

Decision No. 167

Michael Walden,
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal has been seized of an application, received on June 12, 1996, by Michael Walden against the International Bank for Reconstruction and Development. The case has been decided by a Panel of the Tribunal, established in accordance with Article V(2) of its Statute, composed of R.A. Gorman (a Vice President of the Tribunal) as President, P. Weil and Thio Su Mien, Judges. The usual exchange of pleadings took place. The case was listed on May 16, 1997.

2. The principal decision contested by the Applicant is the Bank's giving him a 1995 merit award of 3 minus, reflecting the lowest salary increase for "fully satisfactory" performance. He also challenges an earlier investigation of him that was carried out by the Respondent's Ethics Officer. The Respondent has raised a jurisdictional objection to the application, alleging a failure to exhaust internal remedies in a timely manner as required by Article II of the Statute of the Tribunal; and it has requested that the jurisdictional issue be separated from the merits of the case.

3. The Tribunal grants the Respondent's request to separate the jurisdictional issue and decides that the application should be dismissed, for the reasons set forth below.

4. The Applicant joined the World Bank in 1966, and after a series of promotions and assignments he came in early 1994 to occupy the position of a Group Audit Manager in the Internal Audit Department (IAD), at level 26. During 1994, the Applicant voiced to the highest Bank officials his criticisms of certain of his superiors and of the performance of IAD. On May 4, 1995, apparently without any advance notice of its intention, the Respondent, by a memorandum from the Vice President & Controller, informed the Applicant that the two Group Audit Manager positions were abolished immediately, that he was being placed on administrative leave the next day and that he was to vacate his office no later than the next afternoon. A staff member placed on administrative leave continues to receive salary and benefits, and to be subject to Bank rules and standards of conduct, but is not required to report to work.

5. By a "For Your Information" (FYI) memorandum dated May 3, 1995, all members of the Bank staff were given basic information about the 1995 Salary Review. A Salary Review Matrix was set forth, showing on one axis a staff member's "salary zone" within his grade level and on the other axis his "performance category"; the lowest performance category was a 2 ("less than satisfactory") and the highest was a 5 ("exceptional"), with 3 representing "fully satisfactory performance." Within each box on this matrix was a percentage range, so that, for example, the percentage salary increase for a staff member in salary zone 2 with a 3 performance rating could fall between 1.4% and 4.0%, as determined by his manager. The FYI memorandum stated: "The minimum increase for staff with fully satisfactory performance is 1.4%."

6. Soon afterwards, by a Personnel Action Form (PAF) dated June 2, 1995 but apparently not received by the Applicant until June 22, 1995, he was notified that his salary review increase for 1995-96 was "\$1,820 (1.4%)," with an effective date of May 1, 1995 ("the 1995 merit award"). On June 22, the Applicant asked his immediate superior, the Auditor General, to inform him of the performance category in which he had been placed in the 1995 review. Had the Applicant had the salary matrix before him, it should have been immediately obvious to him that his 1.4% salary increase placed him at the low end of the range of increases for "fully satisfactory"

performance (i.e., category 3). The Applicant received no response from the Auditor General, and he soon left for a job search visit to England from July 8 to August 14.

7. More than three weeks after his return to the United States, the Applicant, on September 8, 1995, sent an e-mail to his Personnel Officer (PO). He noted that he had received no response from the Auditor General to his question about his performance level, and continued: "I therefore made my own estimate based on the relevant matrix and have tentatively concluded that the performance level was 3 minus. I would be glad if you could kindly confirm if that is correct and, if not, what the level was." Although the PO informed the Applicant that she would check and respond by the following Wednesday, September 13, she in fact did not reply until September 26, at which time she confirmed that the Applicant had received a 3 minus rating.

8. The Applicant, on September 28, 1995, wrote to the Controller and requested administrative review. That was denied on October 12 for failure to request it in a timely manner pursuant to Staff Rule 9.01, paragraph 2.01, which requires that such requests be filed no later than 90 calendar days after being notified of the decision. The Controller pointed out that the Applicant had been informed of his 1995 salary increase through the PAF received no later than June 22, 1995. The Applicant's request for administrative review on September 28 thus came eight days too late.

9. The Applicant filed an appeal to the Appeals Committee, which concluded that it had no jurisdiction because no administrative review had taken place. The Committee added that it was "of the view that the Appellant could have calculated the performance category (a three), and in fact did so," as stated in his September 8 e-mail to his PO; "[t]he delay in filing the administrative review is, therefore, not justified."

