



World Bank Administrative Tribunal

2019

Decision No. 599

**EV,
Applicant**

v.

**International Finance Corporation,
Respondent**

(Merits)

**World Bank Administrative Tribunal
Office of the Executive Secretary**

**EV,
Applicant**

v.

**International Finance Corporation,
Respondent**

1. This judgment is rendered by the Tribunal in plenary session, with the participation of Judges Mónica Pinto (President), Andrew Burgess (Vice-President), Mahnoush H. Arsanjani (Vice-President), Abdul G. Koroma, Marielle Cohen-Branche, and Janice Bellace.

2. The Application was received on 9 February 2018. The Applicant was represented by Alice C. Hwang and Marie Chopra of James & Hoffman, P.C. The International Finance Corporation (IFC) was represented by Ingo Burghardt, Chief Counsel (Institutional Administration), Legal Vice Presidency. The Applicant's request for anonymity was granted on 2 October 2018.

3. The Applicant challenges the non-confirmation of his appointment.

FACTUAL BACKGROUND

4. On 14 September 2015, the Applicant joined the IFC as an Associate Investment Officer, Level GF, in the Global Manufacturing, Agribusiness & Services (MAS) Department. He held a five-year term appointment through the Global Transaction Team (GTT) program. The letter of appointment stated that the Applicant "will be subject to a probationary period of one (1) year, which may be extended for up to one additional year."

5. The GTT program is a two-year program, with the first year in an industry department in Washington, D.C., and the second year in an industry department in one of IFC's regional offices "to maximize learning and mentoring."

6. In his first year, the Applicant was assigned to the Global Tourism, Retail, and Property (Global TRP) team. The Applicant's Manager was a Senior Manager who was based in Hong

Kong. The Applicant's Supervisor (FY16 Supervisor) was a Principal Investment Officer and Global TRP Sector Lead who was based in Paris.

7. In mid-October 2015, the Applicant and his FY16 Supervisor discussed the Applicant's work program and objectives. The FY16 Supervisor asked the Applicant to draft his individual business objectives for Fiscal Year 2016 (FY16).

8. By email dated 28 October 2015, the FY16 Supervisor asked the Applicant to send him the draft objectives so that they could be entered into the performance management system. The Applicant did so on the same day, and the FY16 Supervisor approved them.

9. By email dated 18 November 2015, the Applicant asked to discuss his work plan and the project pipeline with his FY16 Supervisor and a Principal Investment Officer. Both responded to the Applicant with proposed times, and the FY16 Supervisor indicated that the Applicant might be able to take on a few projects to help a sick colleague.

10. In early December 2015, the FY16 Supervisor instructed the Applicant to prepare a presentation on e-commerce. The Applicant was provided with background materials to help him prepare the presentation. The Applicant did not deliver the presentation, and the FY16 Supervisor had to ask another colleague to deliver the presentation on time.

11. In early January 2016, the Senior Manager identified Transaction X as one on which the Applicant could work. The Applicant traveled on 29 January 2016 to participate in appraisal meetings with the client. According to a Senior Investment Officer who worked on this transaction, the Applicant was late for about 75% of the meetings and attended a number of the meetings in casual attire. The Senior Investment Officer characterized the Applicant's work on this transaction as "consistently late and of low quality – a number of his deliverables was just straight copy and paste from the client's material" and an analyst had to complete some of the Applicant's tasks.

12. On 17 February 2016, the Applicant had a Mid-Year Conversation by telephone with his FY16 Supervisor. The FY16 Supervisor informed the Applicant that the overall feedback received

to date on the Applicant's performance was positive, although he identified two areas for improvement, namely, proactiveness in terms of "volunteer[ing] to help out" and asking pertinent questions during appraisals. The FY16 Supervisor stated that the Applicant had "started to get involved in project execution which will allow him to learn these important IO [Investment Officer] skills and [this] remains [the] key focus going forward besides providing overall support to the TRP team (sector analysis work, presentations, mappings, etc[.])."

13. By email dated 17 February 2016 to the 2015 GTT/IFC Young Professionals, the Program Manager provided general information about the program's mid-year review conversation, which would be in addition to the Mid-Year Conversation with managers and which would "1) take stock of how you are doing on the program and in your work, 2) discuss the early thinking about your rotation and 3) discuss upcoming development curriculum components."

14. On 22 February 2016, the Applicant emailed the MAS Global Administrative Manager to inform her that he had had a Mid-Year Conversation with his FY16 Supervisor and to schedule a meeting to discuss rotation options for the following year.

15. The Applicant and the MAS Global Administrative Manager met in late February 2016. The MAS Global Administrative Manager advised the Applicant on rotational options within Global TRP and informed him that she had been told about the Applicant's tardiness for every meeting during the appraisal mission for Transaction X. The Applicant disputed this statement and acknowledged that he had been five minutes late only for one breakfast meeting.

16. On 7 April 2016, the Applicant met in person with the Senior Manager. The Senior Manager conveyed criticisms he had received about the content and timeliness of the Applicant's deliverables on Transaction X and about the Applicant's tardiness for multiple meetings during the appraisal mission. The Applicant committed to addressing the issues identified by the Senior Manager. The Applicant also stated that the relationship with his FY16 Supervisor was not working well because they did not work together and had little interaction, so his FY16 Supervisor could not properly evaluate or weigh the feedback about the Applicant's performance. The

Applicant requested another supervisor, who was based in Washington, D.C., and with whom he had worked, but his request was not granted.

17. By email dated 26 May 2016, the FY16 Supervisor thanked the Applicant for his agreement to help onboard a summer intern and asked the Applicant if his workload was enough. The Applicant responded to his FY16 Supervisor by email on the same day and informed him that he was currently staffed on three projects. The Applicant indicated that he would meet with the MAS Global Administrative Manager the following week to catch up and discuss his next rotation.

18. In an email exchange on 14 and 15 June 2016, the Applicant and his FY16 Supervisor discussed the Applicant's feedback providers for his FY16 Staff Annual Review. As the Applicant had nominated only three persons, his FY16 Supervisor requested him to add more to ensure that the minimum number of providers would be met, and the Applicant agreed to do so.

19. By email dated 23 July 2016, the FY16 Supervisor asked the Applicant to send a list of his key achievements to the Senior Manager. The Applicant responded the following day with an email to the Senior Manager, describing his project-related work over the past six months and the training courses he had taken.

20. On 31 August 2016, the FY16 Supervisor and a Senior Human Resources (HR) Business Partner met with the Applicant to discuss his FY16 Staff Annual Review. The Applicant received positive feedback about his "solid technical skills," "sectorial expertise," "quick learn[ing]," and "personable and helpful nature [...]." The FY16 Supervisor also noted that the Applicant was "receptive to feedback" and tried to improve those shortcomings that had been identified. However, the Applicant was informed that his probationary period would be extended a further six months until 13 March 2017 to address the following areas of development: "(i) timeliness of deliverables; (ii) punctuality to meetings (external and internal); (iii) diligent preparation for meetings [...]; [and] (iv) proactivity in order to get involved in multiple tasks." The Reviewing Official wrote that the Applicant's "performance has been varied in the first year and he has been struggling in meeting deadlines and the quality of his work is not always consistent. Moreover, punctuality is an issue." At the end of the meeting, the FY16 Supervisor indicated that he would

no longer supervise the Applicant because of the FY16 Supervisor's promotion and the consequent change in reporting lines.

21. According to the Applicant he subsequently spoke with the Senior HR Business Partner to request a locally based supervisor, "a written agreement on a clear set of objectives and a work program on which he would be evaluated for the extended six-month probationary period," and a rotation to a regional hub, preferably outside MAS. The Applicant claims that the Senior HR Business Partner undertook to follow up with the Senior Manager and the FY16 Supervisor.

22. In email exchanges between 6 and 9 September 2016, the FY16 Supervisor, the Senior Manager, the MAS Global Administrative Manager, and the Senior HR Business Partner discussed the Applicant's placement during the second year of his appointment. In response to the options put forth by the GTT Program Manager, the Senior Manager and the FY16 Supervisor recommended that the Applicant be placed in another department on a twelve-month assignment rather than remaining in the Global TRP team for six months and then being rotated to another department for six months.

23. On 14 September 2016, the Applicant's probationary period was extended for another six months.

24. On 30 September 2016, the Applicant responded to his FY16 Supervisor's comments in his FY16 Staff Annual Review. The Applicant wrote that "[t]he feedback was generally well-received and [he] committed to continue working on the deficiencies highlighted." However, the Applicant stated that more than half of his feedback providers worked with him only prior to the Mid-Year Conversation and not in the second half of the year, so "there seemed to be considerable overlap between the year-end feedback provided and the mid-year review feedback." The Applicant observed that "it would have been helpful for me to get specific feedback on my performance during the second half of the year (ideally on an on-going basis) to allow me to zero in on the areas where I am still not meeting expectations."

