues that he did not receive adequate “performance diagnostics” that would have provided a simple, logical process for conducting the performance-improvement exercise. Ms. Brooks and the ESSD management team sabotaged his MWP projects by: (i) restricting him from travel; (ii) forcing him to rely on his colleagues to perform tasks he would otherwise have undertaken; (iii) failing to provide proper feedback during the MWP-related meetings; and (iv) generally failing to comment on his work or to hold necessary departmental meetings. According to the Applicant, these “maneuvers were designed to disrupt and prevent timely delivery of the tasks.”

63. The Bank answers that it assessed the Applicant’s performance in a reasonable manner in the MWP and FY05 OPE. Given the Applicant’s performance, a decision not to institute an MWP would have constituted a dereliction of managerial duty. Given the Applicant’s failure to use the MWP for its intended purpose, the decision to initiate a PIP was reasonable, legitimate and within the Bank’s discretion. The Bank agrees that the Applicant possesses analytical skill, but asserts that this quality has not been combined with an ability to deliver results in a collaborative manner.

Mishandling of the FY05 OPE

64. The Applicant maintains that the Bank abused its discretion by failing to follow required procedures for OPEs, including by: (i) providing the Applicant with written rather than in-person feedback; (ii) overloading him with tasks; and (iii) failing to provide him with Results Agreements. Feedback and ratings that were favorable to him were ignored, downplayed or misrepresented.

65. The Bank responds that it did not violate due process in managing and assessing the Applicant’s performance, and that the Applicant’s behavioral deficiencies were coupled with weak performance and results, as evidenced in the Applicant’s FY03 and FY04 OPEs. The Bank states that Ms. Brooks’ assessments of the Applicant’s behavior were positive when merited (i.e. in the FY03 OPE), and her other assessments, confirmed by Mr. McIntire, did not reflect any bias against the Applicant, being instead based on multiple feedback sources. The Bank did not ignore positive feedback about the Applicant.

66. The Applicant, so the Bank further says, was not overloaded with projects during the performance-improvement process, but had difficulty organizing his work and spent his time challenging his terms of reference and the process applied to him instead of concentrating on the tasks given to him.

Retaliation

67. The Applicant insists that the Bank retaliated against him for his November 2004 “Food for Thought” paper, and more generally for exercising his freedom of speech. It did this instead of disciplining him in an appropriate manner or publicizing the Bank’s rules on e-mail usage.

68. The Bank denies that it retaliated against the Applicant, or that it denied him either his professional freedom of expression or his right to perform research and publish writing unrelated to his work, so long as he did this on his own time rather than on the Bank’s. The Applicant nevertheless persisted in misusing the Bank’s e-mail system rather than utilizing the Bank’s grievance procedures to resolve his complaints.

The Tribunal’s Analysis

69. The Applicant expressly contests the following decisions by the Bank:

- (i) the “Partially Satisfactory” ratings in his FY05 OPE; and

(ii) the Bank's decision to place him on a PIP in FY06.

70. The Applicant has appeared before the Tribunal *pro se*, and his contentions against the MWP, and those concerning alleged discrimination, retaliation, unfair treatment, lack of due process, denial of appropriate work and suppression of his free-speech rights may have been inadvertently left out of the appropriate section of the application. These issues are nevertheless susceptible to evaluation under the rubrics of the two claims expressly put forward, which themselves may to a large extent be analyzed together.

71. The Applicant's PIP was instituted following an unsuccessful MWP for which the deliverables formed the Results Assessment line items of the FY05 OPE. The behavioral requirements of the MWP substantively corresponded with those assessed in the FY05 OPE. Consequently, the legitimacy of the Applicant's placement on a PIP is inextricably bound up with the specific "Partially Successful" assessments made in the FY05 OPE.

72. It follows that if the Bank abused its discretion when it assessed the Applicant's performance results and behavior for the FY05 OPE process, its MWP assessment and the PIP decision are likewise flawed. If, on the other hand, the Bank did not abuse its discretion in this respect, then the MWP assessment and PIP decisions are presumptively valid absent some other independent flaw such as retaliation in the decision-making processes relating to them.

