

**Decision No. 351****Nezam Motabar,  
Applicant**

v.

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

1. The present judgment is rendered by a Panel of the Tribunal, established in accordance with Article V(2) of the Tribunal's Statute, and composed of Jan Paulsson, President, Robert A. Gorman and Francisco Orrego Vicuña, Judges. The application in this case was received on 11 October 2005.

2. The Applicant served for a probationary period as Senior Financial Management (FM) Specialist, Level GG, between July 2002 and July 2004. The Bank declined to confirm his appointment at the end of that probationary period. The Applicant challenges this and other related Bank decisions as an abuse of discretion. In particular, he complains about the process whereby his service as a probationer was evaluated by his immediate supervisor and other managers. While conceding the Tribunal's jurisdiction to review the decision not to confirm, the Bank contended that some of the Applicant's grievances are barred for failure to exhaust internal remedies in a timely fashion. In *Motabar*, Decision No. 346 [2006], the Tribunal concluded that it had jurisdiction to determine the validity of the Bank's decision not to confirm the Applicant's appointment, the validity of his first interim Overall Performance Evaluation (OPE) during his probationary term, and related issues of due process and conformity to the Staff Rules. Those are the issues that the Tribunal now addresses on the merits.

*Factual Background*

3. In early 2002, the Applicant was invited by a Senior Recruitment Officer of the Bank to apply for the position of Regional Financial Manager, Level GH. The Applicant did so, but the position was awarded to another person. On 13 June 2002, the Bank offered the Applicant an Open-Ended appointment as a Senior FM Specialist, Level GG, in the Middle East & North Africa Regional Office (MNA). The Letter of Appointment stated that "your appointment will be subject to a probationary period of up to two years." According to the Applicant, the Senior Recruitment Officer assured him that the risk of non-confirmation in his case was negligible. On 27 June 2002, the Applicant signed his Letter of Appointment. His service at the Bank began on 8 July 2002 in the Operational Core Services unit of MNA (MNACS). His immediate supervisor was the person who had recently been awarded, in preference to him, the position of Regional Financial Manager, Level GH.

4. The Applicant was expected to work as a member of various task teams and country teams on Bank-financed projects. More specifically, his duties and responsibilities were defined in the Terms of Reference (TOR) as follows:

- (i) provide a leadership role with respect to public sector financial management;
- (ii) take a proactive role in working in and defining practice in new areas of business;
- (iii) develop strategies for harmonizing financial management/ disbursement approaches with other donors;
- (iv) provide substantial technical input into policy and strategic work in the field of financial management;

- (v) provide leadership, technical oversight, mentoring and coaching of staff;
- (vi) assess, certify and advise on the adequacy of the Borrower's and the Bank's financial management systems, and monitor Bank-financed projects;
- (vii) assist the Borrower and Task Team members of the Bank's financial management requirements, including monitoring and reporting criteria;
- (viii) participate in the assessment, selection and engagement of auditors of Bank-financed projects;
- (ix) provide financial management guidance for the development of technical assistance programs and evaluate and monitor their financial implementation;
- (x) assess periodic project financial monitoring reports for financial performance, linkage to physical and other monitorable indicators, and general compliance with financial covenants;
- (xi) provide advice and support to Borrower and Task Teams of the Bank-financed projects on matters affecting financial management, disbursement and accountability; and
- (xii) ensure that the Borrowers provide auditors with all the pertinent information necessary to carry out their engagement.

According to the Bank, these TOR were endorsed by the FM Sector Board. All Senior FM Specialists, according to the Bank, are assessed against them. The TOR were posted on the Bank's intranet and were accessible to the Applicant at the commencement of his service with the Bank.

5. The week the Applicant joined the Bank, the then Director of MNACS met with him and briefed him about his work program within the MNA Region, particularly in Iran. The following week, on 15 July 2002, the Applicant's supervisor met with him and discussed his work program. According to the supervisor, in testimony before the Appeals Committee, in that meeting "we started discussing the unit and I briefed him on what we are doing and what we are expecting from him." In the Applicant's view, despite this and other conversations and group meetings with his supervisor, he received a "well-delineated" work program only from the Director of MNACS but not from his immediate supervisor.

#### *First Interim OPE*

6. In January 2003, the Applicant completed the first six months of his probationary employment. According to the Applicant, during that period he was mostly supervised by the then Director of MNACS, and she was happy with his work. It appears clear, however, that during that period the Applicant was also in periodic touch with his supervisor, who set out tasks for him, exchanged e-mails with him about the course of his work, and identified staff members and team leaders whom he should contact if issues arose as his work progressed. The record warrants the conclusion that the Applicant received from his supervisor little feedback on the quality of his work during his first six probationary months, and what feedback he received reasonably appeared to him to be positive. On 12 September 2002, she wrote in an e-mail: "Many thanks for the excellent summary you elaborated. This will help us a lot." And on 21 January 2003, she wrote: "Congratulations for the first 6 months of your career in Bank's [sic]."

7. In the latter e-mail, the Applicant's supervisor also asked him to submit a draft of an interim OPE covering the period 8 July 2002 to 7 January 2003 ("the first interim OPE"). This was presumably in compliance with Staff Rule 4.02, para. 2.02(b), relating to probation: "During the probationary period, the Manager or Designated Supervisor shall ... at the end of each six months of the probationary period, or earlier, share with the staff member a written assessment of the staff member's suitability and progress based on achievement of the work program, technical qualifications and professional behaviors. ..."

