



World Bank Administrative Tribunal

2020

Decision No. 624

**FH,
Applicant**

v.

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

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

**FH,
Applicant**

v.

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

1. This judgment is rendered by the Tribunal in plenary session, with the participation of Judges Andrew Burgess (President), Mahnoush H. Arsanjani (Vice-President), Marielle Cohen-Branche (Vice-President), Janice Bellace, Seward Cooper, Lynne Charbonneau, and Ann Power-Forde.
2. The Application was received on 10 June 2019. The Applicant was represented by Stephen C. Schott of Schott Johnson, LLP. The Bank was represented by Edward Chukwuemeke Okeke, Interim Chief Counsel (Institutional Administration), Legal Vice Presidency. The Applicant's request for anonymity was granted on 22 May 2020.
3. The Applicant is contesting his Fiscal Year (FY) 2018 performance rating of 2.

FACTUAL BACKGROUND

4. The Applicant first joined the Bank in December 2003 as an Information Technology (IT) Assistant in the East Asia and Pacific Region, Resident Mission in China. He was promoted to a Level GD Information Assistant in Information and Technology Solutions (ITS) in September 2014. Throughout his career at the Bank, he has worked in the Beijing, China office of the International Finance Corporation (IFC). The Applicant states that he has had a history of fully satisfactory performance during his career at the Bank.
5. The Applicant received a positive performance evaluation and a performance rating of 3 for FY 2015. His FY 2015 Annual Review noted that the Applicant's strengths included "[p]ersistence in driving our existing technology to perform better" and "[a]lways looking to improve, and never satisfied with less than the best." The Annual Review also noted that the

Applicant needed to take “a higher level of responsibility” for logging and tracking incidents and that he needed to take a “more active role in [...] IT informational sessions.” The “Overall Supervisor Comments” in the Annual Review stated that the Applicant “works tirelessly towards bringing the best technology solutions for the users.”

6. In FY 2016, the Applicant’s Annual Review noted that the Applicant was “extremely hard working, and holds his clients at the highest priority.” Under “Areas of Development,” the Annual Review stated that the Applicant “needs to engage more as a team member, and work across the WBG [World Bank Group]” and that he needs to “comply with instructions and demonstrate that he can respect the chain of command, and reach compromise.” The Annual Review also included the statement under “Overall Supervisor Comments” that “[the Applicant] has been informed that he may be at risk of receiving an SRI [Salary Review Increase] of 2 if none of the recommended actions are taken, and if there is no improvement in performance.” The Applicant received a performance rating of 3 for FY 2016.

7. The Applicant and his Supervisor met to discuss the Applicant’s performance on 24 March 2017. On 6 April 2017, the Supervisor sent the Applicant an email outlining areas of improvement under the headings of “Improve Team Work, Communication and Service Level Monitoring, and Learning and Knowledge Sharing.” The Applicant replied to this email on the same day, stating that he found the advice overwhelming and criticizing the behavior of the Location Lead, a senior colleague of the Applicant who was also based in Beijing. The Supervisor responded the following day and said that he did not agree with the Applicant that the Location Lead was abusing his authority.

8. On 15 June 2017, the Supervisor sent the Applicant an email summarizing a monthly discussion they had on the areas of improvement they had previously discussed. The email noted progress in some areas and shortfalls in others. The email also discussed an incident in which the Applicant had made a technical mistake regarding the cloning of 60 new computers “without any consultation with any other WBG engineer, ITS team member, or even Beijing IT.”

9. The Applicant's FY 2017 Annual Review was finalized on 23 September 2017. The Applicant's FY 2017 Annual Review noted that the Applicant's strengths included a client-oriented attitude and a result-driven attitude. The Review included under "Areas of Development" that the Applicant "will need to make major changes to his working style" and "collaborate regularly and keep the Beijing team informed of his work, especially if he is thinking of testing or applying any non-standard method of operating, deploying, or configuring of user PCs [personal computers]." Under "Overall Supervisor Comments," the Annual Review noted that the Applicant "has a client oriented attitude" and is "highly responsive, and works all hours to resolve issues. [...] Feedback from his feedback providers are overall positive, with some specific areas noted for improvement." The "Overall Supervisor Comments" also noted that the Applicant should follow institutional guidelines, especially with reference to the incident where he cloned personal computers without consultation, and that the Applicant should "work closely and collaboratively with the Beijing IT team led by [the Location Lead] by communicating more often and offering support to other team members more pro-actively."

