



World Bank Administrative Tribunal

2023

Decision No. 693

**HB,
Applicant**

v.

**International Finance Corporation,
Respondent**

(Merits)

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

**HB,
Applicant**

v.

**International Finance Corporation,
Respondent**

1. This judgment is rendered by the Tribunal in plenary session, with the participation of Judges Mahnoush H. Arsanjani (President), Marielle Cohen-Branche (Vice-President), Janice Bellace (Vice-President), Andrew Burgess, Seward Cooper, Lynne Charbonneau, and Ann Power-Forde.

2. The Application was received on 20 October 2022. The Applicant was represented by Ryan E. Griffin of James & Hoffman, P.C. The International Finance Corporation (IFC) was represented by David Sullivan, Deputy General Counsel (Institutional Affairs), Legal Vice Presidency. The Applicant's request for anonymity was granted on 1 May 2023.

3. The Applicant challenges the determination that he was ineligible for an IFC Departmental Performance Award.

FACTUAL BACKGROUND

4. The Applicant joined the IFC in March 2007 as an Associate Financial Officer. He later became a Financial Officer and a Senior Financial Officer in 2009 and 2015, respectively. In 2018, the Applicant was promoted to Grade Level GH, Principal Financial Officer in the Treasury and Syndications Vice Presidential Unit (VPU).

The Applicant's disciplinary sanctions

5. On 22 July 2019, following an investigation by the Ethics and Business Conduct Department (EBC), the Applicant was notified via a letter from the Human Resources Department Vice President (HRDVP) that there was sufficient evidence to find that the Applicant had

committed misconduct as a result of his failure to disclose a change in his immigration status which caused him to receive a total sum of \$279,197.67 in Mobility Premium benefits to which he was not entitled. The HRDVP imposed the following sanctions:

- Ineligibility for salary increase for a period of five years;
- Ineligibility for promotion for a period of five years;
- Restitution to the WBG [World Bank Group] for financial losses attributable to [the Applicant's] actions for the total amount of Mobility Premium benefits paid to [the Applicant] from April 12, 2007, to January 4, 2016, which would be reimbursed to the WBG through a reduction in [the Applicant's] payroll; and
- This letter will remain on [the Applicant's] personnel record indefinitely.

6. Following his receipt of the HRDVP's letter, the Applicant did not challenge either the finding of misconduct or the sanctions imposed.

The Departmental Performance Award

7. The Applicant claims that he was notified in November 2021 that he was being selected by his department for a Departmental Performance Award under the IFC's Departmental Performance Awards program. Under this program, all IFC staff (excluding those in GJ- and GK-level positions) who receive performance ratings of 4 or 5 receive a standard award amount. IFC staff who receive a performance rating of 3.5 are eligible to be selected by their department to receive an award "based on relative performance and budget availability." The Applicant received a performance rating of 3.5 for Fiscal Year 2021.

8. On 29 November 2021, the Applicant's HR Business Partner (HRBP) emailed the Manager, HR Development Corporate Operations (HRDCO), writing:

This is about [the Applicant], who was sanctioned in 2019 for 5 years due to misconduct (disclosure of mobility premium eligibility).

His manager had wanted to give him a performance award but due to the sanction, did not do so. My question is that the sanction was ineligibility for promotion and salary increase for 5 years. The performance award is not a salary increase so

technically does not fall under the sanction. Is this correct? Can he be given a performance award?

9. The IFC explains that it is its understanding “that following receipt of the email from the HRBP, the [Manager,] HRDCO phoned the HRBP to discuss the matter.” The HRBP states that HR Case Management “confirmed that as part of the sanctions imposed by the HRDVP following EBC’s investigation, [the Applicant] was ineligible for a financial award.” In a later email discussing the matter, the Manager, HRDCO stated, “There is no consideration of rewarding or awarding any extra remuneration during this sanctions period. It is as obvious as the end of our nose.”

10. On 29 November 2021, the Applicant had a telephone conversation with the HRBP. According to the Applicant, during this call the HRBP informed him that his department had included him on its list of nominees for Departmental Performance Awards, but that he could not receive an award. The HRBP states that she informed the Applicant that “he was ineligible for a performance award under the IFC Departmental Awards program due to the sanctions imposed on him by the HRDVP in connection with the investigation conducted by the EBC.” The HRBP explained to the Applicant that she “consulted with the HR Case Management team who had previously reviewed his case and confirmed the interpretation regarding the HRDVP’s decision on the application of the sanctions.”

11. According to the Applicant, the HRBP also told him that she had asked the Manager, HRDCO if the Applicant could be included on a list of awardees without receiving any monetary award, but that the Manager, HRDCO had rejected that idea. An email chain between the HRBP and HR Case Management from 3 December 2021 regarding talking points for a discussion with the Applicant notes that a non-monetary award would go against the award policy, which provides for monetary recognition only.

