World Bank Administrative Tribunal

2009

No. 390

Yang-Ro Yoon (No. 6 and No. 7),
Applicant

v.

International Bank for Reconstruction
and Development,
Respondent

World Bank Administrative Tribunal
Office of the Executive Secretary

Yang-Ro Yoon (No. 6 and No. 7),
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 Francisco Orrego Vicuña, Sarah Christie, and Florentino P. Feliciano. Application No. 6 was received on 28 January and Application No. 7 on 29 January 2008. The Tribunal consolidated the cases on 27 March 2008.

2. The Applicant challenges her Overall Performance Evaluation for 2004-2005 ("2005 OPE") and for 2005-2006 ("2006 OPE"), in the course of which, she claims, the Vice President of Human Resources ("HRSVP") and the World Bank Institute ("WBI") colluded against her. She also challenges her Salary Review Increase ("SRI") in conjunction with the 2005 OPE. In addition, she complains of the allegedly unauthorized extraction of a message from her Bank e-mail account at the request of her supervisor. She requests monetary compensation of a total of eight years' salary for the "mismanagement of the performance review process," for the "terminal destruction" of her career, and for "threatening [her] professional survival and employment at the Bank"; an independent reevaluation of her work for 2004-2005 and 2005-2006; reinstatement to a level GH; the establishment and promulgation of guidelines on reinstatement; and full reimbursement of legal and other costs.

FACTUAL BACKGROUND

3. Following her redundancy in mid-1999, the Applicant submitted two applications, contesting, respectively, the Staff Retirement Plan's "Rule of 50" (which allows early retirement with an unreduced pension) and the redundancy itself. Her first application was dismissed. *Yoon*, Decision No. 221 [2000]. Her second application was successful; the Tribunal ordered the Bank to reinstate her on the basis that she had "been in several respects treated unfairly," in abuse of the Bank's discretion. *Yoon (No. 2)*, Decision No. 248 [2001]. Although the Bank was not required to reinstate the Applicant and could have paid her monetary compensation instead, the Bank decided to reinstate her.

4. The Applicant subsequently complained about the manner in which she had been reinstated, but the Tribunal rejected her new application in this respect because she had not exhausted internal remedies. *Yoon (No. 3)*, Decision No. 267 [2002]. She then took her case to the Appeals Committee. Following the Appeals Committee's rejection of her claims, she returned to the Tribunal which dismissed her claims on the merits. *Yoon (No. 4)*, Decision No. 317 [2004].

5. The following year, she raised claims relating to her work program, performance evaluation, and salary merit increases in 2002 and 2003. In *Yoon (No. 5)*, Decision No. 329 [2004], the Tribunal dismissed a majority of her claims as untimely or barred as *res judicata*. In *Yoon (No. 5)*, Decision No. 332 [2005], the Tribunal dismissed some of the remaining claims on the merits but found certain irregularities in the Bank's treatment of the Applicant and its management of her case, and ordered it to pay her $40,000.

6. In 2002, upon her reinstatement following *Yoon (No. 2)*, the Applicant had been assigned to the WBI. She requested and was granted an 18-month developmental assignment followed by an eight-month external assignment. On 1 June 2004 she re-

joined WBI in the Human Development unit ("WBIHD"). The events which occurred after this date gave rise to the present case.

7. Between 1 June 2004 and 31 March 2005, the Applicant was assigned to perform the role of Task Team Leader ("TTL") of a number of workshops and courses, at headquarters as well as in China and Africa:

a. A three-day Labor Market workshop in September 2004.

b. A two-day conference on Labor Market Stock Taking in November 2004.

c. A two-week core course on Labor Market Policy in February and March 2005. The Applicant described this course as her "main (and in fact, the most important) task." It provided a basic framework for other courses, including the DL Courses described in the next sub-paragraph.

d. Two simultaneous Distance Learning Labor Market Courses for Africa ("DL Courses"), one in French and the other in English, in April and May 2005. Although they were offered after the end of the 2005 OPE cycle, it appears that much of the preparatory work was completed before 31 March 2005.

e. A Morocco Labor Market Workshop/MENA (Middle East and North Africa) Labor course in December 2005. This workshop had been initially planned for June 2005 and the preparatory work was to have been largely completed prior to the end of the 2005 OPE cycle.

8. In her first six months in WBIHD, the Applicant met twice with her supervisors, Ms. A and Mr. B, to receive feedback. She met with Ms. A in September 2004 and with both in November 2004. She described these meetings in positive terms and generally

appeared to be satisfied with her relationship with her supervisors during the first part of her tenure in WBIHD.

9. *Yoon (No. 4)* was issued in June 2004. Not satisfied with the Tribunal's judgment, the Applicant sent several e-mail messages to the Bank's President, copying a large number of Bank staff. She attached several documents. Her messages expressed strong disapproval of the Tribunal's judgment and the Bank's alleged lack of policies to deal with reinstatement. On 5 November 2004, HRSVP warned the Applicant by e-mail that:

> your actions are a misuse of the Bank's e-mail system which is intended for business purposes, not for the pursuit of personal agendas. Furthermore, your actions could be perceived as creating a hostile work environment by some of the parties who are named in your transmission. This is a serious matter which, from my perspective, shows poor judgment on your part and a disregard for Bank policies.

10. On 3 January 2005 the Applicant wrote to HRSVP requesting a "more productive work environment" and asking whether "an arrangement can be found that allows me to resign on viable terms." Although she copied the Vice President in WBI, as well as the Chair of the Staff Association, she did not copy her immediate supervisor, Ms. A. In an attempt to resolve the Applicant's complaint, HRSVP put the Applicant in touch with an HR manager, Mr. C, who met with the Applicant on 5 April 2005. During that meeting, the Applicant asked for "immediate administrative leave" as a short-term arrangement until *Yoon (No. 5)* was decided. HRSVP approved the administrative leave the next day and sent the Applicant a formal approval on 15 April 2005. The administrative leave was to begin on 25 April 2005 and end on 29 July 2005, by which time the Tribunal's judgment in *Yoon (No. 5)* had been issued.

11. Meanwhile, as is customary throughout the Bank, an e-mail message had been sent to all staff on 23 March 2005 informing them that the OPE process for fiscal year 2005

("FY05") had begun. On 28 March WBI staff received general guidelines for their OPEs, including a request for them to select their feedback providers. On 5 April 2005 Ms. A reminded her staff that they should prepare their draft OPEs and send them to their feedback providers.

12. The Applicant asked Ms. A that her 2005 OPE be delayed until after 1 August 2005, when she planned to return from administrative leave. The Applicant did not complete her initial draft of the 2005 OPE before going on administrative leave.

13. On 17 April 2005 the DL Courses were initiated. On 19 April 2005 the Applicant informed her colleagues of her impending administrative leave, and two days later held a handover meeting to reallocate her tasks related to the courses that had just started. According to the Applicant, most of the "main tasks for the entire course period [had] been taken care of although you have to pay attention to the follow-up implementation and the details." In response to a staff member's concerns about the sudden handover, she reassured her colleagues that she would be available throughout the courses should problems arise. It appears that the Applicant communicated with her colleagues by e-mail during the courses. Much of the communication appears to have related to administrative issues.

14. *Yoon (No. 5)* was decided in May 2005 and the judgment was published a few weeks thereafter. On 1 August 2005 the Applicant returned to work.

15. On her first day back at WBI the Applicant wrote to HRSVP asking when she could expect to hear the Bank's response to the Tribunal's judgment. On 3 August, Mr. C answered on HRSVP's behalf, assuring the Applicant that the Bank was "processing the

payment" ordered by the Tribunal in *Yoon (No. 5)*, and asking where she wanted it to be transferred.

