

Decision No. 117

Gerald Shaffer,  
Applicant

v.

International Bank for Reconstruction and Development,  
Respondent

1. The World Bank Administrative Tribunal, composed of P. Weil, President, A.K. Abul-Magd and E. Lauterpacht, Vice Presidents, and F.K. Apaloo, R. A. Gorman, E. Jiménez de Aréchaga and Tun Suffian, Judges, has been seized of an application, received January 31, 1992 by Gerald Shaffer, against the International Bank for Reconstruction and Development. The usual exchange of pleadings took place. The case was listed on August 24, 1992.

The relevant facts:

2. The Applicant joined the Bank in July 1983 as a Network Communications Specialist (NCS), level K (equivalent to current Grade 22), in the Information Resource Management Department.

3. In the summer of 1986 the newly appointed Division Chief and Applicant's second in line supervisor undertook to change the focus and the orientation of the work of his Division. Consequently, the NCSs were expected to add to their purely technical and engineering functions the function of an account manager. This new function consisted of an increased emphasis on client satisfaction and service orientation, including documentation, prompt completion of work, establishment of and commitment to meet promised deadlines, and an effort to anticipate the needs and problems of the client group.

4. In the Applicant's Performance Reviews (PPRs) for the year 1987, 1988 and 1989 his supervisors acknowledged the Applicant's technical skills, but they stated that he should take on a more assertive approach and stronger initiative and leadership in order to be more effective. Moreover, in the Applicant's PPR for 1989 which was signed by his Division Chief on May 15, 1989, the latter stated that during the Annual Merit Review the Applicant's performance, as compared with the performance of his colleagues, was rated below satisfactory and that he needed to take immediate action to correct the situation.

5. In a memorandum, dated May 15, 1989, to the Applicant, the Section Chief and Applicant's first in line supervisor advised him that the reasons for rating his performance below satisfactory were his lack of initiative, punctuality, team spirit, proper assignment of priorities and seriousness in conducting Bank business. Furthermore, in a memorandum to the Applicant, dated August 29, 1989, entitled "Performance Expectations" the same supervisor indicated the actions the Applicant had to take to improve his performance.

6. In a memorandum, entitled "Interim Performance Review - Mr. Shaffer", dated April 3, 1990, the Section Chief informed the Applicant's Division Chief that the Applicant during the last six months continued to perform satisfactorily his technical tasks, but his overall performance remained below expectations.

7. In the Applicants' PPR for the year 1990 which was finalized in September 1990, his supervisors stated essentially that the Applicant did not show any improvement in the areas of initiative and leadership and that, unless his performance showed a major and visible improvement in the near future, his continued employment with the Bank was at stake. Furthermore, they decided that the Applicant should receive in writing a development plan for the next six months, which would be monitored. In the same PPR the Applicant recorded his disagreement with his supervisors' assessment of his performance, and cited examples demonstrating his

leadership, timeliness and team spirit. He also stated his preference to work in future on large scale projects.

8. In the 1990 Salary Review the Applicant received a below norm merit increase. By memorandum, dated August 28, 1990, he filed a request for Administrative Review against this decision. In response, in a memorandum, dated September 26, 1990, to the Applicant, the Director of the Technology Facilities Department (ITF) stated that he was satisfied that the process followed in his case had been fair and objective and that there was not basis for concluding that any improper considerations were involved in the evaluation of his performance.

9. On November 26, 1990, the Applicant filed an appeal with the Appeals Committee which, in its decision, dated October 28, 1991, recommended that, because of the state of the relationship between the Applicant and his Section Chief, the Applicant should be reassigned to another section and given a detailed agreed performance plan and appropriate training to improve his performance. by letter, dated October 30, 1991, the Vice President, Personnel and Administration (PA), accepted the Appeals Committee's recommendation.

10. While the Respondent was seeking reassignment for the Applicant, the latter unsuccessfully requested that the Bank right the wrongs done him. Even after the filing of his application with the Tribunal the Applicant requested, on the ground of new evidence, that the Appeals Committee reopen his case and that the Bank compensate him for the injury sustained. However, the Respondent refused these requests but invited the Applicant to bring the new evidence to the attention of the Tribunal.