10. In his application to the Tribunal, the Applicant challenges not only the Bank's decision regarding his 1995 merit award but also certain decisions stemming from an investigation undertaken against the Applicant by the Ethics Officer in late 1994 and early 1995. A complaint was filed with the Ethics Officer by a staff member who had been assigned in early 1994 to work under the Applicant's supervision. The relationship between the two men proved to be extremely difficult, and the staff member, after complaining to the Applicant's superiors, took his charges of misconduct to the Ethics Officer. Countercharges were filed soon after by the Applicant. Ultimately, by a memorandum of April 7, 1995, the Ethics Officer reported that the Director, Personnel Management Department (PMD), had concluded that no misconduct on the part of the Applicant had occurred, but that the Applicant had engaged in inappropriate behavior, that he had exercised poor managerial judgment and skills and that his 1995 performance review should so reflect. It is to be noted that, in fact, no such performance review was ever completed by the Applicant's supervisors, and that he was given notice of his redundancy on May 4, less than a month after the report of the Ethics Officer.

11. Although it appears that the Applicant never sought or secured administrative review of this action by the Ethics Officer and the Director, PMD, he did attempt to challenge the Ethics Officer's findings before the Appeals Committee, as beyond the authority of the Ethics Officer, at the same time as he contested his 1995 merit review. The Appeals Committee also dismissed the former appeal: "On the issue of the Ethics Officer's findings no administrative review was requested by the Appellant as required by Staff Rule [9.01]."

12. In his application to the Tribunal, the Applicant seeks the rescission of the Respondent's decision to give him a merit award of 3 minus "bordering on unsatisfactory performance," the decision to refuse administrative review of that salary decision and the decision to "refuse consideration" of a number of aspects of the investigation and findings of the Ethics Officer. He also seeks compensation and an order that the Respondent adjust his 1995 merit award to the highest category (5). The Applicant does not contest the decision of the Bank declaring his position redundant.

13. The Respondent contends that the application must be dismissed by virtue of noncompliance with Article II, paragraph 2(i) of the Statute of the Tribunal. This provides: "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" The Tribunal has frequently held that part of the requirement of exhaustion of internal remedies is a timely request for administrative review. It is not disputed that Staff Rule

9.01, paragraph 2.01, provides that "If a staff member wants an administrative review of an administrative decision, he shall request the review in writing no later than 90 calendar days after being notified of the decision in writing." Having received his PAF, showing a salary increase of 1.4% for 1995, no later than June 22, 1995, the Applicant had until September 20, 1995 to request administrative review. He did not make his request until September 28.

14. The Applicant, however, contends that he was induced to delay such a request by the assurance of his PO that she would respond by September 13 with precise information about his performance rating. In fact, she did not so respond until September 26 -- beyond the final date for administrative review -- and the Applicant requested administrative review on September 28. The Applicant claims that it was not until September 26 that he in fact had a basis for seeking administrative review. He blames the Respondent for repeated failures to inform him of his performance rating and he asserts that he could not have otherwise known of that rating.

15. There are, essentially, three elements in the Applicant's contentions concerning his non-exhaustion of internal remedies: (a) the salary matrix, which would have allowed him to calculate his performance rating, was not available to him in the period following his receipt of his PAF; (b) in any event, the matrix did not definitively reveal that his performance rating was as low as a 3 minus; and (c) he acted reasonably and promptly in questioning his supervisor, the Auditor General, and his PO about his rating; and this should be taken into account in determining the date by which administrative review could have been sought.

16. The first element is contradicted by the record, indeed by the Applicant himself. In his application, the Applicant states: "Applicant was locked out of his office [on May 5, 1995] and his divisional files were not accessible to him. The matrix [dated May 3, 1995] which is distributed to managers was in his unit files and he did not, in any case, have it for reference." It is very likely true that the summary expulsion of the Applicant from his office on May 5, 1995 was a source of great inconvenience and disruption. Yet, on September 8, in an e-mail to his PO, the Applicant noted that he had received no reply to an earlier inquiry about the "level of performance" on which his 1995 salary adjustment had been based and that "I therefore made my own estimate based on the relevant matrix and have tentatively concluded that the performance level was 3 minus." It is thus clear that the Applicant fully recalled the percentage salary increase reported in his PAF and that, no later than September 8, 1995, he had matched that against the pertinent salary matrix to ascertain his performance rating, which he accurately determined to be 3 minus.

17. As to the second element of his defense to the Respondent's claim of non-exhaustion of internal remedies, the Applicant contends that examination of the salary matrix could not have definitively revealed that he had been given a 3 minus performance rating. He contends that, even though his salary increase was indisputably at the very lowest level of staff members with a 3 performance rating, standard methods of awarding salary increases would allow for managerial discretion to place him in a higher performance category -- and had that been the case here, the Applicant might not have complained.