10. On 29 September 2017, the Applicant and his Supervisor agreed on the Applicant's individual business and professional development objectives for FY 2018.

11. On 13 November 2017, the Applicant was informed that he received a performance rating of 2 for FY 2017. The Applicant was notified on the same day that he would be placed on an Opportunity to Improve (OTI) plan. The deficiencies to be addressed in the OTI were described as follows: "teamwork, task completion, self-learning of new processes, [WBG] collaboration and respect for [Location Lead]."

12. On 28 December 2017, the Applicant and the Location Lead in the Beijing Country Office met for the FY 2018 Mid-Year Conversation (MYC). The Location Lead highlighted certain areas of improvement for the Applicant during this conversation, including teamwork and communication, incident tracking, integrated WBG support, and respect for the Location Lead.

13. The Applicant went on sick leave on 22 January 2018. The Applicant was diagnosed with a stress disorder that included difficulty performing at work. He subsequently went on Short-Term

Disability (STD) leave on 22 February 2018. His STD leave was ultimately extended until 10 December 2018.

14. In the meantime, the Applicant challenged his FY 2017 Annual Review, SRI rating, and the decision to institute an OTI before Administrative Review (AR) on 6 February 2018. AR reviewed only the terms of the OTI because the other complaints were not filed in a timely manner. On 9 March 2018, the AR Reviewer, who was a Manager from the Human Resources (HR) Vice Presidency, submitted her report to the Senior Manager of ITS Client Services. The AR Reviewer concluded that there was a reasonable basis for placing the Applicant on the OTI, but that there should be amendments to the formulation of the OTI. The amendments included replacing the item on “respect for location lead” with collective team training on respectful workplace behaviors.

15. The Applicant requested a Performance Management Review (PMR) of the terms of the OTI on 5 April 2018. On 19 April 2018, the Applicant’s Supervisor, the Applicant’s Manager, and representatives from the Staff Association met to review the terms of the OTI. The PMR Reviewer examined the revised OTI that resulted from that meeting. On 14 May 2018, the PMR Reviewer submitted his recommendations to the Vice President and WBG Chief Information Officer. The PMR Reviewer concluded that there were several issues with the formulation of the OTI and recommended certain changes to the OTI. These included clarifying the requirements for the Applicant to improve his performance. For example, the PMR Reviewer recommended that an item in the OTI should clarify that the Applicant is not solely responsible for the overall accuracy level of inventory tracking. The PMR Reviewer also suggested that the requirement for the Applicant to raise the number of “Remedy/Service Now” incidents that he reports per month should be removed, since he had already achieved that performance target. The PMR Reviewer further recommended that the OTI should not be implemented until after the Applicant’s STD ended and he returned to work. Furthermore, the PMR Reviewer stated that the Applicant should be provided a grace period of one month after the Applicant returned to work before the OTI was re-activated. The Vice President and WBG Chief Information Officer accepted the PMR Reviewer’s recommendations.

16. In August and September of 2018, the Applicant's performance evaluation for FY 2018 took place while the Applicant was still on STD.

17. On 8 August 2018, the Director of the ITS Global Telecoms and Client Services met with the Applicant to discuss the Applicant's concerns.

18. On 29 August 2018, the Applicant completed his self-assessment for his performance evaluation.

19. On 11 September 2018, the ITS Vice Presidential Unit finalized the performance ratings of ITS staff members.

20. On 24 September 2018, the Applicant inquired with his Supervisor about the status of his performance review and sent a reminder on 26 September 2018. On 28 September 2018, the Applicant's Manager proposed having a conversation by videoconference with the Applicant, but the Applicant responded that an exchange of email was sufficient. On 29 September 2018, the Applicant's Supervisor provided the Applicant with a draft of his FY 2018 performance evaluation. The draft noted that the Applicant had shown some improvement during the first half of FY 2018. On 3 October 2018, the Applicant responded to the draft with detailed comments and suggestions. The Supervisor did not modify his comments as a result, but the Applicant's comments were included in the final Annual Review. The Reviewing Official signed off on the Annual Review on 23 October 2018.