#### The Applicant's main contentions:

11. The Respondent's treatment of the Applicant amounted to an abuse of power, because it ignored the rules of procedure which apply to PPRs, to interim Performance Reviews and to Termination of Employment.

12. The Respondent never filled in Section II, Part B of the Applicant's PPR which is reserved to record unsatisfactory performance and never proposed the specific actions that the Applicant should have taken to improve his performance.

13. The Respondent never warned the Applicant that his employment might have to be terminated because of unsatisfactory performance. The Respondent's memoranda to the Applicant concerning his performance were intemperate, harping, insulting, harassing and distinctly unmanagerial. Instead of being designed to motivate, guide and assist the Applicant to improve his performance, they were part of a deliberate attempt to denigrate the Applicant and lay a foundation for his dismissal.

14. The Respondent solicited from his co-workers derogatory statements concerning the Applicant and at least one staff member felt that his own career would be jeopardized if he did not respond in the manner the Respondent expected.

15. Conversely, the Respondent concealed positive statements made by people with whom the Applicant had worked and from whom the Respondent had solicited performance evaluations concerning the Applicant.

16. The Respondent damaged the Applicant's career in the Bank and the whole process had taken a toll on his family life.

17. The Applicant requests:

- (i) deletion from his personnel file of the unfair and malicious memoranda in dispute;
- (ii) deletion of unsubstantiated negative statements from the Applicant's PPRs for the years 1989 and 1990;
- (iii) correction of the unfair merit awards for the years 1989 and 1990;
- (iv) compensation for mental suffering, disruption of family life and for damages to his professional reputation in the amount of three times his annual net salary; and

(v) attorney's costs in the amount of \$13,500.

The Respondent's main contentions:

18. From 1986 onwards the Respondent consistently and clearly conveyed to the Applicant that he should add to his technical skills the responsibilities of a well-rounded accounts manager. However, the Applicant never successfully assumed these responsibilities because he did not like this new requirement of his job.

19. The Applicant performed his technical duties to the satisfaction of both his supervisors and his client group. However, this was only half the picture. The other half which was exclusively left to his managers to evaluate and in which the Applicant was repeatedly found lacking, concerned the preparation of thorough background documentation, prompt completion of work, establishment of and commitment to meet promised deadlines, and an effort to anticipate the needs and problems of client groups before they arose. In this regard on the basis of the Respondent's managerial judgment the Applicant's overall performance was unsatisfactory and for this reason, for the second consecutive year, he received in 1990 a salary adjustment below the norm.

20. The Applicant was not harassed by his supervisors. He was given criticism in an objective and professional manner and in a constructive spirit. However, the Applicant became increasingly hostile to the constructive criticism he was receiving.

21. The Applicant received written appraisals recording lateness in completing his assignments, lack of punctuality, as well as his failure to exhibit leadership and initiative expected from a senior member of his section. He also received a performance expectation memorandum delineating the actions he had to take to correct his shortcomings. Finally, his performance was measured against the given expectations.

22. There was no secrecy involved in the Respondent's intention to terminate the Applicant's services because of overall unsatisfactory performance. The Respondent followed the proper procedure and the Applicant had several opportunities to defend himself.

23. The Respondent did not solicit derogatory statements from the Applicant's coworkers. It was one of the Applicant's colleagues who complained to the Section Chief about the Applicant's negative work attitude and the Section Chief asked that person to put his complaint in writing, which he did. However, the statements he made about the Applicant were not quite so negative as the Applicant would have it appear.

24. The Tribunal should deny the Applicant's request for compensation because he has not demonstrated that he has suffered any harm. Similarly, the Tribunal should deny his request for attorney's fees and costs. In addition, the Applicant has failed to submit an itemized statement of costs and to show that all \$13,500 in costs have been incurred in connection with this proceeding. The Applicant should not be allowed to recover in this proceeding attorney's fees incurred before the Appeals Committee.