73. In the context of performance evaluation, the Tribunal does not interfere or substitute its own judgment for the Bank's absent an abuse of discretion, that is to say where the contested decision is arbitrary, capricious, discriminatory, improperly motivated, intentionally ill-willed, or carried out in violation of a fair and reasonable procedure. (See the three recent judgments of *O*, Decision No. 337 [2005], para. 39, *Moussavi*, Decision No. 360 [2007], para. 17, and *Prakas*, Decision No. 357 [2007], para. 47.)

74. The Tribunal cannot and should not conduct a microscopic inquiry into each facet of the Applicant's work program and behavior during the assessed period. The record contains extensive arguments, counter-arguments and evidence about the degree of difficulty of the Applicant's individual tasks during the relevant period, the reasonableness of the deadlines set for those tasks, and whether changes made to the work program during the relevant period were proper and reasonable. It would be difficult and probably fruitless to assess each individual task and change to the work program, given the number of internal and external clients, managers and team members involved, and also given the Unit's broader work needs and responsibilities with respect to which the Tribunal is ill-equipped to evaluate each decision. The only effective approach is to assess whether the evidence from the FY05 OPE period satisfies the abuse of discretion test.

75. Insofar as the issue is one of arbitrariness or capriciousness, three facts are salient: (i) the Applicant's OPEs from FY98 onward consistently reflected managerial concerns over the Applicant's behavior, collaboration skills and overall teamwork, despite a high regard for the Applicant's technical skills; (ii) the Bank repeatedly engaged the Applicant in developing and modifying his work program both before the FY05 assessment period, as the MWP was designed and carried out, and (to a seemingly lesser extent) when the PIP was instituted; and (iii) the Bank appears to have changed its approach to managing the Applicant's performance at different points in the FY05 period when the Applicant raised concerns or requested a different course of action. It does not appear that the Bank acted in an arbitrary or capricious manner when it assessed and took action in response to the Applicant's performance in FY05. Nor does the record reveal improper motivation, intentional ill-will, or an unfair or unreasonable procedure. The Applicant has not been able to demonstrate the existence (indeed even the appearance) of *mala fides*.

76. Yet the requirement of a fair and reasonable procedure may be violated even in the absence of *mala fides*. The Tribunal has held that "a basic guarantee of due process requires that the staff member affected be adequately informed with all possible anticipation of any problems concerning his career prospects, skills or other relevant aspects of his work." (*Garcia-Mujica*, Decision No. 192 [1998], para. 19.) This requirement is also set out in Staff Rule 5.03 with respect to performance evaluations, and to the management of PIPs. In the present case, the Applicant was given several formal MWP feedback sessions with Ms. Brooks, and it was apparently expected that the Applicant would undertake monthly PIP feedback sessions with Ms. Brooks. Given

the amount of managerial attention and coaching which the Applicant received in the course of the performance-enhancement processes, it does not appear that the Bank abused its discretion in respect of its notice and feedback to the Applicant.

77. With respect to the related issue of whether the Applicant's work program was properly established for the FY05 period, the Staff Rules require that such a program be set out in advance, both for the OPE and the PIP. The record shows that the Bank endeavored to do this and was responsive to the Applicant's desires for specific changes, both before each period began and in certain instances mid-course. It does not appear that any task assigned to the Applicant was clearly unfair. To be sure, the Applicant was unhappy with his work program. Indeed, he forced changes in the work program by declining projects for unusual reasons (e.g. unspecified security concerns), and did not follow through on a conditionally approved request for a task change. But the Bank cannot give every staff member *carte blanche*. It does not appear that unfair or unreasonable processes were applied to the Applicant in respect to the establishment of his work program.