25. By email dated 3 October 2016 to the MAS Global Administrative Manager and the FY16 Supervisor, the GTT Program Manager followed up on the Applicant's placement during his second year. The FY16 Supervisor responded on the same day that "we have discussed and agreed on the way forward whereby [the Applicant] would do his second rotation in another unit (possibly manufacturing or elsewhere)."
26. By email dated 3 October 2016, the Senior HR Business Partner asked the Senior Manager to identify the Applicant's new supervisor.
27. By email dated 7 October 2016, the FY16 Supervisor informed the Applicant that his salary review increase (SRI) rating was 2, which means "below expectations," for FY16.
28. By email dated 9 October 2016 to the FY16 Supervisor, the Applicant asked with whom he should discuss his objectives and the basis for evaluating his performance during the extended probationary period. He also asked whether he would continue in Global TRP or rotate to another team and/or department.
29. By email dated 13 October 2016 to the Senior HR Business Partner, the Applicant followed up on his request for clarification, as he had not received any response.
30. By email dated 15 October 2016 to the Senior Manager, a Senior Property Specialist who worked with the Applicant on a project appraisal provided feedback on the Applicant's performance. While she recognized that the Applicant was "presentable and articulate in meetings" and gave him credit for being on time to meetings, except on one occasion, she assessed the Applicant as having performed "very poorly" and having failed to complete on time or at all the tasks assigned to him. She supported her assessment with examples, such as the Applicant's failure to produce a table with data and his failure to send a daily list of information promised in meetings. The Senior Property Specialist highlighted the support the Applicant had been given to assist him in completing the tasks, such as a briefing and sessions with senior staff to help him produce a model, daily reminders, and feedback on and assumptions for him to use in a model.

31. By email dated 19 October 2016, the Senior HR Business Partner followed up with the Senior Manager, indicating that the Applicant's case was an urgent one since his new supervisor would have to administer the Opportunity to Improve (OTI) plan. The Senior HR Business Partner stated: "It's [i]mportant that we get this right. You do not want staff to use excuses such as lack of clari[t]y in reporting line to justify his lack of performance."

32. By email dated 20 October 2016 to the Senior Manager, a Principal Investment Officer who worked with the Applicant on the project appraisal also provided feedback on the Applicant's performance. While she recognized some strengths, such as the Applicant's ability to speak clearly and his sociability, she also noted that the Applicant had not prepared sufficiently for meetings with clients, had missed two deadlines for completing a financial model, and had difficulty meeting deadlines generally despite discussions about milestones for specific tasks and summaries outlining the Applicant's responsibilities. She also noted that the Applicant did not seem to be open to guidance for improving his work.

33. By email dated 8 November 2016 to the Senior HR Business Partner, the MAS Global Administrative Manager stated that she would be the Applicant's new Supervisor (FY17 Supervisor), and the MAS Chief Investment Officer would be the Applicant's Mentor.

34. In mid-November 2016, the MAS Global Administrative Manager informed the Applicant that she would be his new Supervisor and Manager. The FY17 Supervisor proposed that the Applicant would report to her as his new Supervisor and Manager but would work on transactions with the MAS Europe, Middle East and North Africa (EMENA) manufacturing team, a region-focused MAS team based in Washington, D.C. According to the Applicant, she also informed him at this time that "he could not rotate to a regional office [...] within MAS or any other department until he had been confirmed."

35. On 28 November 2016, the FY17 Supervisor met with the Applicant and "indicated an issue with [the Applicant's] technical skills." She explained that working with the MAS EMENA manufacturing team would give him additional experience on transactions with the Chief Investment Officer, who would be his Mentor.

36. By email dated 29 November 2016 to the Senior HR Business Partner, the Applicant pointed out the inconsistency between the feedback at the meeting on the previous day when his FY17 Supervisor told him that there was “an issue with [his] technical skills” and his FY16 Supervisor’s observation that the Applicant had “solid technical skills.”

37. In or around December 2016, the Applicant applied for and successfully obtained a rotation opportunity with the C3P (public-private partnerships) advisory team. The Applicant declined the rotation offer on 26 December 2016. He claims that he did so because he did not want to alienate his FY17 Supervisor.

38. On 6 January 2017, the Applicant met with the Mentor to discuss potential work projects.

39. On 9 January 2017, according to the Applicant, the GTT Program Manager informed him that the FY17 Supervisor had told the Senior HR Business Partner that the Applicant’s appointment was unlikely to be confirmed because the Applicant had refused to do work assigned to him.

40. By email dated 24 January 2017 to the FY17 Supervisor, the Mentor stated: “I have an optimistic outlook for [the Applicant]. My impression is that in the past 2-3 weeks he has worked on overcoming the challenges he felt and is open and interested to work [...]. He and I are engaging on some early leads now.”

41. By email dated 3 February 2017 to the Senior HR Business Partner, the Applicant sought guidance on the submission of his Fiscal Year 2017 (FY17) objectives. By email dated 6 February 2017, the Senior HR Business Partner suggested that the Applicant “submit objectives based on the visibility you have so far.” The Applicant responded on the same day to the Senior HR Business Partner, stating that he “wanted to have [his] objectives linked to the OTI so that [he would be] assessed on one set of criteria” and claimed that, in the previous year, he had not been assessed against the set objectives.

42. By email dated 15 February 2017, the Mentor informed the FY17 Supervisor about several tasks that she had assigned to the Applicant since early 2017. The Mentor indicated that the Applicant “has shown interest, good attitude and has actively participated to understand and engage in these tasks. He also showed adequate financial analytical skills, ability to draw conclusions from the financial analysis, and to identify project issues and opportunities. His follow up on the tasks has been timely.” The Mentor mentioned that she had introduced the Applicant to several manufacturing sector colleagues in January and February 2017 to inform them of the Applicant’s “availability to take additional project and/or other work” and to help the Applicant “strengthen his own network of colleagues.”

43. On 22 February 2017, the Applicant had the Mid-Year Conversation with his FY17 Supervisor, in the presence of the Senior HR Business Partner. The Applicant was assessed as having made “[n]oticeable improvements” with respect to “punctuality and preparation for meetings” and having made “[s]light progress (but inconsistent) on timeliness of delivery and proactive engagement.” The Applicant was informed that his probationary period would be extended another six months, “allowing more time [for the Applicant] to consistently address identified gaps.” At this meeting, the FY17 Supervisor also asked the Applicant to draft his FY17 objectives. The Applicant sent his draft FY17 objectives by email to the FY17 Supervisor on the same day.

44. On 8 March 2017, the Applicant, the FY17 Supervisor, and the Senior HR Business Partner met to review the Applicant’s current work program and to discuss and approve the Applicant’s objectives for the next six months. In his summary of the meeting, the Senior HR Business Partner highlighted the Applicant’s request to have his FY17 Supervisor’s “support to ensure he gets the opportunity to be involved on deal[s] which will allow him [to] address identified areas of improvement.”

45. On 15 March 2017, the Applicant’s probationary period was extended for another six months.

46. By email dated 20 April 2017 to the Mentor and the EMENA Manager, the FY17 Supervisor followed up to see if they had assignments on which the Applicant could work, and she stated: “any help to move him onto a live deal hugely appreciated.” Both replied by email on the same day, with the Mentor indicating that she would keep the Applicant in mind and the EMENA Manager stating that the Applicant’s work had been “OK but way too late. Would certainly not say ‘gone well.’”

47. By email dated 25 April 2017, the Senior HR Business Partner suggested a meeting between the Applicant and the FY17 Supervisor to formally assess the Applicant’s progress. He noted that the Applicant and the FY17 Supervisor had been meeting every two weeks. The Applicant responded by email on the same day, agreeing to a meeting and stating that “getting staffed on live deals is my primary concern.”

48. By email dated 4 May 2017 to the FY17 Supervisor, the Mentor gave positive feedback on a memorandum prepared by the Applicant. According to the Mentor, the Applicant “did a very good job (good content, delivered on time, well written).”

49. By email dated 4 May 2017 to the FY17 Supervisor, the EMENA Manager also assessed the Applicant’s performance on several tasks. While the EMENA Manager considered the Applicant to be a “very nice person” and “quite capable,” he reviewed the Applicant’s performance as “mixed” since the Applicant performed well on some assignments, but took longer than expected on a high-priority project. The EMENA Manager also considered the Applicant’s refusal to work on a project as a sign that the Applicant “would struggle with multi-tasking” and he stated that “2 deals, even if during an ‘intense’ time, should be manageable.”

50. On 5 May 2017, the FY17 Supervisor identified an early-stage agribusiness transaction on which the Applicant could work.