8. In late January 2003, using the standard OPE blank form, the Applicant furnished a skeleton list of several projects on which he had worked from July 2002 to January 2003. The Applicant's supervisor found this to be an unsatisfactory initial response, and she engaged him in a series of communications relating to the form of the interim OPE. This led to his preparation of several drafts from January to September 2003. This period was protracted, in part, by a malfunction in the Bank's electronic processing of OPEs which caused them to be deleted from the system; and included a period of several weeks in which the Applicant reconstructed the work that he had done on his OPE prior to the system malfunction. At the beginning of this OPE-preparation period, in January 2003, the Applicant's supervisor contacted a Senior Human Resources (HR) Officer with whom she raised concerns about the Applicant's performance; the Senior HR Officer advised her about the need to document matters in the OPEs, to provide feedback, and to provide the Applicant with an opportunity for improvement.

9. On 12 June 2003, the supervisor met with the Applicant and, apparently for the first time, comprehensively discussed his performance during the six-month period covered by the initial interim OPE. She told him that it had not been up to the level expected of a Level GG staff member. Moreover, despite the fact that the evaluation period had ended in January 2003, and due to the fact that the focus of the Applicant's supervisor had since then been on formal issues relating to his completion of the OPE, it was not until 15 July 2003 that the supervisor set forth her criticisms in writing. On that day, she gave him a draft copy of the interim OPE that contained fairly extensive comments, many of them negative regarding his work. It also contained adjectival ratings of his performance and behaviors (most of them "Partially Successful"), and a warning of the possibility of non-confirmation in the event that the Applicant's performance did not improve. The supervisor's draft was rendered somewhat confusing by the interweaving of passages typed directly on the OPE form by the Senior HR Officer, who meant to give instructions to the supervisor, presumably confidentially, about how better to draft her OPE comments. (The supervisor had assumed her new position recently, and it appears that she was neither experienced nor altogether fluent in communicating critical evaluative comments to the Applicant.)

10. On 5 August 2003, the Applicant met with the recently appointed Director of MNACS and raised his concerns about the ratings in the draft first interim OPE. The Director urged the Applicant to move forward and to focus on his work, and to take the initiative to seek guidance from his supervisor and from other experts in the Bank.

11. According to the final draft of the first interim OPE, the Applicant's first six months were devoted to four main matters:

- (i) Algeria Second Rural Employment Project;
- (ii) Iran Environment Management Support Project (Iran EMSP);
- (iii) Iran Earthquake Emergency Recovery Project (EERP); and
- (iv) Iran Public Expenditure Review.

Based on input from other reviewers who were familiar with the Applicant's work, as well as on her own experience working with the Applicant, the supervisor rated his performance as "Fully Successful" in the Iran EMSP project, and "Partially Successful" in the remaining three tasks. With respect to the Applicant's behavioral assessment, she rated him "Fully Successful" in Teamwork, and "Partially Successful" in Client Orientation, Drive for Results and Learning and Knowledge Sharing. In the Overall Comments section of the OPE, the supervisor provided the reasons for the mixed ratings, recommended that the Applicant take a number of actions, and noted that

[the Applicant] will get regular feedback and guidance from me. And progress will be reviewed by September 30, 2003. If [the Applicant] has not made considerable progress, non-confirmation will be an option I would consider.

12. The first interim OPE was not signed by the supervisor until 9 September 2003. Although the OPE was

intended to be promptly reviewed and signed by a so-called reviewing manager, that person, because of a recent change in his position, did not sign the first interim OPE until 6 February 2004 – more than one year after the six-month period under review, and indeed (as will be seen below) several months after the ending date of the Applicant's second interim evaluation period. When signing the first interim OPE, the reviewing manager indicated his concurrence with the evaluation set forth by the Applicant's supervisor.

### *Second Interim OPE*

13. In the meantime, the Applicant had served the second six months of his probationary employment, from 8 January to 7 July 2003. On 21 July 2003, a few days after the Applicant's supervisor had provided him with the initial draft of the first interim OPE with her comments, the two of them discussed four tasks to be completed by the end of September 2003. Those tasks, as well as the 30 September deadline, were set forth by the supervisor in her Overall Comments in the final draft of the first interim OPE as follows:

- (i) Iran CFAA (Country Financial Accountability Assessments) Initiating Concept Memorandum;
- (ii) Iran ROSC (Reports on the Observance of Standards and Codes) Initiating Concept Memorandum;
- (iii) Tunisia Country FM plan; and
- (iv) Algeria Country FM plan.

According to the Bank, the supervisor "encouraged him to take seriously the four assigned tasks and demonstrate progress compared to the previous period." As noted above, the Applicant's supervisor had stated in the first interim OPE – provided to the Applicant on 15 July 2003 – that "progress will be reviewed by September 30, 2003. If [the Applicant] has not made considerable progress, non-confirmation will be an option I would consider."

14. In late July or early August, a determination was formally made by the Applicant's supervisor – it is unclear whether the Applicant acquiesced – to extend the end of the second interim OPE period from 7 July 2003 to 30 September 2003. In August 2003, the Applicant prepared a draft of the second interim OPE, and forwarded it to his supervisor. Again, there was an exchange of communications between the Applicant and his supervisor regarding formal aspects of the OPE, but it appears that this second interim OPE was never finalized or signed by them.