Prior exhaustion of remedies

12. On 3 December 2021, the Applicant sought mediation concerning his eligibility for a Departmental Performance Award and “other related issues.” On 25 February 2022, the Applicant

was informed by Mediation Services that management had declined to participate and that the request for mediation would therefore be closed.

13. On 18 April 2022, the Applicant filed a Request for Review with Peer Review Services. In his Request for Review, the Applicant challenged the decision to “take away [his] earned Departmental Award on the ground that [he is] under a sanction which prevent[s] [him] from getting any salary increase.”

14. On 23 May 2022, the Peer Review Chair dismissed the Request for Review for lack of jurisdiction.

The Applicant’s requests for clarification

15. As stated in the HRDVP’s 22 July 2019 letter, one of the sanctions imposed on the Applicant was “[i]neligibility for salary increase for a period of five years.” As part of these sanctions, the Applicant received no salary increase following the Fiscal Year 2019 performance cycle, effective 1 July 2019. The Applicant explains that this “retroactive application of the sanction appeared to fully accord with IFC’s general practice of determining salary review increases in August or September after performance ratings are finalized and then applying them retroactively to July 1, the beginning of the fiscal year.”

16. The Applicant states that, “in light of the interpretive differences giving rise to this case,” on 11 June 2023 he wrote to the Manager, HRDCO as well as the new Vice President, People and Culture (PACVP) to confirm the end date of the sanctions with respect to the salary increase ineligibility. In a series of email correspondence over the next few days with the Manager, HRDCO, the Applicant noted that he had not received salary increases in Fiscal Year 2019, 2020, 2021, and 2022 and sought confirmation that the last year of the sanctions would be Fiscal Year 2023. In one response during that email exchange, the Manager, HRDCO explained, “Five years from July 22nd, 2019 ends July 21st, 2024, and during such time you are ineligible [for salary increases and promotions].”

17. Following his 11 June 2023 email, the Applicant met with the PACVP to discuss the issue. On 20 June 2023, the Applicant emailed the PACVP to confirm his understanding of their meeting, writing:

We both agree that I have already received 0% salary increase on 4 consecutive years, i.e. on July 1, 2019, July 1, 2020, July 1, 2021, and July 1, 2022 as shown on the print out that I shared with you. I will be receiving the last 0% salary increase this July 1, 2023, which will be effective as for all the 3 previous ones in the Fall. (Emphasis in original.)

We also agree that my next non-zero salary increase will be on July 1, 2024. (Emphasis in original.)

I will greatly appreciate your confirmation of my understanding.

18. The PACVP replied the same day, writing:

As we discussed, upon your receipt of the 22 July 2019 letter, you have been and remain ineligible for salary increase or a promotion - for a period of five years.

Five years from July 22nd, 2019 ends July 21st, 2024, and during such time you are ineligible.

Beyond July 22nd, 2024, these two sanctions will have expired and as to what % salary increase you may receive after July 21, 2024, I honestly cannot say one way or another.

19. The Applicant replied to the PACVP on 21 June 2023 seeking further clarification but received no response.

The present Application and relief sought

20. On 6 September 2022, the Applicant requested and later received an extension until 20 October 2022 to file an application with the Tribunal. On 20 October 2022, the Applicant then filed this Application with the Tribunal. The Applicant challenges “[t]he determination communicated to him on November 29, 2021, that he was ineligible for an IFC Departmental Performance Award.”

21. The Applicant requests the following relief:
- i. Recission of the November 2021 decision deeming [the Applicant] ineligible for an IFC Departmental Performance Award based on the disciplinary measures imposed on him in July 2019.
 - ii. A grant of the full award [the Applicant] would have received as the result of his selection for a Performance Award but for management's wrongful determination concerning his eligibility, inclusive of both the monetary component and any associated non-monetary recognition.
 - iii. An affirmative declaration from WBG that there is currently no ban on [the Applicant's] eligibility for IFC Departmental Performance Awards or any other IFC Awards Programs.
 - iv. A letter of retraction and apology from [the Manager, HRDCO] to the appropriate senior management personnel within the IFC Treasury VPU, with a copy to [the Applicant], acknowledging that [the Manager, HRDCO's] November 2021 ineligibility determination was in error and that there is currently no ban on [the Applicant's] eligibility for any IFC Awards Programs.
22. The Applicant further requests
- compensation in an amount deemed just and reasonable by the Tribunal to remedy the damage to his career and professional reputation and the emotional distress resulting from being falsely deemed ineligible for an IFC Departmental Performance Award and in effect double-punished for the same conduct for which he was already disciplined in 2019.
23. On 2 December 2022, the IFC submitted preliminary objections and requested that the Application be dismissed. In *HB (Preliminary Objection)*, Decision No. 691 [2023], the Tribunal dismissed the IFC's preliminary objections.
24. The Applicant claims legal fees and costs in the amount of \$18,520.00.