16. The Applicant was not satisfied. She wrote to HRSVP asking for "the Bank's broader response to Tribunal Decision No. 332" and specifically for comments on the following:

> 1. Does the Bank accept the Tribunal's judgment at paragraph 63 that "Because of the disruption to her … career caused by her … wrongful redundancy, she … obviously deserved careful attention in the context of her … reinstatement;" that "it behooved the Bank as a matter of seemingly obvious good management to be especially forthcoming" and that mine "was clearly a special case?" – I might add that until now this has never been properly acknowledged by the Bank since I was reinstated.
>
> 2. Does the Bank accept the Tribunal's overall judgment at paragraph 70 that the "Bank's response to the Applicant's reinstatement has been unimpressive, indeed to a degree which merits sanction," and that it has been "inadequate"?
>
> 3. Finally, does the Bank endorse the Tribunal's massive and unprecedented assaults on my professional character; for example, does the Bank endorse the Tribunal's astonishing allegations that "the record suggests that her conduct in the field was also marked by extreme negativeness: the only ideas she seemed to approve were her own, the only initiatives she viewed with enthusiasm were those unaffected by the input of her colleagues or her managers, and her inability to avoid friction in her most significant professional interactions seems to have been total"? Needless to add, this derogatory characterization is an essential part of the Tribunal's ultimate decision to set the compensation at $40,000, in gross disproportion to the violations the Tribunal itself found, not to mention those that it should have found but chose not to.

17. On 8 August 2005 Mr. C replied that "the Bank considers the decisions of the Tribunal final and binding" and noted:

> Moving forward, the Bank's responsibilities to you are contained in the Principles of Staff Employment and the Staff Rules. We will do our best to adhere to our responsibilities and we expect you will do the same with regard to your duties as a staff member.

18. The Applicant informed the Bank that she would not accept the check paid to her pursuant to the Tribunal's judgment. Mr. C sent the check to her nevertheless. The Applicant returned it on 9 September 2005 with the following note:

> I note with puzzlement the absence of a formal letter (e.g., one with the Bank's letterhead!) which would mark the transfer of a certain amount of money as a proper administrative act of the Bank; what clearer signal could you/the Bank send to demonstrate the absence of even a minimal sense of responsibility for past failures and of respect for the wronged staff member? What clearer signal could you send, indeed, to demonstrate to Bank staff once again the utter futility of attempting to secure one's career prospects, and even one's professional survival, by invoking the Bank's own rules and jurisdiction?

19. On 30 September 2005 Ms. A informed the Applicant that she would resume her 2005 OPE process. The Applicant replied instead to HRSVP on 3 October 2005, with a copy to the Staff Association, in the following terms:

> In view of the WBAT's explicit abandonment of any reasonableness standard for satisfactory OPE evaluations, combined with its own abusive, defamatory use of these evaluations in its rulings, I do not see any point in participating in this process any further. This holds especially since HR has done absolutely nothing to counteract or protect me from these defamations, which HR must know to lack any reasonable foundation in the facts or even the record, as I pointed out in my correspondence with you before and as neither you nor [Mr. C] refuted. I will thus not take any active part in the current OPE process; in particular, I will not sign my OPE.
>
> When I will meet with my manager, [Ms. A], I will convey this decision to her, and make it very clear that it has nothing whatever to do with her or with her behavior towards me.

20. A month later, on 3 November 2005, the Applicant met with Ms. A, gave her a copy of the 3 October 2005 letter to HRSVP and reiterated that she would not participate in the 2005 OPE process. The Applicant alleges that she asked to receive the comments given by the feedback providers. She did not receive those comments; nor did she follow up. There were no further communications between Ms. A and the Applicant on the 2005

OPE until 21 March 2006, after the Applicant returned from eight weeks of annual leave that began on 23 January 2006.

21. Following the 3 November 2005 meeting, Ms. A verbally inquired of HR how she should proceed with the OPE in the absence of any collaboration by the Applicant. She was instructed that she herself should draft the Applicant's 2005 OPE on e-mail, without waiting for the Applicant's input, pursuant to Staff Rule 5.03, paragraph 2.02(f), which provides that:

> Should a staff member refuse to sign the performance evaluation or a supplemental evaluation, the Manager or Designated Supervisor and/or the Supervisor shall continue the evaluation process noting … reasons given by the staff member for the refusal, if any.

22. On 18 November 2005 the Applicant wrote a lengthy letter to the Bank's President, copying (as she had done in September and October 2004) an extensive list of staff members. To the letter were attached many documents under a general heading, "Reform of WBAT."

23. On 5 January 2006 the Applicant informed HRSVP that she planned to take two months of annual leave. In particular, she noted that:

> It has become abundantly clear by now that my career prospects at the Bank have been finished and that I will not be able to function properly without major remedial efforts by the Bank. I have therefore decided to take 2 months of my accumulated Annual Leave in order to give the Bank an opportunity to finally rectify the situation. To play by the rules, I will submit a leave request to my current unit, WBIHD, shortly.

She forwarded this e-mail message to Ms. A's assistant, with a copy to Ms. A and Mr. B, informing her that she was taking eight weeks of accumulated annual leave, beginning on 23 January 2006.

24. On 9 January the Applicant wrote to Mr. B, who was heavily involved in some of the tasks on which the Applicant worked, with a copy to Ms. A, asking him to find

someone to take over her work. She wrote again on 11 and 17 January 2006. Mr. B replied on 11 and 17 January that he was discussing the situation with Ms. A as the office was "short of staff."

25. On 18 January 2006 there was a flurry of e-mail messages between the Applicant and her colleagues who expressed dismay and concern at the sudden and short notice upon which the Applicant was taking leave. On the same day, Ms. A wrote to her, expressing disappointment that she had not been consulted "well in advance" with respect to this intended leave and that she would find it difficult to accommodate her departure on such short notice. The Applicant expressed surprise that the issue of timeliness had not been raised when she first gave notice on 9 January and offered to delay her leave by one to two weeks. Ms. A declined the offer as follows:

> Many thanks for offering to delay the commencement of your leave, but as you know, we have since made other arrangements. … As a senior staff member, I expected that you had taken the timing of your tasks into consideration when you made your decision to go on leave, and that you would have been in better position to judge the suitability of the timing. On the other hand, if you had approached [Mr. B] and/or I (sic) to discuss your proposed leave, which would be the usual practice, prior to forwarding the note from [HRSVP], the discussion would have been different.

The Applicant went on leave on 23 January 2006.

26. On 20 March 2006, around the time the Applicant returned from leave, she received an e-mail message from HRSVP, informing her that she should contact a newly appointed HR manager, Mr. D, who was tasked with exploring a new work program for her.

27. The next day, 21 March 2006, Ms. A forwarded to the Applicant her 2005 OPE in the form of an e-mail message, assessing the Applicant's job performance and rating each of the projects in which she knew the Applicant had been involved. She described four of

them. She determined that the Applicant's performance had been Fully Satisfactory in all of the projects except one, the Morocco Labor Market Workshop/MENA Labor course, for which the Applicant was rated Partially Satisfactory. Ms. A stated that she was aware of difficulties the Applicant had experienced in dealing with staff in Africa. Except for teamwork, for which she was rated Partially Satisfactory, all other elements of her behavioral assessment were rated Fully Satisfactory. Ms. A nevertheless found the Applicant's overall contribution to be "less than what we expect from our Level GG staff." She noted that "it is recognized that this was a start to your work in WBIHD and you will be expected to make a greater contribution in FY06."

28. On 25 March 2006 the Applicant answered, stating that the "draft [was] regrettably far" from a fair and impartial assessment of [her] performance, and that "[t]he anticipation of a lack of good faith as it transpires in your email is exactly the reason why I did not and do not see any merit in participating in the OPE process."

29. On 6 April 2006 Ms. A wrote to the Applicant informing her that she had forwarded the 2005 OPE to the reviewing manager and once more encouraged the Applicant to provide comments. The Applicant still refused to make any comment on the substance of the OPE, insisting that the text prepared by Ms. A was not adequate and did not represent a "fair and impartial assessment of [the Applicant's] performance making full use of the information at [Ms. A's] disposal or within [her] reach." She specifically stated: "If you are truly interested in a fair assessment of my evaluation, the record is sufficiently self-explanatory to allow you to revise your descriptions and ratings accordingly." The Applicant finally noted that in view of what she deemed to be collusion with HR, she "may

not have any alternative but to resort to the formal CRS [Conflict Resolution System] process."