15. On 14 January 2004, the Applicant met with his supervisor, as well as with the Senior HR Officer (who had earlier assisted the supervisor in the preparation of the first interim OPE) and the Director of MNACS. At that meeting, the Director informed the Applicant that confirmation of his appointment was in jeopardy. The Applicant's supervisor gave him a copy of her draft of the second interim OPE (showing a closing date of 30 September 2003) along with her ratings of the Applicant's work and behavior, and her lengthy comments on his performance during the second extended evaluation period.

16. In this draft second interim OPE, the supervisor assessed the Applicant with respect to five key work-program results:

- (i) Iran, Report on Public Financial Management, Procurement and Expenditure Systems;
- (ii) Iran EERP,
- (iii) Iran EMSP, and Jordan, Medicinal and Herbal Plants Project (Jordan MHPP);
- (iv) Iran, Second Primary Health Care and Nutrition Project; and
- (v) Agreed actions (Iran ROSC: Initiating Concept Memorandum; Iran CFAA: Initiating Concept Memorandum; Algeria: Country FM plan; and Tunisia: Country FM plan).

The supervisor rated the Applicant “Fully Successful” with respect to the Iran EMSP & Jordan MHPP tasks and “Partially Successful” with respect to the remaining four tasks. As for behavioral assessment, she rated him “Partially Successful” in three competencies (Client Orientation, Drive for Results, and Teamwork) and “Unsuccessful” in the remaining one (Learning and Knowledge Sharing). In the Overall Comments section, the supervisor explained the reasons for her adjectival ratings, almost completely in the form of quoted comments from four other Bank staff members who were familiar with the Applicant’s work. Those comments were detailed and on the whole quite negative.

17. On 3 February 2004, the Applicant wrote a memorandum to the Director of MNACS stating that his supervisor’s ratings in the draft second interim OPE were unfair and arbitrary. He contended that they were inconsistent with the feedback provided by the staff members with whom he had worked. He also asserted that his supervisor had an undisguised dislike for him, that she had frequently expressed her determination to prevent his confirmation, and that although he regretted her feelings towards him, he was not willing to accept non-confirmation “solely to be accommodating to [her] feelings.”

18. On 3 March 2004, the Applicant met again with his supervisor, along with the Senior HR Officer and the Director of MNACS. At that meeting, the Director reiterated that the Applicant’s confirmation was in jeopardy, and the Applicant’s supervisor gave him a written report on his performance, in which she stated, *inter alia*, the following:

(i) the assessment in the two OPEs was done with reference to the TOR of a Senior FM Specialist, Level GG, as published on the Bank’s intranet;

(ii) the opportunities offered to the Applicant in consultation with senior management to demonstrate ability and skills at his grade level had not been exploited successfully by the Applicant;

(iii) there had been several problems with the Applicant’s performance – in her words, “absence of leadership, absence of initiative, incomplete work, work not meeting internal quality standards, time invested without results, no shared values, no sharing of knowledge, and unwillingness to identify skills to be developed and to participate to [sic] learning events”; and

(iv) the Applicant was not fulfilling his TOR and presented “performance issues in the FM area.”

19. On 22 April 2004, the supervisor gave the Applicant a ten-page single-spaced memorandum titled “Your Performance.” In that document, the supervisor summarized the work program assigned to the Applicant, noted the reasons for the Applicant’s poor ratings in his two interim OPEs, included the names of the Bank staff from whom she had received feedback, and concluded that the Applicant’s work continued to be incomplete, unclear, confusing and difficult to understand. On the same date, the Applicant also received a memorandum titled “Non-Confirmation of Appointment” from the Director of MNACS. That document stated in relevant part:

This is to formally notify you of the decision not to confirm your appointment.

...

I have carefully reviewed the documentation available and discussed the feedback with your manager .... This is also detailed in [her] memo to you which provides a summary of the feedback you have received, as well as final written feedback on the period after your last OPE. I have agreed with her that she could do this in lieu of a final OPE as the process for getting your previous OPEs finalized has been very long. While there are some areas where you have gotten very positive feedback, namely the feedback from clients on teamwork, I have determined that your technical performance is not at the level required of a level GG Sr. Financial Management Specialist.

20. The Applicant left the service of the Bank on 8 July 2004, after precisely two years of probationary service.

21. The Applicant then filed a grievance with the Appeals Committee, challenging *inter alia* the Bank’s decision not to confirm his appointment. The Bank raised certain jurisdictional objections which were sustained by the



Appeals Committee. After conducting a hearing concerning the decision not to confirm, the Appeals Committee concluded that that decision was not arbitrary and recommended that the Applicant's requests be denied. That recommendation was accepted by the Vice President, Human Resources. The Applicant next filed his application with the Tribunal. In *Motabar*, Decision No. 346 [2006], the Tribunal concluded *inter alia* that it had jurisdiction to rule on the Applicant's claims that the Bank abused its discretion in issuing his first interim OPE and in deciding not to confirm his appointment. The Applicant requests the following: rescission of the non-confirmation notice and reinstatement; retroactive payment of salary, including anticipated increases; removal and destruction of his OPEs; compensation of \$1 million if specific performance is denied; and costs estimated at \$10,000.