SUMMARY OF THE CONTENTIONS OF THE PARTIES

The Applicant's Main Contentions

Management treated the Applicant unfairly, and the IFC's proposed remedies are insufficient

25. The Applicant contends he was treated unfairly by management when it decided he was ineligible to be considered for a performance award because the decision (i) imposed a new sanction, thereby violating his due process rights, and (ii) caused damage to his career, which would be insufficiently addressed through the remedies proposed by the IFC.

New sanction imposed and violations of due process

26. The Applicant submits that the terms of the 2019 disciplinary sanctions are unambiguous and include “[i]neligibility for salary increase for a period of five years” and “[i]neligibility for promotion for a period of five years.” The Applicant further submits that a Departmental Performance Award is unambiguously neither a promotion nor a salary increase. Rather, the Applicant contends that the Departmental Performance Award “is a bonus—a one-time, lump-sum, non-salary payment.” The Applicant notes that his salary has been frozen since 2018, with zero percent salary increases for 2019, 2020, 2021, and 2022 despite his having received performance ratings which would normally entitle him to a salary increase. He also notes that his salary would have remained fixed through 2023 regardless of whether he received the Departmental Performance Award.

27. The Applicant next contends that, even if the 2019 disciplinary sanctions were ambiguous, resolving any ambiguities against him violated his due process rights. The Applicant submits that “principles of ‘interpretive due process’” require that any ambiguities in the sanctions must be resolved in his favor. To the Applicant, had the HRDVP intended the sanctions to include eligibility for performance awards, he could have drafted them as such.

28. Further, the Applicant contends, the Manager, HRDCO’s later interpretation of the sanctions to include award ineligibility had the practical effect of imposing a sanction on the

Applicant which he could not have been aware of at the time he received the HRDVP's decision in 2019. In this respect, the Applicant notes that the Manager, HRDCO was not authorized to issue disciplinary sanctions for misconduct. The Applicant also notes that the interpretation was made more than three years after he received the Notice of Alleged Misconduct, which would mean that any additional sanction was time-barred. Moreover, the Applicant notes that the Manager, HRDCO's decision was not "accompanied by the requisite statement of reasons or notice of the right to appeal." Thus, according to the Applicant, the ineligibility decision was effectively a "new and entirely unreviewable disciplinary sanction on top of the sanctions that the [HRDVP had] already determined in 2019 were proportionate to the underlying findings of misconduct."

The appropriate relief to remedy the damages suffered

29. The Applicant further submits that the ineligibility decision has caused ongoing harm to his professional reputation and career. In this respect, the Applicant avers that, by the time his case is decided, the IFC will have completed another annual performance awards cycle in which he will erroneously be deemed ineligible for an award. Further, the Applicant contends that his managers would have no incentive to consider awarding him a performance rating of 4, even if his performance warranted it, because this rating can be awarded to only approximately ten percent of staff and would entitle the Applicant to a performance award.

30. In response to the IFC's recent concession in its Answer that the 2019 sanctions did not include ineligibility for a Departmental Performance Award and the IFC's proposal to remand the performance award decision to the Applicant's Manager, the Applicant submits that the

proposed relief is grossly inadequate. It is premised on misrepresentations about whether [the Applicant] would have received an award in [Fiscal Year] 2021; deliberate omissions of the additional consequences of [the Manager, HRDCO's] wrongful actions both prior to and after [Fiscal Year] 2021; inaccurate statements regarding the value of departmental awards; and unrealistic assumptions about how award budgets work.

31. The Applicant asserts that he would have received a Departmental Performance Award for Fiscal Year 2021 but for the "*ultra vires*" actions of the Manager, HRDCO in determining without

authorization that the Applicant was ineligible for the award. The Applicant also avers that the Tribunal should infer from the HRBP's testimony that he was wrongfully denied an award in Fiscal Year 2020. Further, the Applicant submits that the "IFC alone is at fault for any uncertainty as to this point" and that "fundamental principles of equity dictate that [the IFC] should not enjoy any benefit of the doubt stemming from its own wrongful acts and the uncertainty they created."

32. The Applicant further contends that the IFC's assertions with respect to the amount the Applicant would have received from the Departmental Performance Award are misleading. The Applicant asserts that, as he is a GH-level staff member exercising a core investment function, the awards given to "non-core" staff at lower grade levels "have little bearing on what [he] would have received but for being wrongfully deemed ineligible."

33. The Applicant next asserts that remanding the awards decision to his Manager is unlikely to make him whole because "it is simply unrealistic to imagine" that the Applicant's departmental leadership will be able to accurately reassess his past relative performance compared to other staff who received 3.5 performance ratings. The Applicant further asserts that it is "difficult to imagine" that the leadership "would have an interest in redirecting money from its current fiscal year budget—money that could be used for rewarding strong performance over the past year—toward retroactive awards for efforts made up to four years prior." To the Applicant, "[i]n short, any decision by the department on remand would be an entirely new decision under changed circumstances and not at all reflective of what might have happened but for [the Manager, HRDCO] blocking [the Applicant] from being considered at the appropriate times."