51. On 15 May 2017, the Applicant, the FY17 Supervisor, and the Senior HR Business Partner met to review the Applicant’s performance between March and May 2017. The Applicant received positive feedback on his “writing and presentation skills” including on a memorandum that he had

prepared, and his contribution to a project was recognized. With respect to the project, it was noted that the Applicant could improve his “[a]bility to meet deadlines” and “[a]bility to multitask.” The Applicant was also given advice on how to undertake preliminary work and think through a current project. At this meeting, the Applicant sought clarification about “the outcome of his probation period” and his FY17 Supervisor undertook to examine and revert.

52. By email dated 1 June 2017, the Applicant updated the FY17 Supervisor that the agribusiness transaction he had been working on was on hold and he sought clarification regarding the date of their next bi-weekly meeting.

53. On 8 June 2017, the Applicant, the FY17 Supervisor, and the Senior HR Business Partner had a meeting. As the Applicant had capacity to take on work, the FY17 Supervisor suggested that he reach out to specific colleagues to see if they needed help. In response to the Applicant’s interest in exploring a developmental assignment outside of MAS, the FY17 Supervisor “suggested they rather focus on getting the confirmation [of the Applicant’s appointment] as an initial priority.” Finally, in response to the Applicant’s query about the outcome of the probationary period, his FY17 Supervisor told him that a decision had not yet been made because while “progress [was] made with regards to addressing some of the shortcomings [...] [there were] some gaps that were raised during the last project [the Applicant] was involved in.”

54. On 19 June 2017, the EMENA Manager informed the Applicant of the mixed feedback regarding the Applicant’s performance and offered to keep the Applicant in mind for upcoming projects.

55. On 29 August 2017, the Applicant completed his FY17 Staff Annual Review.

56. By email dated 5 September 2017 to the Manager, HR Employment Policy, Knowledge and Corporate Case Management (HRDCO), the Senior HR Business Partner asked if he would be available to discuss a non-confirmation case. He summarized the Applicant’s case as follows:

Staff member was put on probation for 6 months[.] After review the probation was extended for 6 months. Despite the support, feedback and constant meeting, staff is

still exhibiting some of the behaviors and shortcomings identified 12 months ago. Feedback and meeting with manager have been documented and before [S]ept 13 we need to make a decision of either confirming or not the staff.

57. The Manager, HRDCO responded by email on the same day with his availability and reminded the Senior HR Business Partner of the requirements of Staff Rule 4.02, paragraph 3.02 regarding non-confirmation.

58. The Senior HR Business Partner acknowledged the email from the Manager, HRDCO on the same day and stated: “We’ve not yet taken the decision not to confirm and we want to hear more from you before taking any action.”

59. At a meeting on 11 September 2017, the FY17 Supervisor and the Senior HR Business Partner informed the Applicant that his probationary period was not successful and that his appointment would be terminated effective 13 September 2017.

60. On 11 September 2017, the Senior HR Business Partner asked the Manager, HRDCO to “confirm if the below email [regarding the non-confirmation of the Applicant’s appointment] is quite explicit with regards to notice to staff.” The FY17 Supervisor subsequently sent the email to the Applicant on the same day.

61. By email dated 12 September 2017 to the FY17 Supervisor, the Applicant contested the decision, claiming that he had “acted in good faith to resolve the issues that have been raised with respect to [his] performance over the course of the past two years.” He noted that he could not respond to the reasons for the non-confirmation decision since he did not have an annual performance review discussion.

62. By email dated 12 September 2017 to the MAS Director, the FY17 Supervisor stated: “You will have in your inbox a termination email for [the Applicant]. Please approve.”

63. On 12 September 2017, the FY17 Supervisor initiated the termination of the Applicant’s appointment in the HR system.

64. On 13 September 2017, the MAS Director approved the termination of the Applicant's appointment in the HR system, and the Applicant's appointment was terminated effective that day. The Applicant was paid the equivalent of 60 days' net salary in lieu of notice.

65. The Applicant filed his Application with the Tribunal on 9 February 2018, after having received an extension of time from the Tribunal. He challenges the non-confirmation of his appointment on 13 September 2017.

66. The Applicant seeks rescission of the non-confirmation decision and the removal and destruction of performance evaluations and references to non-confirmation from his personnel file. In addition, he seeks financial compensation for (i) the "IFC's violations of the Staff Rules, denial of due process, and denial of a fair opportunity to be confirmed"; (ii) "the willful harm to and mismanagement of [the Applicant's] career, professional reputation and personal life"; (iii) "the loss of potential benefits and income [...]"; (iv) "intangible damages and distress"; (v) "the pain and suffering caused [to the Applicant]"; and (vi) legal fees and costs in the amount of \$15,463.75.

PRELIMINARY OBJECTION

67. On 7 March 2018, the IFC filed a Preliminary Objection. Although the IFC accepted that the Applicant was entitled to submit the non-confirmation claim directly to the Tribunal, the IFC argued that the Application should be partially dismissed with respect to the following contentions: (i) the Applicant's FY16 Staff Annual Review was unfair and unbalanced, (ii) the Applicant received inadequate warning about deficiencies in his performance during FY16 and at his FY17 Mid-Year Conversation, (iii) the Applicant did not have sufficient opportunity to prove his ability, (iv) the Applicant was not adequately supervised, (v) the Applicant did not have adequate guidance, and (vi) the IFC failed to comply with Staff Rule 4.02, paragraph 2.02 regarding evaluation during the probationary period. The IFC claimed that the Applicant did not appeal any of these decisions within the relevant time period.

68. The Tribunal dismissed the Preliminary Objection in *EV (Preliminary Objection)*, Decision No. 596 [2018]. The Tribunal found that, in addition to challenging the non-confirmation decision,

the Applicant was entitled to “submit any claims directly related to the non-confirmation decision to the Tribunal.” *Id.*, para. 47.

SUMMARY OF THE MAIN CONTENTIONS OF THE PARTIES

The Applicant’s Contention No. 1

The non-confirmation decision was unfair, was arbitrary, and violated a fair and reasonable procedure

69. The Applicant argues that the non-confirmation decision was not based on a fair and objective evaluation of his performance because undue weight was given to the views of the Transaction X team, which exaggerated his tardiness and with which the Applicant worked for only a brief period. While the Applicant admits that he did not always deliver on time, he argues that management should have considered “the quality of his deliverables, the strength of his technical, analytical, writing and presentation skills, [as well as] his ‘personable and helpful nature.’” The Applicant claims that insufficient weight was given to the positive feedback from two other colleagues with whom he worked for the majority of FY16, and his technical competencies were not recognized.

70. The Applicant further contends that he was not assessed on “whether he met his business objectives and completed his work program.”

The IFC’s Response

The non-confirmation decision was based on a fair assessment of the Applicant’s performance, was fair, and was not arbitrary

71. The IFC explains that the non-confirmation decision was not based solely on the Applicant’s tardiness during the Transaction X mission in 2016, but rather “was based on the feedback received by the supervisors and managers over the course of twenty-four months [...] following transactions that the Applicant worked on [...]”

72. The IFC argues that it is for the organization “to establish standards which the probationer should satisfy.” In this case, the IFC assessed the Applicant as having issues “with (i) timeliness of deliverables, (ii) preparation for assignments and meetings, and (iii) proactivity in the assignments and transactions on which he was tasked.” According to the IFC, the “Applicant continuously failed to timely deliver his work, was not sufficiently prepared for meetings, [was] not always able to complete technical financial models requested of him and was not able to handle multiple assignments and transactions.” Despite identifying these areas of concern to the Applicant along with suggestions for resolving these deficiencies, the IFC claims that the Applicant did not sufficiently correct these areas of deficiencies by the end of the probationary period.

73. While recognizing that the Applicant performed well on some tasks and received positive feedback accordingly, the IFC argues that the “Applicant simply was not consistent in his performance, nor in addressing the deficiencies in performance identified to him over the course of twenty-four months.”

74. With respect to the Applicant’s FY16 Staff Annual Review, the IFC states that several staff provided feedback on the Applicant’s performance on various assignments and that this feedback related to areas of strength and development, “[b]oth [of which] were taken into account in equal measure by Applicant’s supervisor and manager in his FY16” Staff Annual Review.

75. Finally, the IFC argues that, until filing this Application, the Applicant did not claim that his performance had been assessed unfairly nor did he seek administrative review or submit a request for review to the Peer Review Services.

The Applicant’s Contention No. 2

The IFC denied the Applicant due process and a fair opportunity to prove his ability

76. The Applicant claims that he did not have adequate warning about deficiencies identified by management. According to the Applicant, prior to the end of his first year of probation, the FY16 Supervisor did not indicate that his appointment would not be confirmed or that there were any concerns about the Applicant’s punctuality or preparedness. With respect to the four areas of

improvement identified by his FY16 Supervisor in the FY16 Staff Annual Review, the Applicant submits that he addressed two of the areas after receiving feedback during the Mid-Year Conversation and that the third area “was too vague to give concrete warning about *how exactly* his work was deficient.” (Emphasis in original.)