30. On 14 April 2006 the Applicant was given 12 additional days to comment on the draft 2005 OPE. Two days later, she responded that she would not provide any comments and would not participate in the 2006 OPE.

31. On 28 April 2006 the reviewing manager gave the Applicant one final chance to participate in the 2006 OPE process. She declined the offer as follows: "As I continue to see no indication [of any] attempt at a fair and balanced performance evaluation, my involvement in that charade continues to be pointless."

32. On 1 May 2006, the reviewing manager forwarded the Applicant's 2005 OPE to HR for inclusion in her personnel file.

33. Meanwhile, on 15 March 2006, Ms. A notified the Applicant by e-mail that she had "retracted" from the Applicant's e-mail account a message she had sent to the Applicant in error. The Applicant reacted on 25 March 2006 as follows:

> I am very surprised by your entering my e-mail account without my knowledge or permission. I cannot see how this squares with the recent very explicit and public declarations by [the Bank's President] on management's monitoring of staff emails, as illustrated for example by the following statement at the February 6, 2006, townhall meeting: "But the only time in which we will, as long as I'm in charge here or as long as I'm floating at the top of this big bucket of water called the World Bank, that we will look at people's emails is when there is probable cause to look for wrongdoing."

34. On 10 April 2006 the Applicant wrote to Ms. A that "[y]ou did not yet respond to my March 25 email … and explain your interference with my email account." On 20 April 2006, at Ms. A's request, a manager of the Bank's Information Solutions Group ("ISG") wrote to explain to the Applicant the relevant Bank policy set out in AMS 6.20A Information Security Policy, and to assure her that "the manager made an accidental error

and proper approval and process according to the policy was followed to retract the e-mail."

35. On 30 March 2006 Ms. A wrote to her staff, including the Applicant, asking them to submit information in preparation for their 2006 OPEs. The Applicant responded on 5 April 2006: "I guess that my last year's OPE needs to be straightened out first." The Applicant once more did not prepare a draft OPE; nor did she, this time, provide any names of feedback providers.

36. On 30 May 2006 Ms. A wrote the Applicant to request a meeting to discuss the 2006 OPE prepared by Ms. A. The Applicant again refused. She was given until 9 June 2006 to prepare an OPE and to suggest names of feedback providers. Ms. A heard nothing more from the Applicant and on 20 July 2006 submitted the 2006 OPE to the reviewing manager. The latter forwarded it to the Applicant on 25 July 2006 and gave her another opportunity – until 31 July 2006 – to participate. The 2006 OPE was copied to Ms. A's successor as well as to two HR staff members.

37. The same day, the Applicant approached the Appeals Committee, requesting provisional relief to suspend the 2006 OPE proceedings and that she be assigned an SRI calculated without reference to her 2005 OPE or pending 2006 OPE. On advice from the Bank's Legal Department, and without waiting for a recommendation from the Appeals Committee, the reviewing manager continued to process the 2006 OPE. On 1 August 2006 the reviewing manager submitted the Applicant's 2006 OPE for inclusion in her personnel records. The Appeals Committee denied the Applicant's requests on 21 August 2006.

38. The Applicant's 2006 OPE explained in some detail the Applicant's refusal to participate in the process. In addition, Ms. A observed that the Applicant's contributions

were “extremely limited” or “minimal,” and that her “sudden departures also make it quite challenging for [her] colleagues to work with [her] in a dependable manner.” The Applicant’s work program described only two courses, a follow-up to a workshop held in 2005 and a labor core course. She was rated Fully Satisfactory for the first and Unsatisfactory for the second. As to her behavioral assessment, she was rated Fully Satisfactory for “client orientation, learning and knowledge sharing,” Partially Successful for “teamwork,” and Unsatisfactory on “drive for results.”

39. Meanwhile, on 11 July 2006 the Applicant had filed a Statement of Appeal challenging her 2005 OPE and alleging “collusion between WBI and HRSVP in mismanaging [her] performance review and career management.” On 29 November she filed another Statement of Appeal challenging her 2006 OPE and again alleging collusion between WBI and HRSVP. Over the Applicant’s objection, the Appeals Committee consolidated the two appeals on 17 January 2007. The Applicant waived her right to an oral hearing and asked the Appeals Committee to proceed on the basis of written submissions only. On 19 September 2007, the Appeals Committee issued its recommendation to deny the Applicant’s requests.

PRINCIPAL CONTENTIONS OF THE PARTIES

The Applicant’s first contention: The Applicant’s 2005 and 2006 OPEs were the result of collusion between WBI and HRSVP

40. The Applicant contends that events that led to her 2005 and 2006 OPEs proved collusion between WBI and HR. Whereas prior to March 2006 her manager had shown appreciation for the Applicant’s work and complied with the Bank’s guidelines and regulations, she reversed her management style “dramatically and suddenly” in March 2006. The collusion between WBI and HRSVP, as inferred by the Applicant, explains the

"extremely negative, inaccurate and prejudiced OPE denigrating Applicant's performance in active violation of the Bank's rules and guidelines."

41. The Applicant specifically rejects the substance of the 2005 and 2006 OPEs on the basis that they were not conducted on an "observable and reasonable basis," as required by *Desthuis-Francis*, Decision No. 315 [2004], para. 26, and were not prepared in conformity with the Staff Rules. She adds that WBI and HR personnel had been "strategizing … collectively and collusively even before the performance evaluation had been shared" with the Applicant, in violation of the Bank's Staff Rules.

42. The Applicant argues that the "Satisfactory" SRI rating she received in 2005 was inconsistent with the 2005 OPE which stated that her performance was below what was expected of a staff member at her level, thereby justifying a review of the substance of the OPE by the Tribunal. Although the Applicant did not challenge the 2006 SRI in her Application, she notes that it was never officially disclosed to her and that she never had a discussion about it with her supervisor, contrary to the requirements set down in *Desthuis-Francis*, at paras. 31-35.

The Bank's answer to the Applicant's first contention

43. The Bank responds that the evaluation of staff performance lies within the discretion of management and that the Tribunal may not substitute its judgment for that of management in the absence of abuse of discretion. The burden of proof, the Bank affirms, lies with the Applicant. The Applicant must show a "prima facie case of abuse of power" (*Harou*, Decision No. 273 [2002], para. 27) and has not done so.

44. The Bank argues that Ms. A took into consideration her own observations, the feedback she received from the Applicant's peers, as well as the Applicant's performance.

The Applicant failed to provide any additional information which might have contributed to Ms. A's evaluation of her performance.

45. Finally, the Bank notes that the Applicant's 2005 SRI rating of 3.2 was "satisfactory" and reasonably justified. The Bank argues that the Applicant's performance gave it a reasonable and observable basis for attributing this SRI rating to her.

The Applicant's second contention: The preparation of the OPE violated due process

46. The Applicant alleges that the Bank did not follow proper procedures and misinterpreted Staff Rule 5.03, paragraph 2.02(f). Ms. A finalized her OPEs before meeting with her, as required by the Staff Rules; the use of the non-formal e-mail format for both the 2005 and 2006 OPEs was in violation of the Staff Rules and policies; the Applicant's refusal to participate in the process was not a credible excuse; the 2006 OPE was completed in bad faith; the 2005 OPE was late; the 2006 OPE was prepared too hastily; and the period covered by the OPEs was incorrect. Finally she challenges the accuracy and validity of the feedback providers' comments.

47. The Applicant also argues that the confidentiality of the process was breached in contravention of the Bank's policies and the Tribunal's holding in *Yoon (No. 5).* The reviewing manager was directly involved in the initial draft of the 2005 OPE whereas the role of the reviewing manager should have been limited to a review of the evaluation process and should not have involved substantive contributions.