34. Rather, the Applicant contends that appropriate relief would include (i) "damages to compensate [him] for the value of the departmental performance awards he was wrongly denied and/or wrongly not even considered for in [Fiscal Years] 2020, 2021, 2022, and 2023"; (ii) an update to his HR records to reflect receipt of the Departmental Performance Awards for the corresponding years; (iii) a retraction of the ineligibility decision and an apology letter from the Manager, HRDCO; and (iv) compensation for unfair treatment and violations of due process.

Additional request for interpretation

35. The Applicant finally requests the Tribunal to resolve an additional issue related to the interpretation of the 2019 disciplinary sanctions, raising the issue for the first time in his Reply. The Applicant contends that the 2019 disciplinary sanctions are clear in that the ineligibility for salary increases for five years means “five annual increases of zero percent.” The Applicant notes that he has already received four annual increases of zero percent and asserts that “2023 should be the last zero percent increase.” In the Applicant’s view, if the 2019 sanctions letter is interpreted as requiring another zero percent increase in July 2024, the retroactive 1 July 2019 zero percent increase should be invalidated. The Applicant notes that the Tribunal is already interpreting the relevant sanction and suggests that it would be “unduly burdensome” and an “extreme waste of judicial resources” to “require him to return and present another full case next year if and when a sixth no-increase decision is imposed.”

The IFC’s Response

The performance award decision should be remanded, and no other relief is warranted

36. The IFC acknowledges that the 2019 disciplinary sanctions lacked specificity and should have indicated that the Applicant was not entitled to financial awards during the sanctions period. The IFC accordingly agrees that the sanctions imposed do not include ineligibility for any financial awards that the Applicant may be entitled to. In this respect the IFC submits, “It is clear that the IFC’s Departmental Performance Award Program is intended to provide nominal financial compensation to certain staff members who had outstanding performance in a given year and does not have the nature of salary nor represent a promotion at the IFC.” The IFC proposes that the Tribunal remand the performance award decision back to the Applicant’s Manager in order to reassess the Applicant’s performance in Fiscal Year 2021 with respect to a Departmental Performance Award “with a clear understanding that the sanctions applied to [the] Applicant do not include awards.”

37. The IFC maintains, however, that the Applicant should not be entitled to any additional compensation as the Applicant did not face any actual damages to his professional career for not

receiving the award. The IFC submits that the Applicant's contentions with respect to the damages suffered are "misleading" in two respects:

i) [the] Applicant was not *selected* for an award, he was merely being considered as he had received an SRI [Salary Review Increase] of 3.5, and ii) [the Manager,] HRDCO did not "block" any award, but rather interpreted and applied a prior sanctions decision issued with respect to [the] Applicant, which was fully within [his] responsibilities and an appropriate exercise of [his] functions. (Emphasis in original.)

38. The IFC further submits that the

IFC's Departmental Performance Award does not represent a major milestone in staff members' careers nor compensation provided to staff for their work done, but rather it is a financial contribution given to staff members who have shown extraordinary efforts, achievements, and positive behaviors consistent with the IFC's core values in a given year.

39. The IFC notes that, for staff members with a 3.5 performance rating, a performance award is decided at the discretion of the relevant manager "based on staff member performance and depending on budget availability of the department." The IFC submits that for the Applicant's unit, in Fiscal Year 2021, "4 staff members in his unit received a 3.5 performance rating, including [the] Applicant. Out of these 4 staff members, 2 staff members were selected by the Manager to receive a financial award in an amount equivalent to 2% of their grade midpoint."

40. The IFC stresses that, "[e]ven if [the] Applicant was considered eligible for such financial award, there was no certainty that [the] Applicant would have received the IFC's Departmental Performance Award for fiscal year 2021 based on his 3.5 performance rating." The IFC also notes that almost half of IFC staff members also did not receive a performance award in Fiscal Year 2021. To the IFC, then, the Applicant faced no harm in not receiving a performance award in Fiscal Year 2021.

41. The IFC avers that compensation awarded by the Tribunal "must be linked to an actual harm suffered by a staff member in connection with her [or his] career prospects, and professional life." In the IFC's view, the "Applicant has not made, or even attempted to make, an argument

demonstrating the actual harm suffered by him and his career in connection with not being selected for the financial award in fiscal year 2021, which should be the minimum expectation in a claim for damages based on alleged harm.”