21. In the Applicant's FY 2018 Annual Review, under "Strengths," the Supervisor's Comments stated that the Applicant was "able to sustain strong client focus and maintain good communication with clients," and that he "often propose[d] best practices in support." Under "Areas of Development," the Supervisor's Comments included the following: "We expect [the Applicant] to focus on behavioral aspects of the job, such as closely following regional direction and decisions agreed to across all IT." The Supervisor's Comments further stated that the Applicant needed "to improve his teamwork and communication skills." Under "Overall Supervisor Comments," the Annual Review stated that the Applicant was encouraged to "continue

to strive to be a great team player, strengthen communications with IT Team Members, and consistently attend team meetings.” The Annual Review acknowledged that the Applicant “had already showed some improvement during the first half of FY18.”

22. On 31 October 2018, the Applicant was told that his performance rating for FY 2018 was 2.

23. On 13 November 2018, the Applicant filed a request with AR for a review of his performance evaluation and the performance rating of 2 for FY 2018, specifically seeking the removal of certain comments made in the Annual Review and the inclusion of his “significant achievements.”

24. On 13 December 2018, the AR Reviewer’s findings and recommendations were sent to the Applicant. The AR Reviewer, who was a Manager from the HR Vice Presidency, found the following irregularities with the FY 2018 Annual Review:

- The Applicant should have had an earlier opportunity to comment on the draft write-up of his FY 2018 performance evaluation before the performance ratings were finalized, since the offer to have a conversation was made by management to the Applicant on 28 September 2018, but the final decision on the performance rating was made on 11 September 2018. Furthermore, the performance rating was communicated to the Applicant on 31 October 2018.
- The MYC should have been held by the Applicant’s Supervisor, rather than the Location Lead.

25. The AR Reviewer ultimately concluded that the procedure was generally observed and that the Applicant was given an opportunity to have his concerns heard in his conversation with the ITS Director in August 2018 before the performance rating was decided. The AR Reviewer further found that management satisfied its obligations to the Applicant in his performance evaluation. Specifically, the AR Reviewer concluded that the areas for improvement that were listed in the Annual Review were consistent with those identified in the OTI. The AR Reviewer noted in this regard that the Supervisor’s comments were balanced, and that “Management satisfied its

obligations to [the Applicant], going beyond the call of duty to understand [his] concerns at the highest level of the hierarchy.” The AR Reviewer concluded that management acted within its discretion.

26. The AR Reviewer recommended that the Applicant’s performance rating of 2 and the write-up of his performance evaluation be maintained, and that in the future management should follow “the usual process for holding performance evaluation conversations with the staff members who are on STD as it does for other staff members,” so that the staff member has the ability to comment on the performance evaluation before the Management Review meeting and the determination of performance ratings. The AR Reviewer also recommended that, as a general best practice, the Supervisor should be the one to hold the MYC with the staff member.

27. The Applicant submitted a request to challenge his performance rating and performance evaluation for FY 2018 to PMR on 31 December 2018. PMR made its recommendations on 28 February 2019. The PMR Reviewer concluded that

there was a reasonable and observable basis for management’s comments in the SAR [Staff Annual Review]. I also conclude that management followed proper procedures and acted within its discretion in determining a performance rating of 2 for [the Applicant] for the review period.

The PMR Reviewer did not recommend any changes to the Applicant’s FY 2018 Annual Review and performance rating.

28. The Vice President and WBG Chief Information Officer accepted the PMR Reviewer’s recommendation on 6 March 2019.

29. In the meantime, the Applicant returned to a full work schedule on 10 January 2019, at which point the OTI resumed. On 7 May 2019, the Applicant’s Manager informed the Applicant that he had successfully completed the OTI, effective as of 10 April 2019.

30. The Applicant filed his Application on 10 June 2019. He contests his FY 2018 performance rating of 2. He seeks (i) revision of his FY 2018 performance rating “to reflect fully successful

performance”; (ii) the appointment of a counselor to assist the parties to improve the work environment; (iii) the review of the “management chain of command”; (iv) an audit of the Applicant’s position; (v) a salary increase since 1 July 2018 to reflect a fully successful performance; (vi) compensation of the 30% of income that the Applicant lost while he was on STD; (vii) compensation for moral damages in an amount to be determined; and (viii) legal fees and costs in the amount of \$19,975.00.