The Bank's response to the Applicant's second contention

48. The Bank answers that the Applicant's 2005 and 2006 OPEs were completed according to Bank practices, rules and procedures. The Applicant was provided with ample opportunity to participate in the process and repeatedly refused.

49. The delay in completing the 2005 OPE was primarily due to the Applicant's request to postpone the evaluation until after she had returned from leave in August 2005, and later by her refusal to participate in the process. The process took longer than expected in part in order to accommodate the Applicant and in order to ensure a careful and fair evaluation.

The Applicant's third contention: improper intrusion into Applicant's e-mail account

50. The Applicant alleges that Ms. A improperly extracted from the Applicant's e-mail account a message which she had sent the Applicant in mid-March 2005.

The Bank's answer to the Applicant's third contention

51. The Bank does not address the Applicant's third contention except to ask that it be rejected.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

52. The issues before the Tribunal are:

(1) whether there was an observable and reasonable basis for the 2005 and 2006 OPEs and the assessment of the 2005 SRI;

(2) whether the Bank followed fair and reasonable procedures in preparing the OPEs and assigning the SRI;

(3) whether Bank managers colluded to the detriment of the Applicant; and

(4) whether the Bank breached rules of confidentiality in extracting a message from the Applicant's e-mail account.

Did the Applicant's 2005 and 2006 OPEs have a reasonable basis?

53. The Tribunal has made clear that it will not overturn a management decision in non-disciplinary cases unless there has been an abuse of discretion. The Tribunal held in *De Raet*, Decision No. 85 [1989], para. 56, that:

> The Tribunal is not charged with the task of re-examining the substance of the Bank's decision with a view to substituting the Tribunal's decision for the Bank's. The duty of the Tribunal is to assess the Bank's decision – as to both its content and the manner in which it has been made – to determine whether it constitutes an abuse of discretion, being arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure.

54. In *Desthuis-Francis*, Decision No. 315 [2004], para. 26, it further explained that:

> The Tribunal may well agree with the opinion of the Acting Vice President for Human Resources that the reviewing Director's comments were given in good faith, that is to say, were not improperly motivated. But lack of improper motivation does not by itself insulate a discretionary management act from being found arbitrary (*see Marshall*, Decision No. 226 [2000], para. 21) if done without an observable and reasonable basis.

55. The Applicant alleges that the 2005 and 2006 OPEs were not conducted on an observable and reasonable basis. She contends that her immediate supervisor failed to ensure that all of her projects were reviewed in both the 2005 and 2006 OPEs; failed to use available tools (such as accessible documents showing the Applicant's contributions) to obtain accurate information about the Applicant's work, in spite of the Applicant's request that the OPE be revised; failed to recognize the Applicant's accomplishments; omitted positive accomplishments and focused only on the negative; failed to give proper weight to the outcome of the courses; did not explain the rationale for her assessment of the Applicant's behavior; failed to include in her OPEs, as required by the Staff Rules, the reason why the Applicant did not participate in the process; failed to mention in her 2006 OPE that the reason she had a light workload was in part due to her being on leave; and falsely attributed to her certain failings in her projects, although Ms. A knew that the Applicant was on leave and her tasks had been transferred to others. Finally, she questions the validity of general comments made at the end of the OPEs.

56. The Tribunal held in *Prudencio*, Decision No. 377 [2007], at para. 74, that it

> cannot and should not conduct a microscopic inquiry into each facet of the Applicant's work program and behavior during the assessed period. … 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 … OPE period satisfies the abuse of discretion test.

57. There is little doubt that Ms. A was aware of the Applicant's work. Although the OPEs were relatively brief and did not provide extensive reasoning behind the assessment, or the specific details of the Applicant's involvement in each project, Ms. A was clearly aware of the projects in which the Applicant was involved. The 2005 OPE refers to all but one minor project, among those described by the Applicant in her own Application. The 2006 OPE describes only two projects, which is consistent with the Applicant's admission that she had a light workload in 2006. The record includes numerous communications between the Applicant, colleagues and supervisors, but little information on the substance of the Applicant's work in respect of 2005 and 2006.

58. The Bank observes and the Applicant does not deny that she wholly failed to provide her supervisors with information regarding her work program. The Applicant contends that the Bank was obliged to seek and find the information, and that the Bank had available tools at its disposal to obtain accurate information about her work. Contrary to the Applicant's assertions, it is the staff member's responsibility to provide information about his or her projects. Staff members are required to use information included in their completed Results Agreement from the previous year. The Results Agreement is typically prepared by supervisors and discussed with staff members during OPE discussions. As the Applicant refused to participate, Ms. A, upon HR's advice, prepared an initial draft of the 2005 OPE. She and the reviewing manager afforded the Applicant several opportunities to

supplement the information available but the Applicant repeatedly refused to do so. And so it went with the 2006 OPE.

59. The OPEs for both 2005 and 2006 reflect Ms. A's personal knowledge, comments received from other staff members or feedback providers, and comments and ratings received from participants on the various projects at their conclusion. They appear to balance positive and negative comments. Ms. A recorded her personal observation in the 2005 OPE that one project "went smoothly," and that the "demand for [another] course was very high." She acknowledged feedback providers' comments that the Applicant's "presentation at the course went well and the team appreciated [the Applicant's] contribution." Further, reporting on course ratings, Ms. A wrote: "The eventual course received high satisfactory ratings." The 2005 OPE also includes the following statements: "you were effective in certain activities" and "due to leave and perhaps difficulty in engaging regional colleagues, your overall contribution … was less than what we expect." In the 2006 OPE Ms. A noted: "Your contribution to the substance appears to have been quite limited." She further observed: "The course also showed a high no show rate." The 2006 OPE includes the following comment: "While I have no doubt you could be much more effective in contributing to our work, your overall contribution … was much less than what we expect."

60. The feedback providers included staff in management positions as well as staff in positions equivalent to the Applicant's. Five of them commented on the Applicant's performance with respect to the 2005 OPE. Their comments are reflected accurately. For example, one feedback provider noted that "[the Applicant] has good interpersonal skills, she is nice and very polite … she managed to deliver successful training activities,

although she appeared to work under stress." Another stated "[the Applicant] has been responsive … worked well with the team, making her effort to ensure that her section [of her project] was delivered …." However, one of them also noted that his "interaction with [the Applicant] was limited …. Consequently I can provide only a partial and incomplete view of her performance." Another comment was to the effect that "[the Applicant's] involvement was mainly attending the workshop and presenting materials …. She was not heavily involved in the development …."

61. One of the feedback providers who gave positive comments also expressed some reservations about the Applicant:

> Obviously, [the Applicant] did not come to the job with the same level of experience or expertise in the subject matter or in training, per se, as … Consequently, the respective roles of WBI and HDSNP were different than in previous years with this course. Having said that, [the Applicant] performed her job extremely well. She is exceptionally well-organized and a good team leader. She has kept track of the myriad of details that go into organizing these courses …. She substantively contributed to the courses as well, suggesting resource people for various topics and managing the team presentations portion of the … course.

62. Another feedback provider, whose comments were overall negative, appears to also have reflected opinions received directly from some of the feedback providers who had provided positive comments, such as:

> I was contacted by our partners … ([names of partners]) who expressed concern regarding [the Applicant's] ability to provide the necessary contribution to the design and delivery of a high quality product. I was told that unless I get personally engaged in the preparation phase, the course will have to be cancelled or postponed.

Yet another feedback provider stated that:

> Our experience … has been disappointing this year. … [The Applicant] made little contribution to the content and her role was merely confined to the logistical support …. My team had to put additional resources to ensure that our … course is of the high standard [we] strive to achieve.

63. With regard to the 2006 OPE, two feedback providers submitted comments. One stated:

> I had repeated complaints from … staff about [the Applicant's] limited capacity to contribute to the preparation on substance and staging and hence limiting essentially her contribution to a GF level type work on logistics.

The other noted:

> She participated in one videoconference together with her … colleague …. She was helpful in that discussion. … I appreciated the support of our … colleagues, but their involvement in the substance of the course has reduced substantially since the initial phase.