42. The IFC notes that the Applicant also claims damages for being wrongly denied or not considered for performance awards in Fiscal Years 2020, 2022, and 2023. With respect to Fiscal Year 2020, the IFC submits that the Applicant’s contentions are “based on the fallacy that he was *entitled* to an award in [Fiscal Year 2020] and that he would have received it but for the [Manager,] HRDCO’s actions.” (Emphasis in original.) With respect to Fiscal Year 2022, the IFC notes that six staff members in the Applicant’s unit received a 3.5 performance rating, and two were selected to receive a discretionary performance award. With respect to Fiscal Year 2023, the IFC notes that the Applicant received a performance rating of 3 and thus was ineligible for a performance award.

43. The IFC further opposes the Applicant’s request to update his HR records to reflect the receipt of a performance award in Fiscal Years 2020, 2021, 2022, and 2023. The IFC submits that the Applicant’s request is beyond the scope of the Tribunal’s purview as he is “asking [the IFC] [to] rewrite [the] Applicant’s record to indicate that he received an award when he did not. Adding an inaccurate entry that rewrites history based on an assumption of actions not taken is certainly not a remedy the Tribunal should consider.”

44. With respect to the Applicant’s claim that he was treated unfairly by management, the IFC submits that the Manager, HRDCO “acted in good faith and advised the HRBP in good faith and in compliance with the [spirit of] the sanctions letter.” The IFC contends that the Manager, HRDCO “was responding to the HRBP’s question and advising the HRBP of the intended scope of the sanctions, which is part of his job.” To the IFC, the Manager, HRDCO “did not act improperly, nor did he act *ultra vires*, nor was his interpretation of the sanctions an abuse of discretion, or unreasonable. On the contrary, there was a reasonable and observable basis for the [Manager,] HRDCO’s interpretation.” In this respect, the IFC opposes the Applicant’s request for an apology letter from the Manager, HRDCO, and instead suggests that a copy of the Tribunal’s judgment be placed in the Applicant’s HR file.

45. The IFC next avers that Article XII of the Tribunal's Statute should be read that "[c]ompensatory damages are only to be considered in cases where rescission and/or specific performance are not possible." The IFC submits that the Applicant's assertion that remanding the awards decision to the Applicant's Manager would not make him whole "grossly underestimates management's abilities."

46. In sum, the IFC requests that the Tribunal "dismiss [the] Applicant's requests for relief, except for the recognition by [the IFC] that the sanctions imposed to [the] Applicant on July 22, 2019, do not include awards." In addition, the IFC

urges the Tribunal to re-instate [the] Applicant's eligibility for the Award, and to have the Manager reassess [the] Applicant's performance in the fiscal year 2021, to exercise their discretion to determine if [the] Applicant would have received the award, based on his performance, as well as budget availability, in fiscal year 2021.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

WHETHER THE APPLICANT WAS TREATED UNFAIRLY

47. The Applicant contends he was treated unfairly by management when it decided he was ineligible to be considered for a performance award because the decision (i) imposed a new sanction, thereby violating his due process rights, and (ii) caused damage to his career, which would be insufficiently addressed through the remedies proposed by the IFC.

48. Although it initially took a different position, the IFC now agrees that "[i]t is clear that the IFC's Departmental Performance Award Program is intended to provide nominal financial compensation to certain staff members who had outstanding performance in a given year and *does not have the nature of salary nor represent a promotion at the IFC.*" (Emphasis added.) Accordingly, the IFC proposes that the Fiscal Year 2021 award decision be remanded to the Applicant's Manager. It is the IFC's position that no other relief is warranted as the Applicant did not face any actual damages to his professional career for not receiving the award.

Disciplinary sanctions

49. The Tribunal has long articulated its distinct scope of review in disciplinary cases as opposed to cases involving acts of managerial discretion. *See, e.g., FA*, Decision No. 612 [2019], para. 138; *EZ*, Decision No. 601 [2019], para. 67; *Koudogbo*, Decision No. 246 [2001], para. 18. In explaining this standard of review, the Tribunal stated in *M*, Decision No. 369 [2007], para. 53, that the

starting point is to appreciate that disciplinary cases are different from the broader range of disputes relating to managerial decisions. The Tribunal has always recognized that the Bank has discretion to run its business. But punitive measures are not business decisions. They must be subjected to meaningful checks and balances, in the interest not only of individual applicants but also to realize expectations that the Bank will eschew arbitrary behavior in this sensitive sphere.

50. With this distinction in mind, the Tribunal observes that it is necessary, in terms of legal security and predictability, to limit the scope of sanctions to the express and precise language of the sanctions which were imposed. As a guarantee against arbitrariness and retroactivity, sanctions must always be explicitly and strictly stated. Sanctions cannot be aggravated, extended, or expanded beyond those explicitly stated in the sanctions decision imposed by the competent administrative authority. The imposition of additional disciplinary sanctions beyond the scope of the original sanctions decision would constitute a clear violation of a staff member's contract of employment or terms of appointment.