### *Issues and Analysis*

#### *(i) Provision of a Work Program*

22. The Applicant contends that throughout his probationary period, the Bank failed to provide him with an adequate description of his work program. He invokes Staff Rule 4.02, para. 2.02(a), which states that during the probationary period "the Manager or Designated Supervisor shall as soon as practicable, meet with the staff member to establish the staff member's work program." The Applicant acknowledges that as early as mid-July 2002, only days after he entered upon his probationary service, the then Director of MNACS provided him with a clear work program, and also supervised his work during most of his first six months of employment. His main complaint relates to his direct supervisor, who he asserts failed to provide him with any clear work program at all, particularly during the period covered by the first interim OPE. He contends that her instructions were vague, and that she often simply delegated to him the burden of identifying his own tasks.

23. The Tribunal is unconvinced by this allegation. The record clearly shows that the Applicant was made aware – in part by the Director of MNACS and in part by his immediate supervisor – of the Terms of Reference for a Senior FM Specialist at Level GG. These are set forth above at paragraph 4, and they spell out at length and in great detail the standards by which the Applicant's work would be evaluated.

24. The record also shows that there were periodic meetings between the Applicant, either alone or as part of a team, and his supervisor, at which tasks were itemized, assigned and explained. For example, in July 2002, in a meeting between the Applicant and his supervisor to discuss the current work and future challenges of the unit, the supervisor explained, among other things, that the Applicant was expected to take a leadership role and to "be the number two in the region," with oversight and quality-assurance responsibility over the FM staff in the field. In September 2002, still early in his probationary period, the Applicant was asked to lead an effort to create Individual Country Plans, and to provide comments and guidance to the FM Specialists. The same month, the supervisor accompanied the Applicant on an assignment to Algeria, where they had further discussions with respect to his work tasks. In due course, he was also assigned as the country coordinator for Algeria, the back-up country coordinator for Iran and Tunisia, the sector coordinator for the Rural Development, Water & Environment Group, the Task Team Leader (TTL) of the Iran CFAA, and the quality reviewer of the Morocco and Djibouti CFAAs. The supervisor, beginning in December 2002, sent regular e-mails to the Applicant containing instructions concerning the work he was to do.

25. The Tribunal concludes that from the outset, and throughout the course of his service as a probationary employee with the Bank, the Applicant was furnished with a detailed work program, principally by his immediate supervisor but also by other managers and staff members. E-mails and evaluative comments made by others with whom the Applicant had worked on one or another of a variety of projects make it clear that he had, or should have had, an awareness of the expected tasks, the anticipated outcomes, and indeed the techniques and skills needed to achieve those outcomes. It is not plausible for the Applicant to assert that he was prejudiced by a lack of knowledge concerning the tasks he was expected to undertake during his probationary period.

#### *(ii) Provision of Regular Written Assessments*

26. The Applicant also asserts that the Bank violated its Staff Rules by failing to provide a written assessment of his work at the end of each six months of service. Staff Rule 4.02, para. 2.02(b) provides that the Manager or Designated Supervisor shall, “at the end of each six months of the probationary period, or earlier, share with the staff member a written assessment of the staff member’s suitability and progress based on achievement of the work program, technical qualifications and professional behaviors ....” This directive is echoed in Staff Rule 5.03, para. 2.01, which provides that Bank management “shall provide staff members subject to probation under Rule 4.02 with an interim review at the end of every six months of the probationary period.” The Bank acknowledges a technical failure to comply with these six-month time limits but it contends nonetheless that, in substance, the Bank satisfied the requirements of these Staff Rules.

27. The Applicant embarked upon his probationary service on 8 July 2002. The six-month term to be covered by the first interim OPE thus ended on 7 January 2003. The Applicant’s supervisor acted consistently with this framework by contacting him on 21 January 2003, congratulating him on the completion of his first six months, and asking him to submit a draft of an interim OPE covering those months. The Applicant did so in late January 2003, albeit in the most skeletal fashion. Regrettably, the supervisor’s strategy for inducing the Applicant to produce a more thoroughly written first interim OPE went far astray, and there was an exchange of several drafts between them that lasted from January into September of 2003. Also in January 2003, the Applicant’s supervisor had contacted a Senior HR Officer to raise her concerns about the Applicant’s performance during the OPE period, and it was that Officer who further complicated the evaluation process by interweaving typed comments and suggestions meant for the supervisor onto the first interim OPE form that was made available to the Applicant in July 2003.

28. Although the supervisor orally communicated her criticisms to the Applicant on 12 June, it was not until 15 July 2003 that she provided a draft copy of her ratings and criticisms and thus took steps to comply with Staff Rules 4.02 and 5.03, which require a written evaluation. But this date was, in the Tribunal’s view, far too late.

29. The Applicant’s supervisor surely exercised poor judgment in needlessly extending the process for getting a proper statement from the Applicant of the major tasks and outcomes of his first six months of service on which she was to rate him. It should have been obvious to her sooner that he was having difficulty understanding what she expected of him in filling out the OPE form, and even though his lack of understanding may have been at least as much his responsibility as it was hers, it was he who was the probationary staff member and she who was the supervisor charged with the task of mentoring. That task could have been far better accomplished had she, after a reasonable time, simply completed the drafting herself, or provided explicit templates, or brought the Applicant together with the Senior HR Officer to provide him (and not simply the supervisor) with guidance and instructions. The Applicant persuasively argues that his supervisor had developed a sufficient perception of his weaknesses as early as January 2003, when the supervisor enlisted the assistance of the Senior HR Officer, to be in a position to communicate those weaknesses to him – as indeed she did to the Senior HR Officer.