77. The Applicant claims that, in FY17, management expressed different concerns about his performance at different points in time. He states that his FY17 Supervisor informed him for the first time on 28 November 2016 that there were concerns about his technical skills, although he had received positive feedback about his technical skills three months prior, and the FY17 Supervisor had no basis for assessing his technical skills. The Applicant argues that, subsequently, he was informed that management was concerned “about his ability to work effectively on a team,” which was in contrast to positive feedback about his teamwork skills that he received in his FY16 Staff Annual Review. Finally, the Applicant asserts that he was told his appointment would not be confirmed because of tardiness in his deliverables and lack of proactiveness.

78. The Applicant argues that he was given “vague, non-specific comments [...] during his mid-year reviews, FY2016 annual performance review, and throughout his employment at IFC,” despite his requests for more specific feedback.

79. The Applicant further argues that he did not have “adequate opportunities to prove his ability, deal with deficiencies, and defend himself.” He claims that the FY17 Supervisor prevented him from rotating to a regional office, contrary to the GTT program and the recommendation of his FY16 Supervisor and the Senior Manager. He contends that the failure to rotate him to a regional office “den[ied] [him] a fresh start in a different department.”

80. The Applicant claims that the FY17 Supervisor “did not discuss [his] objectives and work program with him until his first extended six-month probationary period was effectively over.” The Applicant alleges that he was further hindered by the fact that he was staffed on only two transactions, lasting six weeks, during his second six-month probationary period. The Applicant asserts that he was staffed on “unrelated ad hoc tasks and assignments.”

81. The Applicant asserts that the FY17 Supervisor's decision to move him to her team, which did not have any investment responsibilities, "effectively plac[ed] him in quarantine until his termination" because he did not have the opportunity to do substantive transactional work and address perceived gaps in his performance.

The IFC's Response

The Applicant received ample warning about his deficient performance and had the opportunity to demonstrate his ability

82. The IFC argues that the "Applicant was repeatedly provided feedback about his performance, and progress based on his achievement of his work program, over the course of his twenty-four-month probationary period." As an example, the IFC refers to the FY16 Supervisor and the Senior Manager informing the Applicant, prior to and during the FY16 Mid-Year Conversation, about the Applicant's tardiness and lack of preparation. The IFC also relies on the feedback provided to the Applicant in his FY16 Staff Annual Review, where the areas for development "were consistent with earlier feedback."

83. The IFC argues that, in the second year of the Applicant's probationary period, his FY17 Supervisor met with him "bi-weekly to discuss his progress and feedback on his performance" and that "[t]he same inadequacies in Applicant's performance arose." It states that, during this period, the "Applicant was aware of the feedback on his performance, and on the impact on his ability to undertake a rotation in another unit."

84. The IFC relies upon the Applicant's acknowledgment of the feedback he received and points out that, until this Application, the Applicant did not "indicate to management that the feedback he had received was in any way unclear to him, nor that he did not know what deficiencies he had to work on."

85. With respect to giving the Applicant ample opportunity to demonstrate his ability, the IFC refers to the two extensions of the probationary period "to allow Applicant additional time to improve his performance and address the deficiencies in his performance [...]." The IFC also

recalls the efforts of the Senior Manager and the FY16 and FY17 Supervisors “to staff Applicant with assignments and transactions that would support his development and allow him to demonstrate his ability.”

86. Regarding the rotation to a regional office, the IFC states that “Applicant had insisted on completing the [project appraisal] through to December 2016, which was a project of the TRP team, before considering a rotation to another team. [...] MAS management conceded to Applicant’s request and Applicant remained in the TRP team as desired [...]” The IFC also states that “the rotation to another unit, outside MAS and Washington, D.C., is not a right and is not automatic.” It explains that management preferred to rotate the Applicant within MAS in his second year “to allow him the opportunity to demonstrate to MAS (i.e., the unit that would need to confirm his appointment) that he was suitable for permanent employment” and because management considered the Applicant to require “closer supervision and more guidance,” which could be better provided at headquarters rather than in a smaller, regional office.

The Applicant’s Contention No. 3

The IFC failed to provide adequate supervision and guidance

87. The Applicant contends that he did not have adequate supervision and guidance during the probationary period. According to him, in his first year, he did not work with and barely had contact with his FY16 Supervisor, who was based in Paris, or the Senior Manager, who was based in Hong Kong. He contends that neither “had a basis to weigh or evaluate the feedback received about [the Applicant’s] performance.” The Applicant states that the lack of a supervisor for the first two months of his second year meant that he “had no one with whom to discuss the criteria by which he would be evaluated at the end of his probation.”

88. The Applicant claims that the FY17 Supervisor did not review his work and, therefore, could not have provided appropriate supervision and guidance. He notes that the FY17 Supervisor did not discuss his FY17 objectives with him until February 2017, almost at the end of his first extended probationary period.

89. The Applicant asserts that he was given inadequate guidance regarding the IFC's concerns about his punctuality, preparation for meetings, and proactiveness. Regarding the first two areas of concern, the Applicant claims that the IFC could point to only one incident as an example and that management could not explain how he could better meet their expectations. Regarding the Applicant's lack of proactiveness, the Applicant submits that he was not given "specific guidelines or coaching" on how to address this concern.

The IFC's Response

The Applicant had ample supervision and guidance

90. Although the FY16 Supervisor and the Senior Manager were not based in Washington, D.C., the IFC contends that the FY16 Supervisor "was frequently in touch with Applicant to touch base on his work load, performance, and also to give him assignments" and that the Senior Manager "spoke with Applicant to discuss assignments and performance."

91. Regarding the Applicant's lack of a supervisor for the first two months of the extended probationary period, the IFC responds that, during this time, the Senior Manager, FY16 Supervisor, and FY17 Supervisor "were available to Applicant as a supervisor would be" and that the FY16 Supervisor and the Senior Manager "were monitoring Applicant's workload and performance."

92. The IFC contends that, during the Applicant's second year, the FY17 Supervisor "was actively engaged from the outset [...] in discussions to determine what opportunities would support Applicant's development," met regularly with the Applicant, and "ensured Applicant was consistently staffed on assignments and transactions that would support his development."

The Applicant's Contention No. 4

The IFC failed to comply with Staff Rule 4.02, paragraph 2.02 "Evaluation during probationary period"

93. The Applicant claims that, during the first six-month extension of his probationary period, neither the Senior Manager nor the FY17 Supervisor met with him to establish his work program and objectives until almost the end of that probationary period, in violation of Staff Rule 4.02, paragraph 2.02(a). According to the Applicant, the consequence of this delay was the denial of the opportunity for him to meet those work objectives during the probationary period.

94. As well, the Applicant claims that "there was no clear assessment of [his] suitability and progress measured against the agreed work program" since the FY16 Mid-Year Conversation and year-end performance evaluation and the FY17 Mid-Year Conversation "focused entirely on perceived behavioral issues" and excluded any discussion "of the extent to which [the Applicant] met his individual business objectives or achieved the assigned work program."

95. The Applicant claims that the IFC failed to follow the relevant policies regarding the management of poor performance. Specifically, he claims that management did not have any meetings with him to identify "performance issue/gap; the staff member's perspective; and 'the expected performance improvements including what, how and by when,'" beyond the Mid-Year Conversations and the year-end performance evaluation.

The IFC's Response

The non-confirmation decision was made in accordance with the applicable rules

96. The IFC argues that the non-confirmation decision was recommended by the FY17 Supervisor, "after consulting HR, and after considering the written feedback provided regarding Applicant's performance over the two-year period[,]" and that the Applicant had "ample prior notice in writing [...] regarding deficiencies in his performance, and that failure to remedy his performance may result in termination."

97. The IFC explains that the FY17 Supervisor discussed her recommendation of non-confirmation with the Applicant on 11 September 2017, gave him reasons for the recommendation, and gave him an opportunity to comment. The IFC notes that the Applicant received two months' salary, in lieu of notice, in accordance with Staff Rule 7.01, paragraph 7.04.

The Applicant's Contention No. 5

The IFC did not give the Applicant the opportunity to respond to the reasons for the non-confirmation decision

98. The Applicant argues that, since he was informed of the non-confirmation decision two days before it became effective, he was presented "with a decision that had already been made" and, thus, was denied any "opportunity to respond in his own defense." He further argues that the absence of reasons for his non-confirmation, as conveyed by his FY17 Supervisor, meant that he could not respond.

99. The Applicant contends that the lack of a formal performance evaluation for FY17 "denied him any written assessment of – and an opportunity to comment on – his performance on the FY2017 objectives agreed on after the mid-year review" and that management "did not take [the Applicant's] input into account" with respect to the Applicant's self-assessment of his performance. He asserts that the failure to provide him with a performance review was contrary to Staff Rule 5.03, paragraph 2.01, which requires an annual review of a staff member's performance.