SUMMARY OF THE MAIN CONTENTIONS OF THE PARTIES

The Applicant’s Main Contentions

31. The Applicant contends that the performance rating of 2 for FY 2018 was unwarranted and constituted an abuse of discretion. According to the Applicant, the comments by the Reviewing Official and feedback providers in the Annual Review do not support a rating of 2. He contends that he is “a highly competent IT expert in a poorly managed unit,” and that this poor management was exacerbated by the appointment of a new Location Lead in his unit. The Applicant further claims that, according to the “Overall Supervisor Comments” in the FY 2018 Annual Review, he had improved his performance in the first half of FY 2018 before he went on sick leave and STD. The Applicant states that, while “he was accused of failing on communications and teamwork,” the Bank cannot show that it took any actions to improve the situation.

32. The Applicant states that he had always performed satisfactorily and had received two promotions in his career at the Bank. The Applicant claims that it was the appointment of a new Location Lead in his unit that “led to an unstable, possibly toxic environment.” He also claims that the OTI was poorly managed and “caused [the] Applicant to fall sick.”

33. The Applicant also contends that the PMR Reviewer who reviewed his complaint may not have been neutral, as he was a former manager at the Bank. Furthermore, the Applicant claims that the PMR Reviewer did not show the facts on which he based his conclusions, nor did he “weigh the available evidence [or] consider [the] Applicant’s own credible testimony.” The Applicant

states that the PMR Reviewer also did not invoke his powers to “interview all the parties and demand all relevant documents.”

The Bank’s Main Contentions

34. The Bank contends that there was a reasonable and observable basis for the Applicant’s performance rating of 2. Furthermore, the Bank contends that the performance evaluation and the performance rating did not violate due process. The Bank states that, according to the Tribunal, there are two essential guarantees of due process that are relevant here, namely, that the staff member must be given adequate warning about his performance or any deficiencies in his work that might result in an adverse decision being reached, and that the staff member must be given adequate opportunities to defend himself. The Bank claims that the Applicant was on notice about his performance deficiencies and had opportunities to address them, specifically when there had been a formal performance discussion with the Applicant prior to the determination of the performance rating. The Bank further claims that the Applicant was informed in an email of 15 June 2017 by his Supervisor about the areas for improvement in his work.

35. The Bank contends that there was nothing improper about the AR and PMR reviews of the Applicant’s complaint. According to the Bank, the Tribunal’s review of a discretionary decision does not include the Tribunal substituting its own judgment for that of the management.

THE TRIBUNAL’S ANALYSIS AND CONCLUSIONS

Scope of the Tribunal’s review of performance evaluations

36. In reviewing performance evaluations, the Tribunal held in *Malekpour*, Decision No. 322 [2004], para. 15:

The evaluation of staff performance is an essentially discretionary act entailing the exercise of judgment by management, which is presumed to possess the requisite familiarity with the work of all departmental staff members and to have made many comparative quality judgments. [...] The task of the Tribunal is not to “substitute its own judgment for that of the management” (*Polak*, Decision No. 17 [1984],

para. 43) [...]. The proper task of the Tribunal is, rather, to determine whether or not management's acts and decisions in connection therewith constituted, or were attended by, an abuse of discretion.

37. The Tribunal also held in *Desthuis-Francis*, Decision No. 315 [2004], para. 23:

The Tribunal considers that failure on the part of the [Bank] to submit a reasonable basis for adverse evaluation and performance ratings is evidence of arbitrariness in the making of such an evaluation and rating. Lack of a demonstrable basis commonly means that the discretionary act was done capriciously and arbitrarily.

Whether the Applicant's FY 2018 performance rating had a reasonable and observable basis

38. The Tribunal noted in *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.

39. The Tribunal has also held that "the assessment of performance has 'to take into account all relevant and significant facts that existed for that period of review' (*Romain (No. 2)*, Decision No. 164 [1997], para. 19), so as to ensure a reasonable basis for the OPE [Overall Performance Evaluation] ratings and comments." *Prasad*, Decision No. 338 [2005], para. 28.