18. The Tribunal does not find any such ambiguity in the salary matrix. The 1.4% salary increase was shown at the bottom of the salary range in performance category 3 rating for all staff members so rated, regardless of their salary zone. There was no reasonable basis for the Applicant, having reviewed that matrix, to infer that his supervisors had given him a higher rating, let alone the highest rating of 5 which he asks the Tribunal to direct the Respondent to implement. Although managers do have discretion in assigning a performance category to staff members, and then in assigning them a place within the salary-increase range for that category, once that percentage salary increase is determined, the staff member's "translation" of that percentage back into the corresponding performance rating is an automatic and not a discretionary calculation. The Tribunal notes that the three staff members serving on the Appeals Committee appeared to show no doubt about the performance category that could be inferred from the Applicant's 1.4% salary increase for 1995.

19. The final issue regarding the Applicant's failure to seek timely administrative review of the 1995 merit award relates to the nonresponsiveness of Bank officials -- in particular the Auditor General and the PO -- to the Applicant's request for definitive information about his 1995 performance rating. Most troubling is that the PO assured the Applicant that she would look into the matter and respond to him by September 13 -- one week

before the end of the ninety-day period for administrative review. She did not in fact so respond until that period had lapsed. The Applicant claims to have relied on the assurance of the PO and to have taken no steps to secure timely administrative review by the September 20 deadline.

20. Given what has just been discussed, the Tribunal concludes that the Applicant was unreasonable in waiting as long as he did before lodging his request for administrative review with the Auditor General. The 3 minus performance rating was readily calculable from the matrix that the Applicant concedes was in his possession. There was no reason for the Applicant to have assumed that his performance rating was any higher. It is also to be noted that upon returning from England on August 14 the Applicant, not having heard from the Auditor General, delayed three more weeks in seeking clarification from his PO. Moreover, after not hearing from the PO as promised on September 13, the Applicant let two more weeks go by without taking any steps to pursue the matter. Having been given a rating that he believed was improperly low, the Applicant should have taken timely steps to get the process of administrative review under way. As a matter of principle, a staff member confronted with an adverse decision by the Bank should be careful to invoke administrative review within the prescribed time. If clarification of the Bank's decision is sought by the staff member, it should be done promptly, for the time limits on administrative review would be effectively negated if the ninety-day period could be indefinitely suspended by a staff member's requests for further clarification of a decision whose purport is already quite clear. Having failed to exhaust his internal remedies, and there being no exceptional circumstances, the Applicant's claims must be dismissed.

21. Less need be said with respect to the Applicant's challenge to the investigation and findings reflected in the report of the Ethics Officer dated April 7, 1995. That report set forth the conclusions of the Director, PMD, that the Applicant had committed no misconduct but that he had been responsible, among other things, for poor managerial judgment and deficient management which "should be taken into account by your manager in the review of your performance as a manager." Here too, the Respondent requests that this part of the application be dismissed on jurisdictional grounds for failure to seek timely administrative review.

22. Indeed, there has been no administrative review in this case and it was for that reason that the Appeals Committee dismissed this claim. Yet the Applicant cannot be faulted for having neglected to request administrative review of the April 7 memorandum, for at that time the Respondent asserted to him that there was, in effect, no decision taken by the Bank and that the proper time for the Applicant to seek administrative review was only when the adverse conclusions in the April 7 report were subsequently reflected in his 1994-95 annual performance evaluation. The Tribunal agrees that the report of the Ethics Officer, in itself, did not constitute a "decision" which could properly be made the subject of administrative review. Although no 1994-95 performance evaluation was completed, the Applicant's June 1995 merit award can rightly be treated as the equivalent of such an evaluation; it too was no doubt adversely affected by the findings of the Ethics Officer announced some two months before. Therefore, the Applicant, had he acted in a timely manner, would have been able to secure review by the Tribunal of those findings and the accompanying investigation, as a part of the Tribunal's review of the salary decision. However, the Tribunal has already concluded that the Applicant's challenge to his 1995 merit award must be dismissed for failure to exhaust internal remedies in that his request for administrative review was not made in time. His challenge relating to the investigation and report of the Ethics Officer must, therefore, also be dismissed.

DECISION

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

Robert A. Gorman

/S/ Robert A. Gorman
President

Nassib G. Ziadé

/S/ Nassib G. Ziadé
Executive Secretary

At London, England, June 10, 1997