64. The Tribunal observes that the negative comments were more detailed than the positive ones, which were very short and general. Nor did the latter identify the Applicant's substantive contributions. As the Tribunal held in *Motabar*, Decision No. 351 [2006], para. 39, citing *Lysy*, Decision No. 211 [1999], para. 68:

> A performance evaluation should deal with all relevant and significant facts, and should balance positive and negative factors in a manner which is fair to the person concerned. Positive aspects need to be given weight, and the weight given to factors must not be arbitrary or manifestly unreasonable.

But of course, such a judicious balance can scarcely be achieved without the staff member's input, especially when he or she alone is aware of the full details of assignments. In this case, the Applicant has only herself to blame for refusing to contribute to the process.

65. Overall, the Tribunal has little hesitation in finding that the 2005 and 2006 OPEs were based on information available to Ms. A, who made a determination that the Applicant's performance was overall fully satisfactory in 2005 but less consistent in 2006. The Tribunal sees no evidence to indicate that Ms. A's descriptions and assessments of the projects were unreasonable. Both evaluations moreover accurately reflected the comments received from the feedback providers.

66. The concluding comments in the 2005 and 2006 OPEs were as follows. In the 2005 OPE, which was given to the Applicant on 21 March 2006, Ms. A wrote that the Applicant's "overall contribution in FY05 to WBIHD was less than what we expect from our level GG staff. However, it is recognized that this was a start to your work in WBIHD and you will be expected to make a greater contribution in FY06." The 2006 OPE noted that "in the last OPE e-mail, we had hoped you would make a greater contribution and I am disappointed this did not happen." The Applicant finds fault in the comments made in the 2005 and 2006 OPEs about expectations of greater contributions in the next fiscal year. FY06 ended 10 days after the 2005 OPE was given to the Applicant. The Applicant argues that she could not have been expected to make a "greater contribution" in just 10 days. She also was not given any specific work program for the next fiscal year after she returned from her annual leave in late March 2005. The Applicant asserts that the comment in the 2006 OPE was invalid because it was based on a "brazen fabrication of the facts," exemplified "pure bad faith," and was full of "fabrications and distortions."

67. Regardless of the reason why the 2005 OPE was completed so close to the 2006 OPE, it was still expected to be fruitful and useful to the staff member. The 2006 OPE, which covered a period that ended only 10 days after the 2005 OPE was given to the Applicant, stated that the Applicant had not improved her performance. Improvement could not reasonably have been expected on the basis of the content of the 2005 OPE. However, as noted in HR's definition of an OPE:

> The primary activity of the Overall Performance Evaluation (OPE) is the discussion about performance that takes place between the Supervisor(s) and the Staff member. This discussion should *summarize*--rather than replace--*ongoing feedback* which should have taken place throughout the performance year about the Staff member's work program, progress toward meeting results agreements, development actions, behavioral standards, and

> any needed changes. The conversation should also touch on plans for the upcoming performance cycle. (Emphasis added.)

68. Thus, the comment about improvements in the 2005 OPE ideally should have constituted a summary of ongoing discussions between the Applicant and her supervisor. The Applicant notes in her pleadings that she had several meetings with her supervisor in her first year to discuss her performance. She makes no such averments in respect of the second year. Nothing in the record reflects ongoing discussions about her work program which could be used in the 2006 OPE. On the other hand, during the 2006 OPE year, the Applicant was absent from the office on administrative leave in the first two months and on annual leave in the last two months. Ms. A had limited opportunity to discuss the Applicant's performance with her, and sought to find ways consistent with Bank policy to complete the OPEs appropriately. The Tribunal cannot conclude, on the basis of Ms. A's comment in the 2005 OPE about future expectations, that the OPEs lacked a reasonable basis.

69. The Applicant further argues that her supervisor did not include in the 2005 OPE her reason for not participating in the process. It states: "As you had indicated that you will not actively participate in the OPE process, I will provide feedback to you by this e-mail in accordance with Bank practice covering situations like this." Staff Rule 5.03, paragraph 2.02(f) applies specifically to a staff member who refuses to sign a completed OPE and provides in pertinent part that:

> Should a staff member refuse to sign the performance evaluation or a supplemental evaluation, the Manager or Designated Supervisor and/or the Supervisor shall continue the evaluation process *noting [the] reasons given by the staff member for the refusal, if any*. (Emphasis added.)

70. The Applicant argues that the OPE should have recorded the reason for her non-participation on the basis of Staff Rule 5.03, paragraph 2.02(f). However, she chose not to

participate in the process before the OPE had even been drafted. Her refusal to participate in the process was not related to Ms. A or her opinion of the Applicant's work, but rather to what the Applicant perceived to be the Tribunal's and the Bank's "abandonment of any reasonableness standard for satisfactory OPE evaluations," referring to the Tribunal's judgment in *Yoon (No. 5)*. The omission of this explanation of the Applicant's non-participation cannot be deemed to have affected the validity of the contents of the 2005 and 2006 OPEs; the Applicant's views of the relevant legal standards were immaterial to the task of developing a factually accurate performance assessment.

71. The Applicant also raises a number of unsubstantiated complaints about the Bank's use of specific words and other minute issues. For example, she disagrees with the Bank that her leave in early 2006 was "sudden" and asserts that she gave notice to her supervisors but they mishandled the situation by failing to respond appropriately, or failing to raise the timing issue when she first gave notice. Staff Rule 6.06, paragraph 2.03 provides in part that "[a]nnual leave may be taken, with prior approval, at the initiative of the staff member." Paragraph 11.01 provides in relevant part that "[w]ith the exception of the administrative leave … all leave requests must be approved by the staff member's supervisor." There is no evidence that the Applicant discussed the annual leave with her supervisor, or even used the proper procedures for requesting leave; on the contrary, the Applicant first notified HRSVP, and sent an e-mail message to Ms. A's assistant with a copy to Ms. A and Mr. B. She did not discuss the leave and did not personally inform Ms. A of it until a few days later. The Applicant scheduled eight weeks of annual leave, on two weeks' notice, just before the implementation of one of her projects, while preparations were still under way. She did not ask whether she could take the leave; she simply stated

that she was taking it. The Bank rightfully argues that it did not leave room for discussion. Under the circumstances, the Bank's statement that her leave was "sudden" does not appear to be unreasonable.

72. As to the 2005 SRI, the Applicant argues that the "satisfactory" rating she received was inconsistent with the 2005 OPE which stated that her performance was below what was expected of a staff member at her level, thereby justifying a review of the substance of the OPE by the Tribunal. The Bank responds that the Applicant's 2005 SRI rating of 3.2 was "satisfactory" and reasonably justified. The Bank argues that the Applicant's performance gave it a reasonable and observable basis to give this SRI rating. As explained in *Moussavi*, Decision No. 354 [2007], at para. 17:

> [In an OPE] managers assess staff performance relative to *individual objectives*. In contrast, in the SRI managers rate staff performance *compared to those of peers* at the same level of responsibility and the same grade. Also, the SRI produces a single overall performance rating, whereas the OPE provides a series of ratings on different objectives and behaviors. Thus, while the two evaluations should be broadly consistent, they are not the same.

73. The 2005 OPE appears to reflect fully satisfactory performance on the part of the Applicant. While it appears to have been less than expected for her grade level, it was recognized that the Applicant was on a "learning curve." The unexceptional SRI does not appear to have been unreasonable.

74. The Tribunal concludes that the Bank had an observable and reasonable basis for the OPEs, that the OPEs and SRI generally reflected the work of the Applicant and were not arbitrary, discriminatory or improperly motivated.

Was the Bank's preparation of the OPEs procedurally deficient?

75. The OPE process is intended to begin with the staff member providing his or her supervisor with a summary of projects and achievements so that the supervisor can assess

the performance in view of the latter's recorded expectations at the beginning of the period under review. As described at paragraph 58 above, the Bank's Staff Rules and procedures, as reflected in several e-mail messages to WBI staff, make clear that the Applicant was required to begin the OPE process by preparing her draft OPE.