The IFC's Response

The Applicant was provided with the reasons for the non-confirmation decision and had an opportunity to respond

100. The IFC refers to the FY17 Supervisor's meeting with the Applicant on 11 September 2017, where she explained the basis for her recommendation that his appointment should not be confirmed and gave the Applicant the opportunity to comment on the recommendation. The IFC claims that the Applicant, in fact, responded at the meeting and in a subsequent email that he disagreed with the recommendation because he had made efforts to improve his performance.

The Applicant's Contention No. 6***The IFC failed to treat the Applicant fairly***

101. The Applicant submits that management's actions towards him violated the IFC's obligation to treat staff members fairly. As examples of unfair treatment, the Applicant reiterates (i) the failure by the Senior Manager and FY16 Supervisor to monitor his progress, (ii) the unbalanced FY16 Staff Annual Review due to undue weight given to the feedback from the Transaction X team, (iii) the absence of a supervisor for two months in FY17, (iv) the refusal to rotate him to a regional office, (v) his assignment to a unit with no investment responsibilities, which deprived him of substantive work, (vi) the failure to discuss his objectives until close to the end of his first extended six-month probationary period, and (vii) the identification of new concerns about his technical and teamwork skills, which had previously been commended, and the failure to evaluate him against these concerns.

The IFC's Response***The non-confirmation decision followed a fair and reasonable procedure***

102. The IFC claims that the Applicant was treated fairly and given "reasonable supervision, guidance and opportunity to demonstrate his ability throughout" the probationary period, including receiving formal and informal feedback on numerous occasions. However, according to the IFC, the decision was made not to confirm the Applicant's appointment based on consultations with HR and "the written feedback provided regarding Applicant's performance over the two-year period." The IFC states that the Applicant was given "ample prior notice in writing [...] regarding deficiencies in his performance, and that failure to remedy his performance may result in termination."

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS**RULES AND GENERAL PRINCIPLES ON STANDARD OF REVIEW REGARDING NON-CONFIRMATION**

103. Principle 4.1(c) of the Principles of Staff Employment states:

An appointment for more than a year shall normally commence with a probationary period to allow The World Bank or the IFC and the staff member to assess their suitability to each other.

104. Staff Rule 4.02 sets out the provisions governing the probationary period. According to paragraph 1.01 of that Rule, “[t]he purpose of the probationary period is to assess the suitability of the Bank Group and the staff member to each other.”

105. In *Lusakueno-Kisongele*, Decision No. 327 [2004], para. 42, the Tribunal stated that “the essential purpose of the probationary period is to evaluate the staff member’s performance and to decide whether he or she does or does not qualify for permanent employment.”

106. In *McNeill*, Decision No. 157 [1997], para. 30, the Tribunal stated:

The scope and extent of the review by the Tribunal of the Bank’s decisions concerning confirmation or non-confirmation of appointment during or at the end of the probationary period rest on the basic idea that the purpose of probation is “the determination whether the employee concerned satisfies the conditions required for confirmation” (*Buranavanichkit*, Decision No. 7 [1982], para. 26), that is to say, in the language of Staff Rule 4.02, the determination whether the probationer is “suitable for continued employment with the Bank Group.” The probationer has no right to tenure; pending confirmation his situation is essentially provisional and his future with the Bank depends on his suitability for permanent employment. The assessment of his suitability is a matter of managerial discretion, as the Tribunal has ruled in *Salle* (Decision No. 10 [1982]):

It is of the essence of probation that the organization be vested with the power both to define its own needs, requirements and interests, and to decide whether, judging by the staff member’s performance during the probationary period, he does or does not qualify for permanent Bank employment. These determinations necessarily lie within the responsibility and discretion of the Respondent.... (para. 27).

It is, therefore, for the Bank to establish the standards which the probationer should satisfy. The Tribunal has determined that these standards

may refer not only to the technical competence of the probationer but also to his or her character, personality and conduct generally in so far as they bear on ability to work harmoniously and to good effect with supervisors and other staff members. The merits of the

Bank's decision in this regard will not be reviewed by this Tribunal except for the purposes of satisfying itself that there has been no abuse of discretion.... (*Buranavanichkit*, Decision No. 7, [1982], para. 26).

It is also for the Bank to determine, at the end of the probation or at any time during the probation, whether the probationer has proven either suitable or unsuitable for Bank employment and to terminate his employment whenever it concludes that he is unsuitable. As the Tribunal has repeatedly stated, it will not review the exercise by the Respondent of its managerial discretion unless the decision constitutes an abuse of discretion, is arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure.

107. In *McNeill*, at para. 34, the Tribunal stated:

Regarding probation, the problem is not so much whether the probationer has performed satisfactorily as whether he has proven his suitability to the specific requirements of the Bank regarding the work which he would have to perform if he were to be confirmed.

SUITABILITY FOR CONFIRMATION AND CONTINUED EMPLOYMENT

108. The Applicant claims that his performance was not evaluated fairly because undue weight was given to his work on Transaction X and because insufficient weight was given to his strengths. He contends that he was not assessed against his business objectives or the completion of his work program.

109. The IFC explains that it did not confirm the Applicant's appointment because the Applicant was deficient with respect to "(i) timeliness of deliverables, (ii) preparation for assignments and meetings, and (iii) proactivity in the assignments and transactions on which he was tasked."

110. The record reflects that some staff, such as the Mentor, had positive experiences with the Applicant. For example, on 15 February 2017, the Mentor informed the FY17 Supervisor that the Applicant "has shown interest, good attitude, and has actively participated to understand and engage in these tasks. [...] His follow up on the tasks has been timely." The Mentor also praised the Applicant's technical skills. On 4 May 2017, the Mentor commended the Applicant's work on a memorandum as being "good content, delivered on time, well written."

111. In the Applicant's FY16 Staff Annual Review, the FY16 Supervisor commended the Applicant for his "solid technical skills," "his constructive way to engage with team members," and "his willingness to continue to improve in these identified areas." The Applicant's strengths included being "a quick learner," having "sectorial expertise," and having "a personable and helpful nature."

112. Feedback providers in FY17 identified the Applicant's strengths as relating to his interpersonal skills, communication skills, attention to detail, and problem-solving skills. One feedback provider noted his "strong credit assessment and financial analysis skills."

113. Notwithstanding such positive comments, the record supports the IFC's contention that the Applicant was unable to meet deadlines and had issues with punctuality. For example, in an email from a Senior Investment Officer, who worked with the Applicant on Transaction X, the Senior Investment Officer recalled that the Applicant was late for "about 75% of all meetings," "was 15-30 minutes late (we were nearly finished with the client by the time he joined) for the wrap-up meeting," and "[h]is work was consistently late and of low quality [...] as a result, [another staff member] stepped up from an analyst role to more of an IO [Investment Officer] role to take on [the Applicant's] share of work [...]." The Tribunal observes that this email was written three years after the project, and it is poor practice to memorialize such feedback years later, without contemporaneously documenting it and without any evidence that the same detail was conveyed to the Applicant at the time. Nevertheless, the Tribunal notes that this feedback is consistent with feedback provided to the Applicant in February 2016 by the MAS Global Administrative Manager and in the FY16 Staff Annual Review.

114. The Applicant himself also admitted that he "was not always consistent with the timeliness of his deliverables, though management noted his improvement during his tenure."

115. In addition to timeliness of deliverables and punctuality for meetings, the Applicant's FY16 Staff Annual Review sets out the following areas for improvement: "(iii) diligent preparation for meetings (eg during due diligence or internal task force meetings etc); [and] (iv) proactivity in

order to get involved in multiple tasks and contribute to the wider teamwork and sector deliverables.”

116. These areas for improvement are a reasonable reflection of the comments from the Applicant’s feedback providers. The feedback providers noted that the Applicant needed “to take more initiative”; to “develop a proactive, engaged and time-responsive attitude on the tasks and activities he works on” since “outcomes [...] are incomplete on the due dates”; and to “work on better preparing and more punctually arriving to meetings and engagements.” Three feedback providers identified punctuality and time management/prioritization skills as areas for improvement. Finally, one feedback provider highlighted the quality of deliverables as an area for improvement.

117. The Tribunal finds that, in these circumstances, it was reasonable for the IFC to extend the Applicant’s probationary period for six months to give him “time to demonstrate that these identified areas are being fully addressed in order to obtain a confirmation.”

118. The Applicant’s issues appear to have continued in FY17. By email dated 20 October 2016, a Principal Investment Officer, who worked with the Applicant on an appraisal, observed that the Applicant “did not seem to have spent sufficient time on detailed desk reviews before the dd [due diligence] meeting with clients [...]. As an AIO [Associate Investment Officer], focus on details and specifics is critical [...].” Moreover, the Principal Investment Officer reported that the Applicant missed two deadlines for completing a financial model and generally “has difficulty meeting deadlines and is reluctant to expressly commit.” As an example, he cited the Applicant’s failure to send follow-up questions from each day’s meetings, as instructed, instead sending them at the end of the two-week appraisal.