40. The Tribunal recalls the various comments made by the Supervisor in the Applicant's FY 2018 Annual Review. Under "Individual Business Objectives," the Supervisor's Comments stated:

Over the course of the year, [the Applicant] has shown us his ability to comply with Remedy Incident Management recording best practices, which is an encouraging sign. However, the Opportunity to Improve was suspended due to health issues. We expect to see sustained performance when OTI is resumed. Feedback from IFC colleagues has been positive. Additional feedback from IBRD [International Bank for Reconstruction and Development] clients would also be a positive indicator that [the Applicant] is able to work across the organization and support both IFC and IBRD clients.

41. Under “Professional Development Objectives,” the Supervisor stated:

[The Applicant] clearly has a passion for ICP-related support, and intends to offer quality customer service and support to end users in alignment with his Professional Development Objective.

42. The Tribunal notes that the Applicant’s FY 2018 performance evaluation was mixed. Under “Strengths,” the Supervisor’s Comments stated the following:

I concur with [the Applicant’s] self-assessment of his strengths, and it is [a] positive indication that he will be able to sustain strong client focus and maintain good communication with clients. [The Applicant] does often propose best practices in support. We would expect to see [the Applicant] take a balanced approach when proposing best practices, also taking into consideration constraints on the ITS side, in terms of resource availability.

43. Seven feedback providers made comments in the evaluation. The comments by the Supervisor were consistent with the comments made by the feedback providers. The comments under “Strengths” by the feedback providers stated that the Applicant “can always provide support on time and even answer the phone during weekends or holidays when staff has urgent issues.” Other feedback providers stated that the Applicant “has developed [a] very good relationship with users,” and that he “knows the clients and has tried to do his best to serve them.”

44. Under “Areas of Development,” the Supervisor’s Comments stated the following:

We expect [the Applicant] to return to work after extended leave only after his full recovery. We are committed to assisting him and providing him with guidance, support and opportunities to succeed. We expect [the Applicant] to focus on behavioral aspects of the job, such as closely following regional direction and decisions agreed to across all IT.

45. The comments made by the feedback providers were consistent with this assessment. The feedback under “Areas of Development” included that “more communication with colleagues is encouraged,” and that the Applicant sometimes “works too individually, he’d better to improve his team work skills, to actively share his idea and work related information with the team.” Other feedback providers stated that the Applicant “does not have enough skills and experience in responding to [conflict] situation with colleagues.”

46. Under “Overall Supervisor Comments,” the Supervisor stated the following:

[The Applicant] began the OTI process with a VC [videoconference] on January 15th, 2018, during which a draft document was shared. The OTI was suspended and [the Applicant] has been on extended leave from February 22, 2018. Upon his full recovery and return to office, [the Applicant] will be given an opportunity to demonstrate sustained performance improvement. We believe that [the Applicant] is capable of meeting the OTI requirements because he had already showed some improvement during the first half of FY18. The intent of the OTI will be to clearly guide and support [the Applicant] regarding our expectations in the areas of Team Work and Communication, Incident Tracking, and Integrated WBG Support. We encourage [the Applicant] to continue to strive to be a great team player, strengthen communications with IT Team Members, and consistently attend team meetings. In addition, we are ready to support [the Applicant] to improve his team work and communication skills through relevant training programs at the WBG. Manager and Supervisor are committed to help improve working relations with team members.

47. The Reviewing Official stated the following in his Approval Comments in the performance evaluation:

As noted above, [the Applicant] had a [c]hallenging year and was on extended leave from 22nd Feb 2018. We look forward to his early return so that we can resume our collective efforts in helping him succeed in a sustained manner. We thank [the Applicant] for all his contributions in FY18 and wish him a complete and speedy recovery.

48. The Tribunal finds that the Supervisor’s Comments on the Applicant’s FY 2018 performance evaluation were consistent with the comments made by the feedback providers. The Tribunal concludes that the comments were reasonable, as they acknowledged both the Applicant’s strengths and the need for certain areas of improvement in terms of communication and teamwork. While the Applicant has claimed that the appointment of a new Location Lead created a negative working environment for him, the feedback that he had communication issues was provided by his Supervisor and other feedback providers as well.