51. The Tribunal will thus consider whether the 22 July 2019 sanctions decision explicitly and strictly stated a prohibition on performance-based awards.

52. With respect to disciplinary sanctions, Staff Rule 3.00, paragraph 10.06, (in force at the relevant time) provides:

Depending on the circumstances of the matter, one or more of the following disciplinary measures may be taken by the Bank Group when misconduct is determined to have occurred, provided the determination is made within three years from the date that the misconduct on which the disciplinary measure is based is

discovered, except that no time limitation will apply to a determination of misconduct for which mandatory termination is to be imposed.

Staff Rule 3.00, paragraph 10.12, (in force at the relevant time) further provides: “The Staff Member whose conduct is at issue will be notified of the decision, the disciplinary measures, the reasons for their imposition, and the right to appeal. Except where the measure is oral censure, the notification will be in writing.”

53. In his letter of 22 July 2019, the HRDVP imposed the following sanctions on the Applicant:

- Ineligibility for salary increase for a period of five years;
- Ineligibility for promotion for a period of five years;
- Restitution to the WBG for financial losses attributable to [the Applicant’s] actions for the total amount of Mobility Premium benefits paid to [the Applicant] from April 12, 2007, to January 4, 2016, which would be reimbursed to the WBG through a reduction in [the Applicant’s] payroll; and
- This letter will remain on [the Applicant’s] personnel record indefinitely.

54. Staff Rule 6.01 sets forth “guidelines for periodic review and administration of general levels of compensation, salary scales, and annual pay increases for employees of the World Bank Group.” Under the section titled “Annual Pay Increases,” Staff Rule 6.01, paragraph 3.09, provides:

The Total Merit Increase will be determined annually as the total salary increase authorized for distribution to staff through pay for performance increases. The Total Merit Increase equals the sum of the Structure Adjustment, the Salary Progression Adjustment [SPA] and the Supplemental Merit Increase [SMI].

- a. The Structure Adjustment reflects the percentage of payroll adjustment required to broadly align the salary scale with the 75 percentile of the comparator market.
- b. The Salary Progression Adjustment is determined for the Washington salary plan based on a five-year rolling average of the ratio of the salaries of confirmed staff members in grade for more than one year to the Midpoint. For staff appointed in locations other than Washington, the SPA is determined based on the ratios of the salaries of confirmed staff members who have been in their grade for more than one year to the Midpoints.

- c. The Supplemental Merit equals the five-year average of the ratio of the salaries of all confirmed staff to the Midpoints, minus the SPA. The payable SMI is based on the ratio of salaries to Midpoints for staff with performance ratings of 4 or 5.

55. In a separate section titled “Performance-Based Award Program,” Staff Rule 6.01, paragraph 3.16, provides:

The Bank may pay a non-pensionable performance-based award to staff members (“Individual Performance Award”) within the Bank’s Finance Complex to measure, recognize and reward achievements throughout the year. The Individual Performance Award is for sustained and superior annual performance which is typically linked to the annual performance evaluation process, and subject to certain eligibility requirements adopted by the Bank’s Finance Complex.

56. The HRDVP’s sanctions letter provided for the Applicant’s “ineligibility for salary increase for a period of five years.” It is the IFC’s position that,

[g]iven the magnitude and the significant personal financial gain of the Applicant’s misconduct, the intent of the HRDVP’s sanctions was to ensure that [the] Applicant would not receive any additional financial benefit for a period of five years. *Ergo*, the [Manager,] HRDCO’s “interpretation” had a reasonable and observable basis. The Tribunal has previously found that in cases where there was a reasonable and observable basis for a decision, even though it was erroneous, that these decisions do not constitute an abuse of discretion that warrant compensation.

57. The Tribunal recalls, however, that its scope for review of disciplinary cases, which include the imposition and application of sanctions, is different than that of cases involving acts of managerial discretion. In this respect, the Tribunal notes that the intention of the disciplinary sanction in a given case does not override the precise language of the sanction. The interpretation and application of a sanction beyond the precise language of the original sanction is an impermissible expansion of that sanction.

58. Having reviewed the Staff Rules regarding salary increases and performance awards, the Tribunal observes that performance awards do not form part of the annual pay increases received by staff members. The Tribunal therefore finds that there is no basis to conclude that the sanction providing for ineligibility for salary increases also implicitly provided for ineligibility for

performance awards. As such, the decision that the Applicant was ineligible for performance awards had no basis in the 2019 disciplinary sanctions and amounted to an imposition of additional disciplinary sanctions in violation of the general principles of law discussed in paragraph 50 above.