119. A Senior Industry Specialist, who worked on the same appraisal with the Principal Investment Officer and the Applicant, also gave her feedback. She observed many of the same shortcomings in the Applicant’s performance, such as his failure “to complete timely, or in some cases at all, the few tasks he was asked to do.” She described the support and guidance that had been given to the Applicant to help him complete the tasks. Nevertheless, according to her, the

Applicant still missed deadlines. On one task, she had to do the work assigned to the Applicant because he failed to produce the required table, despite reminders. The Applicant's failure to send follow-up questions from each day's meetings resulted in the Applicant having had to be helped "as he had not noted everything down."

120. At the Applicant's FY17 Mid-Year Conversation, he was assessed according to his "(i) Punctuality; (ii) Timeliness of delivery, (iii) Preparation for meetings and (iv) Proactive engagement and involvement on other tasks and activities." Although the Applicant showed improvement in terms of his punctuality and preparation for meetings, he was inconsistent with respect to "timeliness of delivery and proactive engagement." The Tribunal finds that, in light of these inconsistencies, it was reasonable for the Applicant's probationary period to be extended for another six months to give the Applicant "more time [...] to consistently address identified gaps."

121. The Applicant's tardiness was noted by the EMENA Manager in an email to the FY17 Supervisor dated 20 April 2017.

122. The EMENA Manager evaluated the Applicant's performance as "mixed" in an email dated 4 May 2017 to the FY17 Supervisor. He stated that the Applicant's work took

longer than it should have [...], especially when this was articulated to him as high priority. During that period he also turned down an opportunity to join the [...] team [...] [which] suggests that he would struggle with multi-tasking. [...] 2 deals, even if during an 'intense' time, should be manageable.

So all in all the feedback could be summarized as 'medium' or 'inconclusive', which itself is probably not what we were hoping for given this was meant to be a chance to really shine.

123. Feedback providers on the Applicant's FY17 performance gave a number of positive comments related to his technical, interpersonal, and communication skills. One feedback provider noted that the Applicant was "quick to provide timely input and advice" and another characterized him as "a consummate professional and a great colleague to have."

124. While one feedback provider stated that the Applicant “delivered good quality work on time,” the same feedback provider also noted that he needed to “[i]mprove sense of urgency and clarify timelines/scope of deliverables [...]. Proactively and in a timely manner raise issues related to conflicts or with expected delivery timeline to prevent the team missing its deadlines.” Another feedback provider observed that the Applicant needed to “[i]mprove on timing of delivery of assigned tasks” and to “spend more time on pre-work or pre-reading [...] which would allow him to be better prepared [...].”

125. The Applicant disputes that he was assessed against a work program or his individual business objectives. The Tribunal recalls Staff Rule 4.02, paragraph 2.02, which states that the evaluation of a staff member during the probationary period is not limited to “achievement of the work program” but also includes “technical qualifications and professional behaviors.” In this case, the Tribunal holds that the IFC reasonably considered the Applicant’s performance to be deficient, or at best inconsistent, with respect to punctuality, preparedness, and proactiveness.

126. The record shows that, while the Applicant’s strengths were recognized, his performance was not consistent and the same deficiencies identified in FY16 were observed by some staff in FY17.

127. As the Tribunal stated in *Zwaga*, Decision No. 225 [2000], para. 32, it

will not substitute its own judgment for that of the Respondent on the staff member’s suitability for employment. In reviewing the Respondent’s decision not to confirm the Applicant’s appointment, the Tribunal further notes that the concept of unsatisfactory performance as applied in the case of probation is broader than that of a confirmed staff member.

128. The Tribunal concludes that there was a reasonable basis for the adverse assessment of the Applicant’s performance. The Tribunal is satisfied that the decision not to confirm the Applicant’s appointment was not an abuse of discretion.

RULES AND GENERAL PRINCIPLES ON PROCEDURE REGARDING NON-CONFIRMATION

129. Staff Rule 4.02, paragraph 2.02 regarding evaluation during the probationary period, provides:

During the probationary period, the Manager or Designated Supervisor shall:

- a. as soon as practicable, meet with the staff member to establish the staff member's work program; and
- b. provide the staff member feedback on the staff member's suitability and progress based on achievement of the work program, technical qualifications and professional behaviors.

130. Staff Rule 4.02, paragraph 3.02, sets out the requirements for non-confirmation of an appointment at the end of the probationary period, as follows:

The written recommendation to not confirm must be supported by: prior written notice to the staff member concerning deficiencies in his/her performance, technical qualifications, or professional behaviors; reasonable guidance and opportunity to demonstrate suitability for the position, and warning that failure to do so may result in termination. The staff member shall be provided an opportunity to comment on the recommendation. The recommendation, together with any comments of the staff member, shall be submitted to the Manager's Manager (at Level GI or above) for decision, which shall be made in consultation with the Manager, Human Resources Team and with notice to the staff member's Vice President.

131. In *Salle*, Decision No. 10 [1982], para. 50, the Tribunal emphasized the importance of due process because

[t]he very discretion granted to the Respondent in reaching its decision at the end of probation makes it all the more imperative that the procedural guarantees ensuring the staff member of fair treatment be respected.

132. In *McNeill*, para. 44, the Tribunal recognized that the Bank has a

duty to meet what the Tribunal has called "the appropriate standards of justice" (*Buranavanichkit*, Decision No. 7 [1982], para. 30). While the probationer has no right to be confirmed, he has the right to be given fair opportunity to prove his

ability, and the Tribunal will review whether this right has been respected and whether the legal requirements in this regard have been met.

133. In *Zwaga*, para. 38, the Tribunal held

that one of the basic rights of an employee on probation is the right to receive adequate guidance and training (*Rossini*, Decision No. 31 [1987], para. 25) and that it is its duty to make sure that the Bank's obligation to provide a staff member on probation with adequate supervision and guidance has been complied with in a reasonable manner. (*Salle*, Decision No. 10 [1982], para. 32.)

134. In *Samuel-Thambiah*, Decision No. 133 [1993], para. 32, the Tribunal recognized the elements of due process, in the context of probation, as follows:

First, the staff member must be given adequate warning about criticism of his performance or any deficiencies in his work that might result in an adverse decision being ultimately reached. Second, the staff member must be given adequate opportunities to defend himself.

FAIR OPPORTUNITY, ADEQUATE GUIDANCE AND SUPERVISION, AND DUE PROCESS

135. The Applicant claims that he did not have adequate opportunities to prove his ability, in part, because of his assignment in his second year to a supervisor who led a unit without investment responsibilities, his lack of work during his second extended six-month probationary period, and his inability to rotate to a regional office in his second year.

136. The Tribunal finds that the assignment of a supervisor whose unit did not have any investment responsibilities did not prejudice the Applicant in this case. The record shows that the Mentor assigned the Applicant work and the FY17 Supervisor actively encouraged senior colleagues to give the Applicant assignments, which they did. For example, the FY17 Supervisor wrote to the Mentor and the EMENA Manager on 20 April 2017 "to see if there's anything we can put [the Applicant] on [...] any help to move him onto a live deal hugely appreciated [...]." Both responded that they would keep the Applicant in mind, although the EMENA Manager expressed misgivings about the lateness of the Applicant's work product.

137. The FY17 Supervisor also introduced the Applicant, by email dated 5 May 2017, to senior colleagues to assist on an early-stage agribusiness transaction.

138. The record shows that, when it came to the FY17 Supervisor's attention that the Applicant did not have assignments, the FY17 Supervisor identified specific colleagues from whom the Applicant should try to solicit work. The Tribunal finds that the FY17 Supervisor made reasonable efforts to find work for the Applicant or, at least, to identify staff who might be able to assign work to the Applicant.

139. The Tribunal further finds that it would have been reasonable to expect the Applicant to exert extra efforts, knowing that he was on probation. The Tribunal notes that, on one occasion, instead of working on a model and "writing up the IRM [Investment Review Meeting] book" immediately after an appraisal, the Applicant failed to deliver the model on time and did not make himself available for work, in part, because he took personal holidays.

140. On 14 September 2016, a Senior Investment Officer proposed the Applicant as one of the presenters for an MAS Knowledge Forum. Instead of seizing this opportunity, the Applicant wrote to the MAS Global Administrative Manager that he would prefer not to present and, instead, wished to focus on preparing for an appraisal. He finally agreed to present after the MAS Global Administrative Manager urged him to work on both the presentation and the appraisal and noted that the presentation would be "an opportunity for [the Applicant] to shine."

141. The Applicant also declined to work on an appraisal in March 2017 because he was already working on another project and was concerned that he would not be able to deliver on time.