49. The Applicant’s main claim is, however, not related to his performance evaluation but rather is that his performance rating of 2 was an abuse of discretion. In this regard, the Bank contends that the Applicant was given a rating of 2 because he had not completed the OTI plan that he had been placed on and because his performance had not met expectations. The record

shows that the Applicant was notified that he would be placed on the OTI on 13 November 2017, and his first meeting to discuss the OTI with management was on 15 January 2018. Since the Applicant was on STD, the OTI was suspended by the Bank on 18 May 2018 and resumed once the Applicant returned to a full work schedule on 10 January 2019.

50. According to the Bank's Human Resources Definitions of Performance Ratings, a rating of 2 corresponds to the label of Below Expectations and means the following:

Staff member fails to meet performance expectations, including workplace behaviors, considering the job requirements and compared to staff at the same grade level. Examples of failure to meet expectations include, but are not limited to: (1) failure to achieve a majority of results objectives; (2) failure to achieve one or more key results objectives; (3) failure to demonstrate relevant competencies, despite opportunity to do so; or (4) requiring greater than usual support from others to achieve results objectives.

51. The main question the Tribunal will examine is whether, based on the official FY 2018 performance evaluation, it can be reasonably concluded that the Applicant's performance was below expectations, corresponding to a performance rating of 2.

52. One of the examples given in the Bank's definition of performance ratings for the rating of 2 is if a staff member fails to achieve a majority of results objectives or one or more key results objectives. Based on the Supervisor's Comments under "Individual Business Objectives," it cannot be reasonably concluded that the Applicant either failed to achieve the majority of his results objectives or one or more of his key results objectives. Rather, the Supervisor's Comments stated that the Applicant complied with certain best practices, and that feedback from other colleagues was positive towards his performance. In the same vein, the Supervisor's Comments do not show that the Applicant failed to demonstrate relevant competencies. While elsewhere in the performance evaluation the Supervisor noted that the Applicant needed to improve on his teamwork and communication skills, and that he would be provided support upon his return from leave, the Tribunal does not find this sufficient to conclude that the Applicant required greater than usual support to achieve his results objectives. Rather, it is apparent from the Supervisor's Comments that the Applicant ultimately did not fail to achieve his results objectives.

53. Moreover, the performance evaluation included multiple comments that acknowledged that the Applicant's performance had been improving. The Supervisor's Comments under "Individual Business Objectives" and "Strengths" referred to "sustained" performance from the Applicant. In addition, the "Overall Supervisor Comments" stated that the Applicant was "capable of meeting the OTI requirements because he had already showed some improvement during the first half of FY18."

54. The Tribunal has observed multiple times in the past that performance ratings must have a reasonable and observable basis, and that there is a link between the performance evaluation and the performance rating. *See BY*, Decision No. 471 [2013], para. 31; *BG*, Decision No. 434 [2010], para. 57.

55. Looking objectively at the overall assessment of the Applicant's performance as documented in the FY 2018 Annual Review, it can be inferred that the Applicant had some performance issues, especially in terms of communication and teamwork. Notwithstanding these performance issues, the record as a whole, considering all the comments made by the Supervisor and the feedback providers, does not support that the Applicant's performance was below expectations. The Tribunal notes that managers and supervisors have the responsibility to conduct staff performance evaluations objectively and assign performance ratings based on the performance as a whole, balancing the positive and negative factors. The fact that a staff member needs some improvements in some areas should not automatically lead to a performance rating of 2. A staff member's performance as a whole should be looked into in order to determine if the staff member's shortcomings fall into the same categories as those mentioned in the Bank's definition of what constitutes a performance rating of 2. A rating of 2 has adverse consequences for a staff member's career in the Bank. Such a negative rating must have a demonstrable basis in the official performance evaluation document. *See Desthuis-Francis*, para. 23. Considering the record, the Tribunal is not convinced that the rating of 2 had a reasonable and observable basis.