76. In numerous written communications the Applicant insisted unequivocally that she would not participate in the process and refused to provide comments or attend meetings relating to the OPEs. She did not prepare her OPEs as required by the Bank's Staff Rules and policies. Her unwillingness to participate left Ms. A no alternative but to draft the OPEs herself, using an e-mail format instead of the prescribed electronic form. The Applicant argues that the use of the non-formal e-mail format for the 2005 and 2006 OPEs violated the Staff Rules and policies. According to the Applicant, the consequences of not using the appropriate OPE format deprived her of a rigorous verification by the reviewing manager, and subjected her to "capricious" judgments.

77. The Tribunal finds these allegations to be unfounded in principle and unsubstantiated in fact. By insisting that the Bank respond to her grievance about a decision of the Tribunal before she would participate in the OPE process, the Applicant imposed conditions on the Bank which were not only inconsistent with the Staff Rules, but also with the Bank's general obligations in relation to Tribunal judgments. As noted in Mr. C's response of 8 August 2005 to the Applicant, the Tribunal's judgments are final. The Bank was legally bound to comply with the Tribunal's order in *Yoon (No. 5)* whether it agreed with that order or not. The Bank had no obligation to enter into a dialogue with the Applicant as to the merits of the judgment; it precisely behooves the Bank to avoid such exchanges.

78. The Applicant had the opportunity to express disagreement directly in the OPEs, as envisaged by the Staff Rules. But she elected not to comply with established procedures. She disregarded rules with which she, as a staff member, was obliged to comply. The Tribunal reiterates that the Bank would be ungovernable if every staff member decided which rules to comply with and which to ignore. *See AD*, Decision No. 388 [2008], para. 61, and *K*, Decision No. 352 [2006], para. 40. Under the circumstances, the Tribunal is satisfied that the Bank complied with its obligations under the Staff Rules.

79. The Applicant further argues that the Bank manipulated the periods of review of both the 2005 and 2006 OPEs to her detriment. The period of review of an OPE covers the 12-month period between 1 April and 31 March of the following year. The staff guidelines and procedures (in the form of a Q&A available on the Intranet) are clear.

80. The 2005 and 2006 OPEs were titled appropriately. Requests for comments from the feedback providers also included the correct dates. On the other hand, in her general comments in the 2005 OPE the Applicant's supervisor discussed a matter which occurred in April 2005, which was beyond the end of the 2005 OPE review period. The comments on the administrative leave taken in April 2005 should clearly not have been included in the 2005 OPE. Yet the Applicant has not shown that the inclusion of that comment had any material adverse impact on the 2005 OPE. Other negative comments in that OPE were not related to that administrative leave.

81. The 2006 OPE excluded the month of April. The Applicant notes that an important part of her work was overlooked because of this omission, and argues that she was penalized for having few projects during the 2006 OPE period without any mention of the

administrative leave to explain why she had a lighter workload than might otherwise have been assigned to her.

82. The Applicant was on administrative leave from about 25 April until 1 August 2005. She appears to have stayed in contact with her colleagues about her ongoing projects and provided assistance – mostly logistical – to them. The Applicant could have mentioned this to Ms. A during the OPE meeting sought by the latter, but she declined the meeting and did not provide any comments. The Tribunal therefore cannot conclude that the exclusion of the month of April 2005 had a negative impact on the overall 2006 OPE. While Ms. A's comments in the 2005 OPE were in error in one respect (as noted in paragraphs 80 and 81 above), the Applicant has not demonstrated that the overall evaluation over the two years in question was adversely affected by this error.

83. The Applicant argues that she was unable to assess the validity of the feedback providers' comments because she did not know their identity or the content of their comments. She complains about her inability to check whether the feedback providers for her 2005 OPE were those she had selected and questions whether their comments were provided for the correct period of time. She also questions the validity of the comments they provided in view of what she considers to be a "disparity" between the comments given to her by her colleagues and the apparently negative comments reflected in the OPEs. She specifically questions the validity of comments that she surmises were provided by two particular individuals who allegedly had a negative attitude towards her.

84. The established Bank policy is that such comments are not made available to a staff member. This is to protect the integrity of the system and to ensure that feedback providers are not afraid to express their opinion candidly on the performance of a particular

staff member. A feedback provider may, if he or she so chooses, copy his or her comments to the staff member, but that is at the feedback provider's discretion. As a general practice, the list of feedback providers is discussed with the staff member's supervisor before comments are sought. Had the Applicant participated in the OPE process, she would have sent her OPE to the feedback providers herself; but she elected not to participate.

85. In respect of the 2005 OPE the Applicant sent by e-mail her list of feedback providers to Ms. A. There were no other discussions between them. The Tribunal reviewed the feedback providers' comments *in camera*. It notes that three of the five feedback providers listed by the Applicant for the 2005 OPE were contacted and provided comments, as were two others not listed by the Applicant. There is no requirement to select every feedback provider suggested by the staff member. At any rate, of two feedback providers not listed by the Applicant, one made comments that were generally positive while the other's comments were generally negative.

86. As to the 2006 OPE, the Applicant speculates that comments were provided by only one feedback provider. She asserts that the use of only one feedback provider was arbitrary and violated the OPE process. In particular, she alleges that the Bank should have "reached out to a broad range of feedback." In fact, two feedback providers were contacted for the 2006 OPE. Their comments are properly reflected in the OPE. In view of the limited work program of the Applicant during FY06, the selection of two feedback providers does not appear to have been inadequate.

87. Although the supervisor's communication with the feedback providers by e-mail is questioned by the Applicant, she has not established that this in itself had any negative

consequences. As the Applicant had not prepared her OPE to be used as a basis for comment and feedback, the supervisor had scarcely any alternative. The Tribunal finds no procedural violations with respect to Ms. A's communication with the feedback providers.

88. The Applicant also alleges that Ms. A sent her the 2005 and 2006 OPEs without prior discussion with her, in violation of Staff Rule 5.03, paragraph 2.02(a), as well as the OPE guidelines. The OPE guidelines provide that, after a staff member completes his or her part of the draft OPE, and sends it to the supervisor, the latter may provide further comments and send on the draft to the staff member. The supervisor will then meet with the staff member to discuss the supervisor's comments. This meeting is intended to promote an open and honest discussion about concerns, promotions and the like. The supervisor and staff member should discuss work performed during the period in review and future work, review the information provided by the staff member and ascribe ratings (making comments where desired), and provide overall assessments on areas of particular strength and those in need of improvement. After the meeting, the supervisor may make changes before signing the OPE and forwarding it to the reviewing manager.

89. The Applicant contends that Ms. A should have met with her before drafting her comments. She states that Ms. A's explanations were invalid and that the 3 November 2005 meeting was not a "scheduled OPE discussion" meeting. She informed Ms. A that she would not be participating in the OPE process. According to the Applicant, she told Ms. A that she wanted to meet and discuss the comments provided by the feedback providers as well as by Ms. A in order to apply them to her current tasks. She alleges that Ms. A "flatly refused" to meet with her. These assertions are not supported by the record. The Applicant and Ms. A met on 3 November 2005 to restart the interrupted 2005 OPE

process. It appears that at that time Ms. A had not drafted the OPE. There is scant evidence about the meeting (other than the Applicant's assertions). It is common ground that the Applicant informed Ms. A that she would not be participating in the OPE process and gave her a copy of an e-mail message sent to HRSVP on 3 October 2005. At any rate, the Applicant referred several times in correspondence to the encounter as an OPE meeting. In her e-mail message to HRSVP of 3 October 2005, the Applicant wrote that Ms. A "asked [her] to discuss [her] OPE for the past fiscal year" and that she would "meet with [Ms. A and] convey [her] decision [to not participate in the OPE process] to her." Furthermore, in her pleadings, the Applicant frequently refers to that meeting as "the OPE meeting."