Considerations:

25. The Applicant challenges, and seeks the expunging or correction of, several memoranda from his Section Chief setting forth criticisms of the Applicant's performance, his PPRs from 1989 and 1990, and his lower-than-norm salary merit awards in 1989 and 1990. He claims that those documents and decisions manifest bias, malice and unprofessional behavior on the part of his supervisors, namely his Section Chief and the next-in-line supervisor, the Division Chief, who the Applicant contends conspired to slander and denigrate him in order to furnish a basis for his termination.

26. In effect, the Applicant is challenging the assessments made by his superiors regarding his discharge of his responsibilities in his position as Communications Network Specialist. The Tribunal has ruled that:

The determination whether a staff member's performance is unsatisfactory is a matter within the Respondent's discretion and responsibility. The Administration's appraisal in that respect is final, unless the decision constitutes an abuse of discretion, being arbitrary, discriminatory, improperly motivated or carried

out in violation of a fair and reasonable procedure. (Suntharalingam, Decision No. 6 [1981], para. 27)

27. Although the Applicant's PPRs in his early years at the Bank were overall quite affirmative, negative assessments on the part of his Division Chief relating to matters of leadership, initiative, punctuality and attitude began to find their way into his PPRs as early as 1987, and were repeated and expanded upon by both his Section Chief and Division Chief in the PPRs of 1988 and 1989. Their dissatisfaction was reemphasized in 1989 by a less-than-satisfactory merit review for salary purposes. Although throughout this period the Applicant's technical abilities were praised, the negative assessments coincided with and related to a redirection in mid-1986 in the work expected from the Applicant and other staff members within their job titles. In the words of the Appeals Committee in this case, the Division Chief "implemented a change in the role of the network communications specialist from a purely technical and engineering function to one of account manager with additional responsibilities, including preparation of reports and monitoring of performance." The Applicant's PPRs reflect this expansion in responsibilities, his assertions to the contrary notwithstanding.

28. In addition to the PPRs from 1987 to 1989, the Applicant was further put on notice of specified deficiencies in his work performance through a series of more extended memoranda sent to him by his Section Chief. A memorandum of May 15, 1989, in connection with his annual merit review, set forth the Section Chief's concerns under several headings, including punctuality, teamwork, and sense of urgency; and it concluded that:

[Y]our behavior is characterized by tardiness in your work schedule, lack of team spirit, unwillingness to adhere to common practices specifically prescribed or commonly observed, and inability to maintain seriousness in conducting Bank business. It is unfair to other staff and cannot be allowed in our environment. Based on the above evaluation, I therefore, ranked your performance as unsatisfactory.

The stated purpose of another memorandum from the Applicant's Section Chief, dated August 29, 1989, was "to further elaborate actions to be taken on your part to improve weaknesses in your performance" as outlined in the May 15 memorandum. Among the criticisms and suggestions set forth in detail was the admonition:

As a senior staff member of not only the Section, but also the Division, it is not sufficient to complete only specifically assigned tasks. I look to you to demonstrate your leadership skills and technical initiative to me and to your colleagues. ... I will work closely with you to improve your performance of assigned tasks. However, the burden is on you to demonstrate the required initiative and proactive approach to your work.

29. The Applicant seeks to have the Tribunal order the deletion of what he characterizes as "the unfair and malicious memoranda in dispute" and of the "unsubstantiated negative statements" from the 1989 and 1990 PPRs, and the correction of the "past unfair merit awards." The Applicant's challenge to the 1989 memoranda, PPR, and salary determination come too late. Article II, paragraph 2, of the Statute of the Tribunal provides that "No such application shall be admissible, except under exceptional circumstances as decided by the Tribunal, unless the applicant has exhausted all other remedies available within the Bank Group ... and the application is filed within ninety days after ... the occurrence of the event giving rise to the application ..." or of the timely exhaustion of remedies. The Applicant failed to take timely action to secure administrative review of the negative assessments made by his supervisors in 1989. To that extent, the Tribunal finds his application to be inadmissible.

30. It is, however, appropriate to consider these 1989 assessments of and communications to the Applicant, as they bear upon the question whether the Respondent abused its discretion in making similar assessments in 1990, which the Applicant did challenge in a timely fashion through administrative review and an appeal to the Appeals Committee.