56. The Tribunal is troubled by another aspect of the assessment of the performance rating of 2. The Bank has claimed that the Applicant received a rating of 2 "because he had not completed his OTI." The Tribunal finds this troublesome because the OTI had been suspended by the Bank

during the Applicant's STD leave. The PMR Reviewer who reviewed the terms of the OTI recommended that the Applicant's OTI be suspended during his STD leave. The Tribunal has previously held that "placing the [a]pplicant on an OTI, while she was on Short Term Disability for three months, i.e., more than half of the planned OTI period, and then failing to remove the OTI from her personnel file for nine months was unreasonable and not consistent with Principle 2.1 of the Principles of Staff Employment." *EN*, Decision No. 579 [2018], para. 112.

57. The Tribunal further notes that the FY 2018 performance evaluation considered the Applicant's performance for half of the year, since he went on sick leave on 22 January 2018 and STD on 22 February 2018. The Applicant returned to a full work schedule on 10 January 2019. The Applicant was diagnosed with Acute Stress Disorder in March 2018, and his symptoms included "difficulty concentrating and performing at work." The Tribunal notes that his performance evaluation and subsequent performance rating for FY 2018 were based on his performance for approximately seven months before he went on STD leave. Under these circumstances, the Bank's basis for providing the Applicant a rating of 2 was not reasonable. In addition, the Tribunal notes that the Supervisor acknowledged that the Applicant had already shown some performance improvement before he went on STD.

58. Under the circumstances described in paras. 55–57, the Tribunal, therefore, is not convinced that the performance rating of 2 for FY 2018 was justified.

Whether the Applicant's FY 2018 performance rating followed due process

59. Staff Rule 5.03, paragraph 3.01, provides in part:

- a. At least once in a twelve-month period, the Manager or Designated Supervisor and the Staff meet and discuss the Staff's performance, achievements, strengths, areas for improvement, and future development needs. [...]
- b. The Manager or Designated Supervisor provides the Staff with a written assessment of the Staff's performance during the review period.

60. In *BY*, para. 26, the Tribunal stated:

Staff Rule 5.03, paragraph 2.02 requires 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.” The Manager is required to provide the staff member with a written summary assessment of his or her performance during the review period, and establish in writing, in consultation with the staff member, the development priorities and the results to be achieved during the upcoming review period. The Tribunal has held that the requirement for a formal performance discussion

does not replace the need for ongoing feedback throughout the year in question, which should be provided so that the staff member ‘should be able to anticipate the nature of this year-end discussion and resultant ratings on the OPE’;

and that

there is an established order of things in the Bank’s procedures and requirements concerning a staff member’s career development, beginning with a proper performance evaluation embodied in an OPE [...] followed by performance ratings and an SRI assignment which, although not identical to the OPE evaluation, must not be inconsistent with it unless there is a very satisfactory explanation for such a departure. *Prasad*, Decision No. 338 [2005], paras. 25, 57.

61. The Tribunal has consistently stressed the importance of respecting the requirements of due process in relation to performance evaluations. In *K. Singh*, Decision No. 188 [1998], para. 21, the Tribunal held:

Two basic guarantees are essential to the observance of due process in this connection. 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.

62. The Tribunal has held that “any decision to deviate from established best practices [...] must not be arbitrary or lack a reasonable and observable basis.” *DO*, Decision No. 546 [2016], para. 46.

63. The record shows that the following procedure was conducted with regard to the Applicant’s FY 2018 performance evaluation. On 28 December 2017, the Applicant had his MYC

with the Location Lead. The Applicant's Supervisor shared a draft write-up of the FY 2018 performance evaluation with the Applicant by email on 29 September 2018. The Applicant responded to the draft with proposed edits and additional comments on 3 October 2018. The Applicant's proposed edits and comments were included as part of his comments in the performance evaluation, but the Supervisor's comments remained the same as in the draft.

64. The record also shows that the Applicant's performance rating was decided by his management on 11 September 2018. However, the Applicant was not told about his performance rating until 31 October 2018.

65. Furthermore, the record shows that the following order was conducted for the Applicant's performance discussion. The Applicant completed his self-assessment on 29 August 2018. On 24 September 2018, he inquired with his Supervisor about the status of his performance review and sent a reminder on 26 September 2018. On 28 September 2018, the Applicant's Manager proposed a discussion by videoconference to the Applicant, to which the Applicant responded that an email was sufficient. Accordingly, his Supervisor shared the draft write-up of his performance evaluation with him on 29 September 2018.