90. There were no further meetings between the Applicant and Ms. A to discuss the 2005 OPE. However, in her e-mail message conveying the draft 2005 OPE to the Applicant in March 2005, Ms. A stated: "I would have rather done this in person …. [P]lease let me know if you require any clarifications on these points or you would like to discuss them further." It appears to be a clear invitation to meet, should the Applicant wish to do so. The Applicant declined.

91. As to the 2006 OPE, the e-mail message of 6 April 2006 conveying the OPE states: "You declined my invitation for a discussion on May 30th … You may arrange a meeting … to discuss the evaluation, and moving forward." Again, the Applicant disregarded the invitation.

92. On the whole, the Tribunal is satisfied that the principal reason for the lack of dialogue with respect to the OPEs was the Applicant's unwillingness to participate in the process.

93. The Applicant contends that the 2005 OPE was not completed in a timely fashion, in contravention of the Staff Rules and Bank policies; that the deadlines for the Applicant's comments were arbitrary; that the Bank's sudden rush to complete the 2005 OPE deprived the Applicant of her rights to due process; and that the deadlines imposed during the completion of the 2006 OPE were also arbitrary and artificial.

94. The Bank asserts to the contrary that the delay in completing the 2005 OPE was caused primarily by the Applicant's request that the evaluation be postponed until after she had returned from leave in August, and later by her refusal to participate in the process. The process for the 2005 OPE took longer than expected in part in order to accommodate the Applicant and to ensure a careful and fair evaluation.

95. The Bank's guidelines with respect to the timing of the OPEs provide that "[a]ll confirmed staff must complete their OPEs by June. Each VPU [Vice Presidential Unit] determines its own timing activities within the evaluation process." Several e-mail messages were sent to all staff in the VPU, including the Applicant, clarifying the deadlines for submitting their parts of the OPEs. Ideally, the OPEs would be completed by the end of June so that SRIs could be determined at the beginning of the next fiscal year.

96. With respect to the 2005 OPE, the Applicant requested a delay while she was on administrative leave between April and August 2005. At the OPE meeting in November 2005 the Applicant informed Ms. A she would not participate in the process. Ms. A then contacted HR to determine how to proceed. In January 2006 the Applicant took an extended two-month annual leave and did not return until late March 2006 when the OPE was completed. The Tribunal notes some delay from August to November 2005, but concludes that responsibility for this delay cannot be ascribed solely to the Bank. It was

primarily because of the Applicant's request for delay, her refusal to participate, and her subsequent annual leave. As to the 2006 OPE, it was completed in accordance with the Bank's guidelines by the end of July 2006. The Applicant complains that it was arbitrarily rushed and deprived her of due process. The Tribunal finds no evidence to support her allegations.

97. The Applicant complains that she could not contribute to generating demand for country focus activities – one of the negative comments in her OPEs – as this was not included in her Results Agreement. She alleges that she did not discuss a Results Agreement or any work program for 2006 with her supervisors and therefore could not be penalized for not having performed. She also asserts that Ms. A failed not only to discuss a Results Agreement with her, but also with other staff members in WBIHD. In addition, she alleges that she in fact had begun working on developing country focus activities in Kenya, China, Central Asia and Latin America, but her suggestions were not followed up.

98. Although there was no Results Agreement as such for the Applicant, it appears that the Applicant was aware of the expectations in her first year, between April 2004 and March 2005. As to the second year in WBI, between April 2005 and March 2006, the Applicant was absent from the office on administrative leave in the first two months, and on annual leave in the last two months. In between, she appeared to have worked on two projects. The Applicant suggested some ideas for development prior to her administrative leave, but there does not appear to have been any follow-up or discussion of these suggestions. Because of the timing of her administrative leave, it appears that there had been no opportunity for discussion until her return, and indeed that no discussion ever took place. In addition, in view of the fact that the Applicant refused to meet with Ms. A to

discuss her OPE, she failed to avail herself of the opportunity to meet and discuss her future within her unit. The Bank cannot be faulted under the circumstances.

99. The Applicant makes a number of further complaints that are not substantiated by the record. She complains that her ability to "analyze and respond" to the 2006 OPE was impeded because she was not able to copy or save it when she received it from Ms. A. However, she concedes that when the 2006 OPE was forwarded to her reviewing manager with a copy to her, she was able to copy and file it. She also questions the completion of the process because the reviewing manager added an additional comment when he submitted the 2006 OPE for filing in her personnel file. Yet the OPE procedures afford the reviewing manager an opportunity to provide additional comments at the end of the process, which are then copied to the staff member when they are finalized. It does not appear that the Bank engaged in any inappropriate conduct in this respect.

100. The Applicant's refusal to work with Ms. A to complete the OPE process increased the likelihood of incidental inaccuracies creeping into the OPEs. A staff member cannot, by withdrawing from the process, transform the Tribunal into a forum of first instance in which the minutiae of past performance are alleged, discussed, and resolved for the first time. The Tribunal "cannot and should not conduct a microscopic inquiry into each facet of the Applicant's work program and behavior." *Prudencio*, Decision No. 377 [2007], para. 74.

101. The Tribunal concludes that the Bank, and in particular the Applicant's manager, appears to have made efforts to treat the Applicant fairly. Ms. A was in uncharted territory and appears to have tried to accommodate her concerns. The Tribunal finds that the process followed was not unreasonable under the circumstances.

Was there collusion among Bank managers to the detriment of the Applicant?

102. The Applicant argues that as with the 2005 OPE, the 2006 OPE was copied to the reviewing manager as well as to HR staff at the same time it was first sent to the Applicant and before she had a chance to comment on it or discuss it with Ms. A. This violated the confidentiality of the process, in contravention of the Tribunal's holding in *Yoon (No. 5)*, where it is stated at paragraph 69 that the role of the reviewing manager "is simply to review the performance evaluation of a staff member and not to establish ratings or to participate in the formal OPE discussion." She contends that the reviewing manager was directly involved in the initial draft of the 2005 OPE, which further demonstrates collusion between HR and WBI. The Applicant also argues that the 2005 OPE had been edited by HR and her managing director, contrary to the Staff Rules, before she even saw it, indicating that WBI and HR had been "strategizing … collectively and collusively even before the performance evaluation had been shared" with the Applicant. She concludes that the series of events that led to her 2005 and 2006 OPEs proves collusion between WBI and HR which the Bank has made no attempt to rebut.

103. The record includes a number of e-mail exchanges between Ms. A, HR, and the managing director which discuss the Applicant's 2005 OPE and suggest specific language. It is apparent that a draft was circulated, and editorial suggestions were made. During a typical OPE process, supervisors add their comments and ratings to a draft OPE prepared by a staff member, and then discuss the OPE with the staff member. It is only then that the OPE, including any staff comments, is forwarded to the reviewing manager. This case did not follow the typical process. As the Applicant refused to participate, Ms. A had to find another way to handle her evaluation. The record demonstrates that Ms. A was cautious

and sought counsel and advice on the content as well as the format of the OPE from HR and her own manager. She shared the OPE only with Bank staff who were in the line of supervision and were responsible for the Applicant's personnel matters at WBI. She ultimately completed the OPE, taking some suggestions into consideration. She did not accept all the recommended changes.

104. The Staff Rules do not explicitly or implicitly prohibit a supervisor from copying draft OPEs to the HR person(s) in charge of a particular unit, or the manager(s) of that supervisor. In fact, Staff Rule 2.01, paragraph 3.01 allows supervisors, as well as "[o]ther officials of the Bank Group who need to consult Staff Records in the performance of their assigned duties," access to the records of a staff member. The Tribunal does not consider that the comments she received from these individuals amounted to improper involvement in the OPE discussions.

105. As to the relationship between the Applicant and Ms. A, the latter began the 2005 OPE process for the Applicant consistent with her approach to other staff members. She accommodated the Applicant and agreed to postpone the process until the Applicant's return from administrative leave. She attempted to resume the process but at the scheduled November 2005 meeting the Applicant informed her that she would not participate. Ms. A then told the Applicant she would find an alternative process and ultimately drafted the OPE herself. None of this appears to be arbitrary or based on bad faith. The Tribunal rejects the allegation that the behavior of the Applicant's supervisor, reviewing manager, and HR constituted collusion.