78. One remaining aspect of the work-program issue remains and is apparently of first impression for the Tribunal. The Applicant was placed on an MWP, which is an informal procedure apparently unknown to the Staff Rules and the Tribunal's jurisprudence. It appears that the MWP process was itself benign; it appears to have been modeled on the PIP, and its worst outcome was placement on a PIP (which the Applicant faced from the outset if the MWP were not instituted). Nonetheless, OPE and PIP processes should not be merged. (See *O*, Decision No. 337 [2005], para. 55.) The Bank allowed the FY05 OPE and MWP processes to overlap in the Applicant's case. This initiative appears to have been intended to reassure the Applicant, who had complained of not having a Results Agreement to guide his work program. That the MWP had the character of such an agreement, albeit covering a relatively brief period and combined with elements of a PIP monitoring program, is consistent with other evidence of managerial accommodation of the Applicant's demands, which rules out retaliation as a factor in the work program's composition.

79. Nevertheless, the MWP's blending with the OPE process raises more general concerns for due process. Consistently with the judgment in *O* at para. 55, it must be determined whether the MWP's blending with the OPE process violated due process, or precisely whether: (i) the MWP and OPE processes were "essentially different"; (ii) whether the MWP was "part of a normal or routine oversight and evaluation" or, alternatively, a "special measure" designed to deal with serious problems and which, if unsuccessfully discharged, could have led to the Applicant's termination; (iii) whether the mixture unfairly confused the Applicant and tainted the PIP decision; and (iv) whether the Bank unfairly considered performance under a period of time in which the performance did not actually take place.

80. It is clear that while the MWP imposed on the Applicant more intensive managerial involvement and feedback than a standard OPE period, its purpose (like the OPE in relevant respect) was to determine whether a PIP was needed. The Tribunal finds that the MWP process was similar enough to the OPE to exclude that the MWP was a "special measure" that was "essentially different" from the OPE and requiring a formal process having the character of the PIP procedure. The MWP established the Applicant's work program for the FY05 OPE in response to his request to develop an OPE-directed Results Agreement which Ms. Brooks agreed would form the Results Assessment section of his OPE. In sum, the MWP implemented here should not be deemed a process essentially distinct from the OPE requiring a wholly separate evaluation procedure.

81. As for retaliation, it is first of all to be observed that the Staff Rules forbid it. (See *Prakas*, Decision No. 357 [2007], para. 34, and *O*, Decision No. 337 [2005], para. 46.) Still, the "burden lies with the Applicant to establish facts which would bring his claim within the Staff Rules' definition of retaliation." (*F*, Decision No. 313 [2004], para. 50.) Here the Applicant has alleged that his managers retaliated against him and singled him out for dismissal on the bases of his "Food for Thought" paper, his general exercise of a professional right to free speech, and his self-expression as a Sub-Saharan, francophone African.

82. The Tribunal has seen no evidence of racial animus or individualized discrimination against the Applicant. The charge of retaliation in respect of the Applicant's "Food for Thought" paper and other broadly disseminated communications must also fail because: (i) the Applicant's behavioral and other perceived failings were evident

to his managers well before, and separately from, the “Food for Thought” paper of 29 November 2004; (ii) the Applicant appears to have consciously vexed his relationship with his managers by issuing inflammatory broadcasts and statements after performance-enhancing processes were instituted; and (iii) the Tribunal does not in any event require managers to “disabuse themselves of their existing perceptions of the relative strengths and weaknesses of the Applicant” in making decisions concerning the staff member. (*Prakas*, Decision No. 357 [2007], para. 51, concerning a redundancy decision involving a comparison of two staff members.) Moreover, the Tribunal can hardly fault the Bank, and particularly the Office of Ethics and Business Conduct, which had no operational dealings with the Applicant, for being sharply critical, without even approaching the threshold of impermissible restrictions on free expression, of what may fairly be described, given its context and manner of dissemination, as an unprofessional diatribe likely to have a deleterious effect on the working environment of other staff.

Decision

For the above reasons, the Tribunal dismisses the application.

/S/ Jan Paulsson
Jan Paulsson
President

/S/ Zakir Hafez
Zakir Hafez
Counsel

At Washington, DC, 14 December 2007