66. The Tribunal has held that staff members who are on STD but are in a position to participate in discussions with management must be provided timely discussions regarding their performance. *See DH*, Decision No. 531 [2016], paras. 120, 123.

67. Here, the Applicant's performance rating was decided before he was sent a draft write-up of his performance evaluation and had the opportunity to respond to it. The Tribunal notes that the performance discussion for the Applicant could have been held over email, but by the time he was sent the draft write-up of the evaluation, his performance rating had already been decided. The Applicant was not notified of his performance rating until 31 October 2018. The Tribunal has previously held that a staff member's performance rating must not be set before the staff member has participated in a performance discussion. *See BY*, para. 29. In *Mpoy-Kamulayi (No. 4)*, Decision No. 462 [2012], para. 49, the applicant's performance rating was set on 6 July 2009 and was communicated to him on 26 July 2009, and his performance discussion meeting was three

days later, on 29 July 2009. Taking the evidence into account, the Tribunal in that judgment stated in para. 49 that the meeting appeared “perfunctory,” and that it was not clear to the Tribunal what the applicant could have done to change the decision. Moreover, in *BY*, para. 28, the Tribunal noted that the applicant’s performance rating had been set as early as 20 May 2009, but that his performance discussion did not take place until 29 June 2009, which was more than a month later. In the present case, the Applicant’s performance rating was also set before he had the opportunity to have his performance discussion.

68. Therefore, the Tribunal finds that a proper process was not followed because the Applicant’s performance rating was decided by his management before the Applicant had an opportunity to comment on the performance evaluation. The Applicant also did not have an opportunity to comment on his perceived deficiencies until after the performance rating had already been decided. As the Tribunal stated in *DH*, the Applicant’s STD leave was no excuse for the lack of a timely performance discussion, as his Supervisor could have tried to reach him earlier to have the discussion. *See DH*, para. 120. The Tribunal finds that the lack of a timely discussion constitutes a violation of the Applicant’s due process.

69. In addition, the Applicant’s Location Lead, not the Supervisor, conducted the MYC with him. The Tribunal finds that this also constitutes a procedural irregularity, since the Supervisor is the person who should express his performance concerns to the Applicant. Both the AR Reviewer and PMR Reviewer acknowledged that this was a procedural irregularity. The AR Reviewer stated that, “for continuity purpose but also because of its career component, the mid-year review conversation should have been held by the supervisor, instead of the Location Lead.” Similarly, the PMR Reviewer stated: “[O]nly staff with accountability for personnel should conduct performance discussions. As such, [the Applicant’s] MYC with [the Location Lead] was a violation of that procedure.”

70. The Tribunal concludes that the Applicant’s due process was violated during the performance management process because his performance rating was decided before he was given the opportunity to have a performance discussion, and he was not provided a timely opportunity to comment on his perceived deficiencies before his performance rating was decided.

In addition, the Applicant's Supervisor was not the person who held the MYC with him. The Tribunal observes that staff members are entitled to fair treatment, and this requirement applies to the performance evaluation process. Determining a performance rating before a performance discussion indicates to the staff member that the performance discussion is a formality, rather than a serious matter.

DECISION

- (1) The Bank shall rescind the Applicant's FY 2018 performance rating and remove any references to it from his personnel file;
- (2) The Bank shall assign the Applicant a new performance rating for FY 2018 which cannot be 2 or below, and provide the Applicant with the associated salary increase;
- (3) The Bank shall pay the Applicant compensation in the amount of one year's salary net of taxes;
- (4) The Bank shall pay the Applicant's legal fees and costs in the amount of \$15,000.00; and;
- (5) All other claims are dismissed.

/S/ Andrew Burgess

Andrew Burgess

President

/S/Zakir Hafez

Zakir Hafez

Executive Secretary

At Washington, D.C., * 30 May 2020

*In view of the public health emergency occasioned by the COVID-19 pandemic and in the interest of the prompt and efficient administration of justice, the Tribunal conducted its deliberations in these proceedings remotely, by way of audio-video conferencing coordinated by the Office of the Executive Secretary.