142. The Tribunal finds that it was reasonable for the IFC to expect the Applicant to have been more open to taking on tasks in his second year of probation.

143. The record shows that management displayed an interest in the Applicant's success. For example, the Mentor updated the FY17 Supervisor on 24 January 2017 about her interactions with the Applicant and wrote: "I have an optimistic outlook for [the Applicant]. My impression is that

in the past 2-3 weeks he has worked on overcoming the challenges he felt and is open and interested to work [...]. He and I are engaging in some early leads now.” The FY17 Supervisor also wrote to the GTT Program Manager on 16 March 2017 that “we’re working with [the Applicant] to get him back on track hopefully.”

144. Based on the record, the Tribunal determines that the Applicant was given a “fair opportunity to prove his ability.”

145. The Applicant claims that the failure to rotate him to a regional office in his second year denied him a fresh start. The record shows that, at the end of the Applicant’s first year, the GTT Program Manager presented two options for the Applicant’s second year: to remain with Global TRP for six months and if the Applicant “demonstrate[d] the necessary improvements at which point he would be confirmed” or to move to a new department with a twelve-month probationary period. Although the FY16 Supervisor and the Senior Manager initially recommended that the Applicant start a new, twelve-month assignment in another department, it was ultimately agreed by management that the Applicant “would do his second rotation in another unit (possibly manufacturing or elsewhere).”

146. In an email dated 17 February 2016 to IFC managers, the Program Managers of the GTT Program and IFC Young Professionals Program recalled that the GTT program

is structured with two rotations of one year each, one of which must be in a regional office. Your GTTs are currently completing their first rotations with your unit and will move to a second rotation either still with your unit in a different location, or with a different unit in a different location. Final decisions will be based on business needs, unit’s opportunities, and GTT’s preferences and fit.

147. The IFC gives two reasons for not rotating the Applicant to a regional office. The first reason is that the Applicant requested to continue working on a project with the Global TRP team through to December 2016. However, there is no contemporaneous evidence in the record that supports this assertion, and it is contrary to the Applicant’s submissions. The second reason is that management exercised its discretion to keep the Applicant in Washington, D.C., where he would receive more supervision and guidance, as compared to in a smaller, regional office. The IFC

claims that rotating the Applicant to a new unit within MAS, rather than to a different department, would “allow him the opportunity to demonstrate to MAS [...] that he was suitable for permanent employment.”

148. The Tribunal finds that it was a reasonable exercise of discretion for the IFC to keep the Applicant in Washington, D.C., rather than sending him to a regional office, as the Applicant’s appointment had not been confirmed. Recalling that the IFC is responsible for determining the Applicant’s suitability for employment, the Tribunal concludes that the IFC properly exercised its discretion when it determined that it could best evaluate and provide guidance to the Applicant by keeping him in Washington, D.C., and assigning him to another unit within MAS.

149. The Tribunal will examine the adequacy of supervision and guidance provided to the Applicant during the probationary period.

150. The Applicant claims that, because the FY16 Supervisor and the Senior Manager were located in different countries, in his first year he “did not work directly or indirectly with either and barely had any contact with them” and neither monitored his progress after the FY16 Mid-Year Conversation. The IFC explains that the arrangement of having a staff member in a different location from the supervisor and the manager was not unusual because they were “decentralized for business reasons.” The IFC denies that this arrangement resulted in inadequate supervision because staff at the Applicant’s level “are expected to operate independently, and Applicant was staffed on transactions and assignments that were being le[d] by various senior TRP team members.”

151. The record shows that, in addition to discussing the Applicant’s work program and objectives in October 2015 and conducting the FY16 Mid-Year Conversation and FY16 year-end discussion, the FY16 Supervisor flagged potential work for the Applicant on 18 November 2015, assigned him to prepare a presentation in December 2015, inquired about the Applicant’s workload in May 2016, and corresponded in June and July 2016 regarding feedback providers. The record also shows that, in addition to meeting the Applicant in person in April 2016, the Senior Manager was responsible for identifying Transaction X, on which the Applicant worked. There is also

evidence of the Applicant meeting the MAS Global Administrative Manager in February 2016. At this meeting, they discussed the Applicant's rotation options and the Applicant was given feedback about his performance on Transaction X.

152. In view of the foregoing, the Tribunal is satisfied that the Applicant had adequate supervision and guidance in his first year.

153. At the end of the Applicant's first year, the reporting lines changed, and he needed a new supervisor and manager. Identifying a new supervisor for the Applicant was important to the IFC. The Senior HR Business Partner flagged it as a matter of urgency for the Senior Manager and stated that "[i]t's important that we get this right. You do not want staff to use excuses such as lack of clari[t]y in reporting line to justify his lack of performance."

154. The IFC did not promptly appoint a supervisor for the Applicant. Given the importance of proper supervision and guidance during a probationary period, and in the circumstances of an extended probationary period, the Tribunal finds that the IFC's failure to provide the Applicant with a supervisor for two months of his first six-month extended probationary period was not reasonable.

155. The assignment of a mentor, in the Applicant's second year, was a commendable attempt by the IFC to assist the Applicant in improving his performance. The record shows that the Mentor, who was the Chief Investment Officer, provided guidance by discussing the Applicant's work experience and assigning him several tasks, such as the early lead assessment on four producers/manufacturers, working with her team/task force, and working on a desk review. The Mentor introduced the Applicant via email to a number of managers "to inform the senior manufacturing sector colleagues of [the Applicant's] availability to take additional project and/or other work. It also helps [the Applicant] strengthen his own network of colleagues, in particular in the manufacturing sectors."

156. The parties agree that, during the second year of his probationary period, the Applicant met bi-weekly with the FY17 Supervisor and the Senior HR Business Partner to review the Applicant's work program and give feedback to the Applicant on his performance.

157. In addition to reviewing the Applicant's performance, the FY17 Supervisor gave the Applicant advice to guide his work on current projects. For example, at a meeting on 15 May 2017, the Applicant "was strongly suggested to [...] reach out to IOs/IAs [Investment Officers/Investment Analysts] mapped to agribusiness to have a better understanding of Agri project structuring [...] [and] [e]nsure deliverables are clarified upfront, dateline discussed and me[t]."

158. According to the Bank Group's HR Portal, the deadline for setting objectives is September 30. The Tribunal is troubled by the fact that the Applicant's FY17 business objectives were not set until the Applicant's Mid-Year Conversation on 22 February 2017. The Tribunal finds that this was not good practice since the Mid-Year Conversation is an opportunity to "review staff's progress to date in meeting individual business and professional development objectives; [and] clarify expected deliverables, and adjust objectives as needed for the remainder of the performance year." As this was the Applicant's second year of probation, it would have been important to have clarity on his objectives by the deadline of September 30, or, at the latest, as soon as his new Supervisor was identified in November 2016.

159. The record shows that the Applicant tried to get clarity, but the IFC was not responsive. For example, on 9 October 2016, the Applicant emailed the FY16 Supervisor, copying the Senior Manager, the MAS Global Administrative Manager, and the Senior HR Business Partner, to ask:

I need to discuss and set my objectives and understand the basis for performance evaluation within the context of the extended probation period (there are only five months left). Given your new position [...], should I be discussing this with you or will I be assigned a new supervisor [...]?

160. In the absence of a response from the FY16 Supervisor, the Applicant emailed the Senior HR Business Partner on 13 October 2016 to follow up on his questions and asked for advice on how to proceed. The record does not contain any response from the IFC.

161. Finally, in response to a reminder dated 3 February 2017 from a Program Assistant to submit the FY17 objectives, the Applicant emailed the Senior HR Business Partner on the same day: “Not sure how I should approach this. Can we discuss?” The Senior HR Business Partner responded by email on 6 February 2017 that the Applicant should “submit objectives based on the visibility you have so far” and indicated that a meeting the following week with the FY17 Supervisor would “be the opportunity to clarify the deliverables.” The Applicant agreed to do so, but noted:

I wanted to have my objectives linked to the OTI so that I’m being assessed on one set of criteria. I was in a similar situation last year when I [was] asked to write and submit my own objectives but ultimately, those weren’t the criteria I was assessed on. I want to avoid that by having one set of criteria so I know what I’m working towards.

162. The Tribunal determines that there were shortcomings in the Applicant’s supervision during the second year of his probationary period, namely, the failure to promptly appoint a supervisor and the delay in setting his FY17 business objectives.

163. The Tribunal will examine whether the Applicant was accorded due process during the probationary period. The Tribunal recalls that due process consists of adequate warning about performance issues and the possibility of adverse consequences and adequate opportunities to defend oneself.

164. The Applicant claims that, prior to the end of his first year of probation, his FY16 Supervisor did not discuss any concerns with his performance. However, the Applicant acknowledged in his FY16 Staff Annual Review that he “made a concerted effort to address the problems highlighted during the mid-year review.” The Tribunal finds that concerns about the Applicant’s performance were conveyed to him as early as the FY16 Mid-Year Conversation. The Applicant’s need to continue to focus on timeliness, preparedness for meetings, and proactiveness was pointed out in the FY16 Staff Annual Review.