30. True, part of the responsibility for the long delay in the completion of the first interim OPE cannot be attributed to the Applicant’s supervisor. As noted, the Applicant himself was apparently slow to understand her instructions. The Bank’s system suffered a malfunction that caused in-process OPEs to be lost. And once the system was back on-line, the Applicant apparently took an unreasonably long time to reconstruct the fairly straightforward passages of his OPE. But the system malfunction is no more the responsibility of the Applicant than of the Respondent; and had the supervisor pursued the drafting process more vigorously, it is likely that the time lost as a result of the system malfunction might have been less substantial and the process completed more expeditiously.

31. In any event, even taking account of the Applicant’s contribution to the delay, the Bank has provided no satisfactory explanation for the failure to execute the first interim OPE before 15 July 2003. The anticipated *second* interim OPE period had expired by that time. The obvious purpose of the Staff Rules governing probationary employment is to require the Bank to provide prompt feedback at six months so that the staff member can benefit from and act upon that feedback so as to improve his work and behaviors over the course of the following six months. That purpose is defeated when the first interim OPE is not put into final form and

executed by staff member and supervisor until one full year of service has passed.

32. The “reasonable time” should of course have been understood by reference to the fact that weeks and soon months were passing into the second interim OPE period, which would ordinarily have been from early January until early July 2003. In *McNeill*, Decision No. 157 [1997], para. 51, Staff Rule 4.02, para. 2.02 was applied in a similar situation. There, the Tribunal held that the Bank had violated that Staff Rule, and made the following pertinent observations:

A written progress report should ... have been made around mid-March 1994 at the latest [the Applicant's appointment had been effective as of 7 September 1993]. An oral interim review was in fact held only on April 20, that is to say, more than one month late; and the written evaluation, given on May 24, was more than two months late. ... While the rules on the periodic evaluations have to be applied with some flexibility depending on the circumstances, the Tribunal finds that the staff rule prescribing an interim review after the first six months, that is to say, half-way through the probation, does not allow for a delay of such magnitude. This is all the more so because in the present case the final evaluation was provided a short time after the interim review and because both evaluations pointed to the possible non-confirmation of the Applicant's appointment.

33. For the reviewing manager, the then Vice President of MNA, to consider, evaluate and sign the first interim OPE five months later than the staff member and immediate supervisor did so defeats the purpose of the interim-OPE Staff Rules even more egregiously. Here, the reviewing manager – referring to a recent change in his position – endorsed the appraisal by the Applicant's supervisor of the Applicant's performance from 8 July 2002 through 7 January 2003, and signed the first interim OPE on 6 February 2004. It is highly unlikely that he could have exercised a fully informed judgment at that late date.

34. These delays beyond the six-month evaluation period contemplated in the Staff Rules are more than technicalities. As is indicated in *McNeill*, the Tribunal has tolerated modest expectable slippages in meeting this time limit, particularly in situations in which there is no indication of significant prejudice to the staff member. But that is certainly not the case here. When in June 2003 the supervisor informed the Applicant orally of serious concerns – finally reinforced on 15 July by her very first written criticisms – all that the Applicant had apparently received from his supervisor in writing was an e-mail commendation on 12 September 2002 and another e-mail on 21 January 2003 congratulating him on the completion of his first six months of service to the Bank. The supervisor was delinquent in not recording for yet another six months that the Applicant's job was in jeopardy.

35. Moreover, it was only in the proffered draft of 15 July 2003 that the Applicant's supervisor informed him of four stipulated tasks which he was expected to complete by 30 September – only two and one-half months into the future, rather than six months – and that his failure to do so satisfactorily might result in a recommendation of non-confirmation. Surely the compression of this evaluation period, a direct result of the six-month delay in completing the first interim OPE, cannot be regarded as a matter of negligible prejudice to the Applicant. This case is thus very similar to *Lusakueno-Kisongele*, Decision No. 327 [2004], para. 49, in which the Tribunal stated:

True, the record indicates that the Respondent provided the Applicant with some guidance and supervision necessary to succeed in his assignment. ... On the other hand, the record clearly shows that the Applicant was not given the formal feedback required under Staff Rule 4.02 to be recorded in written assessments of his performance every six months during his probationary period. The Tribunal therefore finds that the feedback given to the Applicant was not properly and timely recorded as required by the Staff Rule. The Applicant may thus not have been given a fair opportunity to improve his performance so as to prove his suitability for the position. In sum, the Tribunal finds the Respondent in breach of Staff Rules 5.03, paragraph 2.01, and 4.02, paragraph 2.02, for which the Applicant deserves some compensation.

36. In summary, the substantial delay in providing the Applicant with written evaluations in his first interim OPE were, in the circumstances, a violation of the Staff Rules, indeed a violation of due process of law, and prejudicial to the Applicant.



(iii) *Basis for Assessments of Performance and Behaviors*

37. The Applicant claims that his supervisor abused her discretion by giving him mediocre ratings and comments in both interim OPEs and in the long memorandum that she furnished on the day he was informed of his non-confirmation. He asserts that both his work performance and behaviors were rated very positively by managers, team leaders, clients and others with whom he worked from July 2002 through April 2004, and that their comments were neither given proper weight by his supervisor, nor properly reflected in the OPEs and her final memorandum. This substantive disagreement between the Applicant and his critics forms the principal basis for his claim that the Bank's failure to confirm his appointment constituted an abuse of discretion.