Damages claimed

59. Having established that the ineligibility decision was an impermissible expansion of the 2019 disciplinary sanctions, and with the IFC now belatedly agreeing on that point, the Tribunal will next consider what relief may be warranted. The Tribunal recalls the Applicant's requests for (i) "damages to compensate [him] for the value of the departmental performance awards he was wrongly denied and/or wrongly not even considered for in [Fiscal Years] 2020, 2021, 2022, and 2023"; (ii) an update to his HR records to reflect receipt of the Departmental Performance Awards for the corresponding years; (iii) a retraction of the ineligibility decision and an apology letter from the Manager, HRDCO; and (iv) compensation for unfair treatment and violations of due process. The IFC opposes the Applicant's requests for relief, requesting instead that the Tribunal remand the Fiscal Year 2021 performance award decision to the Applicant's Manager with the recognition that the 2019 disciplinary sanctions do not include ineligibility for awards.

60. As noted in *EO (No. 2) (Merits)*, Decision No. 629 [2020], para. 94, the Tribunal "has the discretionary power to design and award remedies as appropriate based on the circumstances of each case, taking into account Article XII of its Statute." Pursuant to Article XII(1):

If the Tribunal finds that the application is well-founded, it shall order the rescission of the decision contested or the specific performance of the obligation invoked unless the Tribunal finds that the respondent institution has reasonably determined that such rescission or specific performance would not be practicable or in the institution's interest. In that event, the Tribunal shall, instead, order such institution to pay restitution in the amount that is reasonably necessary to compensate the applicant for the actual damages suffered.

61. The Tribunal has on several occasions throughout its jurisprudence determined on its own accord that compensation, rather than specific performance, is the appropriate remedy. *See, e.g., AI (No. 2)*, Decision No. 437 [2010], para. 69; *Hitch*, Decision No. 344 [2005], para. 76; *Skandera*, Decision No. 2 [1981], para. 29. The Tribunal will make a similar determination here. In this

respect, the Tribunal is persuaded by the Applicant that “any decision by the department on remand would be an entirely new decision under changed circumstances and not at all reflective of what might have happened.”

62. The Tribunal takes into account the IFC’s assertion that any compensation awarded by the Tribunal “must be linked to an actual harm suffered by a staff member in connection with her [or his] career prospects, and professional life.” As explained below, the Tribunal considers that the Applicant in this case suffered two actual harms as a result of the impermissible expansion of disciplinary sanctions: (i) loss of opportunity to be considered for a Departmental Performance Award, and (ii) unfair treatment.

Loss of opportunity

63. Considering the first harm, the Tribunal will begin by observing that, as the Applicant received a performance rating of 3.5 in Fiscal Year 2021, he was eligible only for a discretionary performance award, awarded on the basis of “relative performance and budget availability.” As such, there was no guarantee that he would have been selected to receive the Departmental Performance Award, but he was nonetheless denied the opportunity to be considered for the award. The Tribunal will thus consider next what remedy is appropriate for such a denial.

64. In cases involving non-selection decisions, the Tribunal has on multiple occasions awarded compensation for the denial of a fair opportunity to compete for a position. In *ET*, Decision No. 592 [2018], the Tribunal found that the Bank failed to act transparently and denied the applicant a fair opportunity to compete. For those harms, the Tribunal awarded the applicant one year’s salary. In *GS (Merits)*, Decision No. 679 [2022], the Tribunal found that the applicant was denied a fair opportunity to compete for two positions and awarded her one and a half years’ salary.

65. While this Tribunal has addressed loss of opportunity in cases involving the denial of a fair opportunity to compete for a position, other tribunals have expounded on the concept. For instance, the United Nations Dispute Tribunal (UNDT) has developed governing principles with respect to

its “loss of chance/opportunity” doctrine, elaborated in *Sprauten*, Judgment No. UNDT/2011/094. The UNDT explained in paragraph 70 of that judgment:

Loss of chance/opportunity compensation could represent: (a) the impact on a staff member’s employment situation and career prospects [...]; (b) the loss of opportunity to compete for remunerative employment [...]; (c) the loss of the right to be fairly considered in the promotion exercise [...]; (d) the loss of the right to continue with the Organization until retirement age [...]; (e) the loss of the right to full and fair consideration for promotion and appointment [...]; and (f) the loss of job security of a P-4 position and conversion to a 100 series contract [...]. Other compensable types of loss of chance/opportunity may exist, as well.

66. In *Sprauten* [2011], para. 75, the UNDT further articulated:

Where a staff member has suffered a loss of opportunity, then compensation *may* be measured under the “percentage” method approved [by the United Nations Appeals Tribunal (UNAT)] in *Hastings* 2010-UNAT-109 or *may* be determined according to the trial judge based on the facts of the individual case (*Lutta* 2011-UNAT-117), without being bound by the percentage method articulated in *Hastings* 2010-UNAT-109. (Emphasis in original.)

Essentially, the UNDT empowers the trial judge to determine compensation for loss of opportunity either based on a percentage reflecting the likelihood of the event or based on the facts of the individual case.