165. In the Applicant’s Comments on his FY16 Staff Annual Review, he noted that “it would have been helpful for me to get specific feedback on my performance during the second half of

the year (ideally on an on-going basis) to allow me to zero in on the areas where I am still not meeting expectations.” Although the Applicant may have felt that he was not given specific enough feedback in the second half of FY16, the Tribunal observes that the areas for improvement identified during the Mid-Year Conversation remained the same at the end of the year, and the Applicant was encouraged to focus on these areas going forward.

166. In the Applicant’s second year, his new Supervisor met with him on 28 November 2016 to discuss his performance, and his Mentor met with him and introduced him to senior manufacturing sector colleagues in January and February 2017.

167. In February 2017, the Applicant had the Mid-Year Conversation with his FY17 Supervisor. They met again on 8 March 2017 to review the Applicant’s work program.

168. At a meeting on 15 May 2017 with the FY17 Supervisor and the Senior HR Business Partner, the Applicant was told that he “could have done a better job at completing his tasks within a reasonable timeline.” The FY17 Supervisor also informed him that he needed to multitask and seek clarity on expectations when working on a team.

169. At a meeting on 8 June 2017, the FY17 Supervisor and Senior HR Business Partner reviewed the Applicant’s work program.

170. In response to the Applicant’s request for more specific feedback about his shortcomings, the FY17 Supervisor promised to reach out to colleagues who had worked directly with the Applicant. One of them, the EMENA Manager, spoke with the Applicant on 19 June 2017 to “advise [the Applicant] of the mixed feedback on the various tasks he had.”

171. The record shows that, throughout the Applicant’s second year, his FY17 Supervisor solicited feedback about the Applicant’s performance from staff who had worked directly with the Applicant. The Tribunal is satisfied that the FY17 Supervisor was thus able to have meaningful discussions with the Applicant about his performance.

172. The Tribunal notes that management conveyed the criticisms about the Applicant's performance on several occasions throughout the two-year probationary period. The Tribunal finds that the Applicant was given adequate warning of his performance issues. As the Applicant's probationary period was extended twice, it is reasonable to expect him to understand that a failure to address identified deficiencies might result in the non-confirmation of his appointment.

173. The Staff Annual Review is an important opportunity to evaluate a staff member's performance. Staff Rule 5.03, paragraph 2.01(a) and (b), provides that, "[a]t least once in a twelve month period, the Manager or Designated Supervisor and the staff member shall meet and discuss the staff member's performance, achievements, strengths, areas for improvement, and future development needs" and that "[t]he Manager or Designated Supervisor shall provide the staff member with a written summary assessment of the staff member's performance during the review period."

174. Even where a probationary period is terminated early, the Tribunal has found that the Staff Rules require a performance review to be given at the end of the probationary period. *Zwaga*, para. 54; *Khan*, Decision No. 293 [2003], para. 52; and *Liu*, Decision No. 387 [2008], para. 27.

175. The record shows that the Applicant did not receive an FY17 Staff Annual Review, despite seven feedback providers having given feedback on the Applicant's performance. The Tribunal finds that the failure to provide the Applicant with a performance review not only violated the Applicant's rights but also prevented the Applicant from defending himself against criticisms of his performance. The IFC acknowledges that the non-confirmation decision was informed, in part, by the "feedback provided during [the Applicant's] FY17 OPE [Overall Performance Evaluation] as well as his self-evaluation." The Tribunal finds that it would have been critical for the Applicant to have received this feedback and to have been given an opportunity to respond to it.

176. The Tribunal will examine whether the procedures for non-confirmation, set out in Staff Rule 4.02, paragraph 3.02, were followed. There must be (i) a "written recommendation not to confirm"; (ii) an "opportunity to comment on the recommendation" by the staff member; (iii) the submission of "[t]he recommendation, together with any comments of the staff member [...] to

the Manager's Manager (at Level GI or above) for decision"; (iv) a decision by the Manager's Manager; (v) consultation between the Manager's Manager, the Manager, and the Human Resources Team; and (vi) notice to the staff member's Vice President.

177. The written recommendation not to confirm the Applicant's appointment is reflected in the "Comment entered by the Manager" when the FY17 Supervisor initiated the termination of the Applicant's appointment in the HR system on 12 September 2017. The FY17 Supervisor wrote:

[The Applicant] has had his probation extended twice to a full two years of probation. After careful deliberations and consultations which included feedback received on staff performance I have decided not to confirm [the Applicant]. While [the Applicant] addressed the concern around punctuality, certain key development areas were not addressed includ[ing] timely delivery of tasks/projects which negatively affected team dynamics, as well as willingness to step in and take the initiative, again negatively affecting team dynamics. The feedback has been shared with [the Applicant] for future career development purposes. I wish [the Applicant] all the best for his future.

178. A few minutes later, the FY17 Supervisor emailed her manager, the MAS Director, to inform him that "[y]ou will have in your inbox a termination email for [the Applicant]. Please approve."

179. The Tribunal observes that, while the FY17 Supervisor's Comment satisfies the minimum requirement of Staff Rule 4.02, paragraph 3.02, managers should provide more fulsome reasons for their recommendation so that the decision maker is fully informed before taking a decision.

180. The IFC submits that the staff member's "opportunity to comment on the recommendation" was satisfied by the Applicant's comments at the meeting on 11 September 2017 and in his email of 12 September 2017 to the FY17 Supervisor. The Tribunal is not satisfied that this complies with the requirement since there is no evidence that the Applicant was provided with the FY17 Supervisor's written recommendation for his comment. Further doubt is cast by the Applicant's statement to the FY17 Supervisor that, "[g]iven that we did not have an Annual PEP [Performance Evaluation Plan] discussion for FY-2017, I cannot comment on the specific reasons for the non-confirmation decision."

181. In an affidavit to the Tribunal, the MAS Director stated:

[The Supervisor] informed me that while Applicant disagreed with the recommendation, as he believed he had acted in good faith to resolve the performance issues raised during his probationary period, he did not comment on the specific reasons for the non-confirmation that [the Supervisor] had provided to him.

182. To the Tribunal, the MAS Director's statement illustrates the danger of not providing the Applicant with a written recommendation and, consequently, not providing the decision maker with the staff member's comments on the non-confirmation recommendation. Without the Applicant's email of 12 September 2017, the MAS Director did not have the full context for the Applicant's failure to comment. In that email, the Applicant explained that he could not comment on the reasons because he did not have "an Annual PEP discussion for FY-2017."

183. The Tribunal is satisfied that the non-confirmation decision was made on 13 September 2017 by the MAS Director, who was the FY17 Supervisor's Manager and had authority pursuant to Staff Rule 4.02, paragraph 3.02. The Tribunal is further satisfied that the decision was made in consultation with the manager, who was the FY17 Supervisor, and the HR Team. There is no evidence in the record as to whether the Applicant's Vice President was notified.

184. In *CK*, Decision No. 498 [2014], para. 101, the Tribunal held that the

failure of the Bank to adhere to its own rules represents an irregularity which, when affecting the rights of a staff member, may merit compensation as one form of a remedy. In assessing compensation the Tribunal considers the gravity of the irregularity, the impact it has had on an applicant and all other relevant circumstances in the particular case.

185. The non-confirmation of a staff member's appointment is a serious matter, which has grave consequences for a staff member's professional life. It is not a decision to be taken lightly. The Tribunal finds the following procedural irregularities and failures in due process in the course of the Applicant's probationary period: (i) the delay in appointing a supervisor for the first two months of his extended probationary period, (ii) the delay in setting the Applicant's FY17 individual business objectives, (iii) the lack of an FY17 Staff Annual Review, and (iv) the failure

to provide the Applicant with the written non-confirmation recommendation, which denied the Applicant an opportunity to comment thereon and precluded the MAS Director from having all of the necessary information to make his decision. The latter two are particularly serious since they hindered the Applicant's ability to respond to the criticisms against him and defend himself.

186. The Tribunal recalls that the IFC should comply with its statutory obligations. The Tribunal finds that the IFC's failures to do so in the present case, as set out in paragraph 185, warrant compensation to the Applicant.

DECISION

- (1) The IFC shall pay the Applicant compensation in the amount of three months' net salary, based on the last salary drawn by the Applicant, for the procedural irregularities and failures in due process set out in paragraph 185;
- (2) The IFC shall contribute to the Applicant's legal fees and costs in the amount of \$7,000.00; and
- (3) All other claims are dismissed.

/S/ Mónica Pinto
Mónica Pinto
President

/S/Zakir Hafez
Zakir Hafez
Executive Secretary

At Washington, D.C., 26 April 2019