38. In the first interim OPE, as seen, the Applicant's "Results Assessment" showed one rating of "Fully Successful" and three ratings of "Partially Successful," while the "Behavioral Assessment" showed the same pattern. In the draft second interim OPE (covering the period 8 January to 30 September 2003), which was never finalized in that form, the "Results Assessment" showed one rating of "Fully Successful" and four ratings of "Partially Successful." The "Behavioral Assessment," meanwhile, showed three "Partially Successful" ratings and one "Unsuccessful" rating. The written Management Report dated 3 March 2004, prepared by the Applicant's supervisor, and her final 22 April 2004 memorandum to the Applicant captioned "Your Performance," contained a strongly negative overall evaluation. The Bank contends that the Applicant's mediocre and negative ratings were fully justified by the quality of his work and behaviors as reasonably evaluated by his supervisor and by others with whom he worked.

39. The standard of review by the Tribunal is limited, as both parties agree. The Tribunal has stated, in *Desthuis-Francis*, Decision No. 315 [2004], para. 19, that "[t]he evaluation of a staff member's performance is in principle a matter within the Respondent's discretion. What constitutes satisfactory performance is to be determined by management ... and management's appraisal in this respect is final absent an abuse of discretion." Moreover, as held in *Zwaga*, Decision No. 225 [2000], para. 32:

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. As the Tribunal held in *McNeill*, Decision No. 157 [1997], paragraph 34: "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."

On the other hand, the Tribunal has noted: "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." *Lysy*, Decision No. 211 [1999], para. 68.

40. The Applicant is correct in saying that there were many positive comments about both his work and his behaviors in both interim OPEs. But he tends to read comments as too uniformly laudatory. It may be true that judging simply by the number of comments, the good outnumber the bad. But it is necessary to take the negative comments seriously, based particularly on their level of detail and corroboration, and one must also, of course, give weight to the negative appraisals coming from the Applicant's supervisor herself. As noted earlier, she was inexcusably tardy in communicating these to the Applicant. Her written comments during the first interim OPE period, July 2002 to January 2003, were very few and quite positive. Oral communications during that period may well have been more critical, and certainly the record shows – both in contemporaneous written comments and in testimony before the Appeals Committee – that several persons who played significant roles in working with the Applicant had materially negative comments mixed among the good.

41. In the view of the Tribunal, most harmful to the Applicant's claim of abuse of discretion were the comments made by team leaders and other responsible individuals with respect to his work on the four tasks that were identified very precisely in the final first interim OPE: (i) the Iran CFAA Initiating Concept Memorandum, (ii) the

Iran ROSC Initiating Concept Memorandum, (iii) the Algeria Country FM plan, and (iv) the Tunisia Country FM plan. As already noted, it is disturbing to the Tribunal that these assignments were reduced to writing only on 15 July 2003 while they provided for a completion date of 30 September 2003. Yet it seems that the Applicant had partially undertaken those tasks before, and he apparently does not complain that the time afforded him was too short. Comments from those with whom he worked on each of those projects were forwarded to the Applicant and his supervisor, and they were overall quite negative. Among other things, these evaluative comments recorded that the Applicant's work was incomplete, difficult to understand, and lacking central technical points and other essential elements. Rather than attempt to summarize or paraphrase these comments in her draft second interim OPE, the Applicant's supervisor simply set forth quotations at length. The Applicant fails to give much weight to these appraisals.

42. Although it might be reasonably argued that the Applicant's supervisor glossed over too quickly the positive comments about his work – which were significant in number – the Tribunal must defer to her weighing of the respective evaluations, both positive and negative, provided there is credible substantiation. The Tribunal accepts that such is the case here. This is particularly the case with respect to the evaluation of his technical proficiency in the FM field.

43. What does concern the Tribunal, however, are the behavioral ratings given by the supervisor in both the first and second interim OPEs. As set forth on the OPE form, the "Behavioral Assessment" requires a staff member's supervisor to rate him or her on several qualities: client orientation, drive for results, teamwork, and learning and knowledge sharing. As distinguished from the evaluations of the Applicant's work performance in the field of financial management, discussed above, the evaluations of his behavioral attributes, at least from persons other than his supervisor, are unqualifiedly positive and in some cases very enthusiastic.

44. In the final draft of the first interim OPE, the Applicant's supervisor stated:

The many colleagues who commented on his performance as a team member or peer mention that he is a very pleasant person to work with, extremely respectful, serious, expressing willingness to help, however the results show a sort of disconnect between what is expected and what is delivered. They pointed out a need for [the Applicant] to reach a better understanding of the issues before starting expressing his views and to be clear in conveying his messages. It was reported that most of the time the team faced difficulties to understand his ideas, comments or analysis.

The latter observations appear to the Tribunal to move from comments about his behaviors to comments about his work performance. The first sentence is essentially all that the supervisor has to say about his behaviors; it reflects what was said by others with whom the Applicant worked, and it is plainly positive. Yet the Applicant was given three "Partially Successful" behavioral ratings out of four. Curiously, in the extensive 22 April 2004 memorandum furnished to the Applicant in lieu of his second interim OPE, the supervisor stated: "The feedback received from different TTLs covered tasks that I have already assessed in the first interim OPE. I reported these positive feedbacks in the interim OPE. The behavior was at that time fully satisfactory." That final statement is altogether inconsistent with the ratings actually given in the first interim OPE.