67. The Tribunal considers that compensation for loss of opportunity must be assessed by the actual opportunity lost and cannot be equated to an advantage that this opportunity would have conferred had it materialized.

68. The Tribunal will first consider the Applicant’s loss of opportunity to be considered for a Departmental Performance Award in Fiscal Year 2021. The record demonstrates that, had the Applicant been selected for the award, he would have received monetary compensation in the amount of \$9,248.00. The record further demonstrates that, including the Applicant, four staff members in his unit were eligible for the discretionary award, and two of these staff members were selected to receive the award. The Tribunal finds it reasonable to conclude that the Applicant stood a fifty percent chance of being selected for a Departmental Performance Award in Fiscal Year 2021. Noting that compensation for the loss of opportunity must be assessed by the actual

opportunity lost, the Tribunal finds that \$4,624.00 is appropriate compensation for this loss of opportunity.

69. The Applicant also contends that the ineligibility decision wrongfully denied him consideration for Departmental Performance Awards in Fiscal Years 2020, 2022, and 2023 and requests appropriate compensation. With respect to Fiscal Year 2020, the Tribunal observes that any awards decisions were made prior to the November 2021 ineligibility decision in the record. The Tribunal cannot, then, conclude that the ineligibility decision had any effect on the Applicant's non-selection for an award in Fiscal Year 2020.

70. Conversely, with respect to Fiscal Year 2022, the Tribunal observes that the awards decision was made after the Applicant's Manager was wrongly advised that the Applicant would be ineligible for performance awards for five years. The Tribunal concludes that the ineligibility decision also denied the Applicant the opportunity to be considered for an award in Fiscal Year 2022. For Fiscal Year 2022, the record demonstrates that, had the Applicant been selected for the award, he would have received \$14,166.00 in monetary compensation. The record further demonstrates that, including the Applicant, six staff members in his unit were eligible for the discretionary award, and two of these staff members were selected to receive the award. The Tribunal finds it reasonable to conclude that the Applicant stood an approximately thirty-three percent chance of being selected for a Departmental Performance Award in Fiscal Year 2022. The Tribunal therefore finds that \$4,674.78 is appropriate compensation for this loss of opportunity.

71. With respect to Fiscal Year 2023, the Tribunal notes that the Applicant received a performance rating of 3 and was thus ineligible for the performance award. There was accordingly no loss of opportunity for which compensation is warranted.

72. The Applicant also requests an update to his HR records to reflect receipt of the Departmental Performance Awards for the corresponding years. While the Tribunal has found compensation appropriate for the denied opportunities to be considered for these awards, it remains true that there was no guarantee the Applicant would have received any award even if he had been granted the opportunity to be considered for an award. Accordingly, the Tribunal finds the

requested remedy inapposite. Instead, the Tribunal considers it appropriate to order that a copy of this judgment be placed in the Applicant's HR file.

Unfair treatment

73. The Tribunal considers that the impermissibly expansive interpretation of the sanctions imposed constitutes unfair treatment. However, in this case, the damage that flowed therefrom was the loss of opportunity for which compensation has already been granted.

THE APPLICANT'S REQUEST FOR FURTHER INTERPRETATION

74. The Applicant has also requested that the Tribunal resolve an additional issue related to the interpretation of the 2019 disciplinary sanctions. The Applicant is specifically concerned with the application of the five-year period for ineligibility for a salary increase. In the Applicant's view, as his first zero percent salary increase was applied retroactively to 1 July 2019, 1 July 2023 should represent the final zero percent salary increase. The Applicant contends that a zero percent salary increase in July 2024 would represent a sixth year of ineligibility, contrary to the sanctions.

75. While the Tribunal understands the Applicant's concern and desire for clarity with respect to the application of the disciplinary sanctions, the Tribunal notes that, as of the time of this judgment, there has been no decision on the Applicant's eligibility for a salary increase in Fiscal Year 2024. The Tribunal considers, then, that the Applicant has failed to identify a particular decision by the IFC that has adversely affected him, and that "he is therefore seeking relief in the nature of an advisory opinion which is beyond the power of the Tribunal." *Agodo*, Decision No. 41 [1987], para. 20.

DECISION

- (1) The IFC shall pay the Applicant \$4,624.00 for the loss of opportunity to be considered for a Departmental Performance Award in Fiscal Year 2021;

- (2) The IFC shall pay the Applicant \$4,674.78 for the loss of opportunity to be considered for a Departmental Performance Award in Fiscal Year 2022;
- (3) The IFC shall include a copy of this judgment in the Applicant's personnel file;
- (4) The IFC shall pay the Applicant's legal fees and costs in the amount of \$18,520.00; and
- (5) All other claims are dismissed.

/S/Mahnoush H. Arsanjani
Mahnoush H. Arsanjani
President

/S/ Zakir Hafez
Zakir Hafez
Executive Secretary

At Washington, D.C., 10 November 2023