31. On April 3, 1990, the Applicant's Section Chief sent him another memorandum which had been addressed to the Division Chief that purported to assess the Applicant's compliance with the directives and suggestions in the August 29, 1989 memorandum. After stating that "Although Mr. Shaffer has made some improvements in certain area [sic], his overall performance remains below expectation," the Section Chief catalogued yet again

the Applicant's shortcomings under the headings of quality of work, quantity of work, judgment and attitude, priority, initiative and leadership, and interactions with others. In the 1990 PPR, the Section Chief on April 5 concluded,

During this review period, Mr. Shaffer has not shown any improvement of initiative and leadership that I expected of him as a Senior staff member of the section. Mr. Shaffer's overall performance remains below expectation.

32. In the same PPR, the Division Chief noted this "subpar" rating, stated that it was of "serious concern" and "particularly disappointing," and further stated:

The inability to meet deadlines, lack of a sense of urgency and of initiative, and difficulty in conforming to the work priorities of the section are of particular concern. I have discussed these concerns with Mr. Shaffer and his supervisors. He has been made aware that unless his performance shows a major and visible improvement in the near future, his continued employment with the Bank is at stake.

Reference was also made to a discussion within the Departmental Management Review group, its determination that ordinarily performance such as the Applicant's "would lead to consideration of a possible separation action," and its conclusion nonetheless that the Applicant's extended service, technical skills and desire to improve warranted "another final opportunity" accompanied by a monitorable development plan and regular performance reviews.

33. The Applicant's merit evaluation for his 1990 salary increase was, for the second consecutive year, less than satisfactory.

34. The Tribunal concludes that the Applicant has failed to substantiate his contention that the April 1990 memorandum from the Applicant's Section Chief, or the 1989-90 PPR, or the 1990 merit salary review, constituted an abuse of discretion by the Respondent.

35. There is no evidence to support the Applicant's characterization of the criticisms of his performance as slanderous, intemperate, unprofessional and the like. The criticisms were consistent over time, balanced the bad with the good, and were relatively detailed. It is telling that, despite the significant criticisms of his work in the 1989 memoranda and PPR, and his below-norm salary increase in 1989, these actions by the Respondent were not challenged through administrative review. The criticisms were also quite consistent with the Applicant's frequently expressed preference for technical work, the kind of work for which he was consistently praised.

36. Moreover, there is no evidence in the record to sustain the Applicant's contention that the Section and Division Chiefs were conspiring to distort the Applicant's evaluations in order maliciously to lay a foundation for his unfair termination of employment. Nor can it be fairly claimed, as the Applicant does, that his failings were not brought to his attention by his supervisors and that he was unaware of the fact that termination of his employment was a predictable consequence of continued job performance at what his supervisors had unequivocally characterized as a less-than-satisfactory level. Nor does the Tribunal find any evidence to substantiate the Applicant's contentions relating to procedural flaws connected with his 1990 PPR and salary review.

37. Although the Appeals Committee concluded that the Applicant's supervisors, and representatives of the Personnel Department, should have been more forthcoming in rendering a corrective plan for the Applicant, it did conclude that "We do not believe that the Performance Reviews and various comments by Appellant's managers were unfairly derogatory nor do we find any reason to reprimand or otherwise penalize his managers." It is these PPRs and supervisory comments that are the focus of this application to the Tribunal.

38. After the recommendations of the Appeals Committee were forwarded to the Vice President, Personnel and Administration, the Respondent successfully pursued attempts to reassign the Applicant. The Applicant, who

acknowledges that he is now working “in a special, highly technologically oriented, global communications project” that is “professionally satisfactory” to him, asserts nonetheless that such a reassignment does not rectify the damage occasioned by the Respondent’s earlier actions in 1989 and 1990. As the Tribunal has concluded, the former actions have not been challenged in a timely manner and the latter have not been shown to constitute an abuse of the Bank’s discretion.

Decision:

For these reasons, the Tribunal unanimously decides that the application should be dismissed.

Prosper Weil

/S/ Prosper Weil  
President

C. F. Amerasinghe

/S/ C.F. Amerasinghe  
Executive Secretary

At Washington, D.C., November 13, 1992