Did the Bank breach any rules of confidentiality in extracting a message from the Applicant's email account?

106. The Applicant alleges that the Bank, in violation of the Bank's AMS 6.20A, extracted from her Bank e-mail account a message that Ms. A had sent the Applicant on 15 March 2005. The basic facts are simple. On 15 March 2005, at 3:49 p.m., Ms. A sent the Applicant an e-mail message. At 5:35 p.m. the same day, Ms. A notified the Applicant that she "sent an email to [her] in error which was retracted from [her] account" with "apologies for the inconvenience."

107. As seen in paragraph 34 above, the Applicant demanded an explanation. On 20 April 2006, ISG informed her of the Bank's policy regarding retraction of messages from a staff member's e-mail account. The ISG message included the relevant provisions of AMS 6.20A as well as a description of the process that is followed "when [ISG] receive[s] a note from a manager with a business justification to delete an e-mail from a staff member's account, and [has] written authorization from the staff member's Vice President." Upon further questioning by the Applicant regarding the nature of the business reason and whether the extraction of the message had been approved in writing by the Vice President, ISG replied that "the manager made an accidental error and proper approval and process according to the policy was followed to retract the e-mail." The Applicant argues that ISG failed to respond directly to her specific questions about whether the extraction complied with the Bank's policy and that this failure to respond is evidence of a violation of that policy. The Applicant contends that only a substantive and objective business purpose can justify management intrusion into a staff member's e-mail account, and that there was no "such colorable purpose here." She doubts that procedures were followed, assumes that her supervisor retracted the message "without permission" and "presumes and believes [that the message] relates to her performance evaluation. "

108. The Bank failed to respond to the Applicant's contention in its pleadings, but included in submissions to the Tribunal part of the retrieved message. The Bank fails to provide the Tribunal with any evidence of compliance with its published policy. Pursuant to AMS 6.20A, paragraph 9, "[p]rivacy is not guaranteed by the Bank Group for anyone using its infrastructure." Still, the Bank restricts access to staff members' communications, as set out in paragraph 10, which states: "Monitoring of Information User activity is governed by the following principles set out in Information Security Policy."

109. Specifically, the Bank is authorized to monitor a staff member's e-mail messages if there is a "genuine business justification" as "authorized and pre-approved by the staff member's Vice President." A "genuine business justification" is defined in paragraph 13 of AMS 6.20A as a "legitimate reason connected to the work program of the Bank Group." The Bank's written procedures, as explained to the Applicant by ISG, thus prohibit deletion of e-mail messages from a staff member's e-mail account, except under specified conditions. Upon receipt of a written request to delete an e-mail message from a staff member's e-mail account which includes a business justification, ISG is required to inform the requestor of the following:

1. It is the policy of Notes Admin not to delete emails from a client mail database

2. If a request is received the requestor is informed that:

    a. This procedure violates the Security policies established for the Bank

    b. To proceed with the request an approval must be received from the appropriate VP

    c. There are no guarantees that the email has not already been read by its recipients

> d. If approved the requestor is required to send a message to all the recipients whose mail databases have been accessed explaining what has been done.
>
> All documentation of the incident including the written approval must be stored in a database.

110. The Bank's intrusion into the e-mail account of any staff member may be a serious matter. While the Bank has a legitimate business interest to reserve the right to monitor or screen or examine a staff member's e-mail messages under limited circumstances, the Bank also recognizes the private nature of e-mail communication. A genuine business justification is defined in AMS 6.20A, paragraph 13, as one that must be connected to the work program of the Bank Group.

111. The Bank has failed to establish that ISG sought to ensure that there was a genuine business justification for retrieving the message from the Applicant's e-mail account. There is moreover no evidence that it followed its own published procedures, which require written approval prior to gaining access to the e-mail messages. The bare assertion from ISG that "the manager made an accidental error and proper approval and process according to the policy was followed to retract the e-mail message" is not supported by evidence of prior approval or written authorization. The Bank only submitted for *in camera* review by the Tribunal an e-mail message dated 15 March 2006, and sent at 6:52 p.m., between two staff members, copied to the Legal Department and confirming that the Applicant's supervisor requested that ISG retrieve the e-mail message from the system.

112. In sum, it appears that Ms. A sent the e-mail message to the Applicant in error and quickly moved to have it retrieved from the Applicant's e-mail inbox. She so informed the Applicant, pursuant to the Bank's written procedures described above. It therefore seems clear that Ms. A was not involved in wrongdoing, as she could simply have kept the

Applicant unaware of the retraction. On the other hand, there is no evidence that ISG complied with its own internal procedures.

113. The Tribunal does not purport to establish rules of privacy. It has no reason in this judgment to opine on whether it would be open to the Bank to adopt a policy of no privacy at all with respect to e-mail accounts on equipment furnished to staff members. But the Bank has adopted a different policy and must be held to it. Staff members are entitled to rely on that policy in a climate of confidence and trust. In this case, the Bank has provided no evidence to impede the disturbing conclusion that ISG, within a matter of hours if not less, acceded to a request to enter a staff member's e-mail account in secrecy and in disregard of the established prerequisites (approval of a VP and existence of a business objective). Such disregard of staff members' rights is unacceptable. It stands in stark contrast to ISG's compliance with Bank policy as analyzed in *AE*, Decision No. 392 [2009] and *AF*, Decision No. 393 [2009].

114. While the Applicant's rights have thus been violated, the circumstances are such that she cannot be said to have suffered actual prejudice. Any notion that Ms. A was engaged in subterfuge is immediately quashed, as noted, by observing that she immediately and directly informed the Applicant of what she had done. Nor did the fact of the retrieval of an e-mail message which the Applicant had no entitlement or expectation to receive cause her any concrete prejudice. The fact that her rights were not respected was certainly valid grounds for complaint, but the feeling of discomfort that may have been engendered by that grievance does not in itself warrant monetary reparation.

115. The Tribunal emphasizes its concern that the possibility that supervisors might find it convenient to retrieve e-mail messages, and that ISG would assist them in doing so with

no regard to the requirements established by the Bank itself, would create an environment of immanent risk of violation of the rights of all staff members. The Tribunal will continue to scrutinize closely the Bank's conduct in cases where a violation of AMS 6.20A is alleged. In *AE* and *AF*, the Bank was able to demonstrate compliance with these procedures, and the Tribunal will hold it to that standard.

Other allegations

116. The Applicant makes two further incidental arguments: (1) she argues that her managers were considering putting her under a performance improvement plan ("PIP"), but did not do so because they were told by HR that the Staff Rules required an OPE to be completed before a PIP could be invoked; and (2) the Applicant argues that the Bank was planning to transfer her to another unit and prepared the poor 2005 OPE in order to facilitate the transfer. The Tribunal considers that neither contention is supported by the record and that each merits summary dismissal.

117. Finally, the Applicant alleges that she has been the victim of a further conflict of interest because since 17 July 2006 Mr. D of HR served as a representative for the Bank (when the Applicant's supervisor went on external assignment) and has testified before the Appeals Committee on behalf of the Bank. At the same time, Mr. D was acting as HR officer for the Applicant and was somewhat involved in her 2006 OPE. The Applicant contends that because Mr. D received copies of the Applicant's draft 2006 OPE he ought not also to have represented the Bank. The record does not, however, show that Mr. D represented both the Applicant and the Bank at any time relevant to these proceedings. Furthermore, Mr. D appeared before the Appeals Committee after the expiry of the periods under review in the 2005 and 2006 OPEs. The Tribunal concludes that the Applicant has

not established that Mr. D's limited involvement in the matters giving rise to these proceedings created a material conflict of interest.

DECISION

For the reasons stated above, the Applicant's requests for relief are dismissed.

/S/ Jan Paulsson
Jan Paulsson
President

/S/ Olufemi Elias
Olufemi Elias
Executive Secretary

At Washington, DC, 25 March 2009