45. At least as troubling to the Tribunal is the fact that the supervisor's draft of the second interim OPE, covering the period January to September 2003, sets forth three behavioral ratings of "Partially Successful" and one of "Unsuccessful." These ratings are unexplained by the supervisor, who set forth quotations from others regarding the four tasks identified in the first interim OPE. These comments stated little if anything about the Applicant's behaviors, and certainly nothing so uncomplimentary as to warrant the behavioral ratings tentatively given to him. It is true that the second interim OPE was apparently never put into final form, and was replaced by the supervisor's written memoranda of March and April 2004. Even so, comments from several staff members, contemporaneous with the preparation of those memoranda, concerning the Applicant's behaviors were uniformly and strongly positive. These are not reflected in either of those two 2004 memoranda.

46. The Tribunal concludes that the behavioral ratings given to the Applicant in his OPEs and related memoranda are unsubstantiated and arbitrary. It also concludes, however, that the arbitrariness of these

ratings should not obscure the negative comments made by the supervisor and others about the Applicant's technical proficiency – in great detail and with substantial support – in his OPEs and in the two 2004 memoranda.

(iv) *The Applicant's Due Process Rights*

47. The Applicant claims that the Bank during the probationary period denied his rights to due process in several respects: (i) the right to be given adequate warning about deficiencies in work; (ii) the right to adequate opportunities to defend himself; and (iii) the right to receive adequate guidance and training. These are indeed the elements of due process that have been prescribed for probationary staff members by the Tribunal in earlier judgments. See, e.g., *Lusakueno-Kisongele*, Decision No. 327 [2004], paras. 46-49; *Zwaga*, Decision No. 225 [2000], paras. 35-38. The Bank, on the other hand, insists that the Applicant was provided from the outset with sufficient guidance, comments regarding his work problems, and suggested strategies for improvement.

48. Although there is doubt that the Applicant's supervisor warned him of deficiencies during his first six months of service, she began to communicate such cautionary comments to him by fairly regular e-mails beginning in January 2003. For example, in January 2003, she provided the Applicant with a model to be used for work on a Country FM Plan. In February, she reviewed and gave advice on the Iran Earthquake Emergency Recovery Project (Iran EERP). In March, she provided further detailed comments on the Iran EERP. In April, she criticized and advised on the Applicant's work relating to various projects in Iran, and commented upon his work relating to his project in Algeria. In May, she provided work guidelines for various projects. On 12 June 2003, she met with him to discuss his work and performance, and on 15 July 2003, she presented her first written criticisms in the draft first interim OPE.

49. In addition, the Applicant learned of criticism from other staff members with whom he had significant work relations. For example, in early February, at the outset of the second interim OPE period, an Advisor, FM Board, sent an e-mail stating among other things that a major document prepared by the Applicant "would need to be significantly changed in style and tone to become an adequate CFAA." In late March, the Lead Economist for Public Sector Issues sent an e-mail praising the Applicant's behavior but criticizing his work with respect to various projects in Iran, noting in particular a lack of creativity and analysis, and the Lead Economist's difficulties in understanding the Applicant's terminology.

50. In sum, the Tribunal concludes that there were many warnings, from his supervisor and others, that the Applicant's performance – at least apart from his behaviors – was deficient, and that he was given suggestions and instructions about what needed to be done to improve. Moreover, the record reveals a pattern of contemporaneous responsive statements by the Applicant disputing the criticisms, most commonly directed to his supervisor. It must be reiterated, however, that the principal intended vehicle for critical comments and for his own defense was the first interim OPE, which should have been prepared by his supervisor, reasonably soon after the end of that evaluation period in January 2003. Yet it was not discussed with him until June, and put into writing by his supervisor – so that he could respond in full – only on 15 July 2003. This resulted in an improper compression of the first and second interim evaluation periods, in the form of a 30 September 2003 deadline to complete four enumerated tasks. In the first interim OPE, the Applicant did take issue, in writing and at length, with his supervisor's criticisms. That opportunity should have been provided long before. See *Lusakueno-Kisongele*, Decision No. 327 [2004].

51. With respect to guidance and training, the Tribunal has already noted in paragraphs 48- 49 *supra* that the supervisor and other senior staff at the Bank provided the Applicant with advice and guidance from January 2003 to July 2003. In addition, between July 2003 and September 2003 the supervisor provided the Applicant with additional guidance regarding the four tasks he was expected to complete by 30 September 2003. The record also shows that the supervisor continued to give advice to the Applicant until March 2004.

52. The Applicant has not clearly articulated how and why the guidance provided by management was insufficient. In *McNeill*, Decision No. 157 [1997], para. 47, the Tribunal observed:

A probationer aged 49, with 25 years of professional experience, a good academic background and a good knowledge of Brazil and of the Portuguese language was not expected to require the same degree of training and guidance as an inexperienced newcomer.

In his application, the Applicant pointed out that he had strong academic background and some 30 years of professional experience, including experience in Bank-funded projects, when he joined the Bank. He noted that "I was the only Sr. Financial Management Specialist (FMS) in MNA with background in economics and statistics, and, hence, best qualified to work on the FM aspects of [Economic and Sector Work]. I was the only Farsi-speaking Sr. FMS in the region with FM experience in Iran, and, hence, best qualified to be in charge of the Iran FM work." In addition, it appears that the Applicant did not accept the supervisor's advice about taking training seriously. For example, in November 2003, when the supervisor inquired about the learning activities that the Applicant would like to undertake, the Applicant responded "I was confident and competent in my own field. ... I have all the skills required for undertaking the proposed activities."

53. Based on the Applicant's background and the circumstances of the present case, the Tribunal concludes that the guidance provided by the supervisor was reasonably adequate and thus did not constitute an abuse of discretion.

(v) *The Signatory of the Non-confirmation Decision*

54. Staff Rule 4.02, para. 3.03, provides that the decision not to confirm a probationary employee "shall be made by the staff member's Vice President." The Applicant points to the 22 April 2004 memorandum from the Director of MNACS which declared that "[w]hile there are some areas where you have gotten very positive feedback, namely the feedback from clients on teamwork, I have determined that your technical performance is not at the level required of a level GG Sr. Financial Management Specialist" and that "your appointment with the World Bank Group will terminate on July 8, 2004." The Applicant contends on that basis that the Bank ignored the terms of the pertinent Staff Rule by allowing the Director, MNACS, to decide against his confirmation.

55. The Tribunal rejects this argument. Although the Applicant's supervisor and her manager, the Director of MNACS, consulted at length and reached a conclusion against the Applicant's confirmation, the Director conveyed that recommendation to the Vice President of MNA. It was the latter who ultimately decided not to confirm.

(vi) *Pre-employment Promise Allegedly Made to the Applicant*

56. In June 2002, at the time the Applicant was recruited for an FM position with the Bank, he contends that the Senior Recruitment Officer told him that the risk of non-confirmation in his case was negligible. He claims that he relied upon this statement in good faith when he embarked upon his probationary period, and he invokes the Tribunal's decision in *Bigman*, Decision No. 209 [1999], paras. 21-22, where the applicant relied upon assurances, given by a manager having at least apparent authority to give them, to the effect that his appointment would be regularized after one year if his performance was satisfactory. The Tribunal found that "[t]he promise was conditional on the Applicant's satisfactory performance. His performance was not only satisfactory but commended throughout the period of his appointment, as is clearly evidenced by the record." There was a "breach of a legally valid promise, the conditions of which had been properly met."

57. The circumstances in the instant case are fundamentally different. For one thing, although the Bank clearly mishandled many aspects of the Applicant's evaluation, as found above, there were genuine problems with his work performance and technical proficiency, so that the decision against confirmation was not unreasonable. More important, the Senior Recruitment Officer gave no assurance that could reasonably be viewed as of a contractual nature. Even accepting the Applicant's version of events, the Senior Recruitment Officer stated only that the risk of non-confirmation was negligible. That can only be viewed as in the nature of a prediction rather than a guarantee. It was accurate at the time it was made, given the statistical likelihood that a person with considerable experience in the financial management field would, if performing up to his abilities, be confirmed.

Given this statement about risk, the Applicant should reasonably have understood that he could possibly have fallen short, and in fact he did. That does not constitute a breach of contract.

### *Conclusion*

58. The substantive question before the Tribunal was whether management had a proper basis to conclude that the Applicant's "technical performance [was] not at the level required of a level GG Sr. Financial Management Specialist," which resulted in non-confirmation. The Tribunal concludes that there is sufficient evidence in the record for it to be satisfied that the assessment of the Applicant's technical performance by management was based on facts, and was not arbitrary. In reaching this conclusion, the Tribunal has considered the following factors:

(i) "[r]egarding 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" (*McNeill*, Decision No. 157 [1997], para. 34);

(ii) "management has a very broad discretion to determine the suitability of a probationary employee, and it is not for the Tribunal to determine whether too much was expected of the Applicant" (*Khan*, Decision No. 293 [2003], para. 72);

(iii) under Staff Rule 4.02, para. 3.02, it is the Applicant's supervisor who "shall determine [the Applicant's] suitability or non-suitability for confirmation," and her negative assessment of the Applicant's technical performance is stated in detail in the record;

(iv) the supervisor's negative assessment of the Applicant's technical performance was corroborated by others, particularly by team leaders and other responsible individuals who reviewed the four important tasks that the Applicant was expected to complete by the end of September 2003; and

(v) although a number of staff members provided positive feedback about the Applicant, this feedback was for the most part limited to the Applicant's behavior, and did not focus on the question of technical performance.

59. Nevertheless, the Tribunal concludes that the Respondent's treatment of the Applicant during the probationary period was wholly unsatisfactory in the following respects:

(i) the Respondent failed to provide the Applicant with a written assessment of his work at the end of each six months of service;

(ii) there was a long delay in the completion of the first interim OPE – it was not put into final form until one full year of service had passed and the reviewing manager took another five months to evaluate and sign it;

(iii) although the supervisor raised her concerns about the Applicant's performance to a Senior HR Officer as early as in January 2003, she did not promptly bring these concerns to the Applicant's attention, and she waited until June to inform him orally and until July to inform him in written form; and

(iv) the behavioral ratings given to the Applicant in his OPEs and related memoranda were unsubstantiated and arbitrary.

Based on the above, the Tribunal concludes that the treatment of the Applicant fell far short of the standards of the Staff Rules and the Applicant's due process rights. This has effectively caused him harm for which he is entitled to be compensated.

### **Decision**

For the reasons stated above, the Tribunal hereby orders that:



(i) the Respondent shall pay compensation to the Applicant, including costs, in the amount of \$100,000 net of taxes; and

(ii) all other claims are dismissed.

/S/ Jan Paulsson  
Jan Paulsson  
President

/S/ Nassib G. Ziadé  
Nassib G. Ziadé  
Executive Secretary

At Paris, France, 28 September 2006