

ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

JUDGMENT No. 2007-2

Ms. V. Shinberg, Applicant v. International Monetary Fund, Respondent

Introduction

1. On January 22, 23 and 24, 2007, the Administrative Tribunal of the International Monetary Fund, composed of Judge Stephen M. Schwebel, President, and Judges Nisuke Ando and Michel Gentot, Associate Judges, met to adjudge the case brought against the International Monetary Fund by Ms. Vivian Shinberg, a staff member of the Fund.
2. Applicant challenges the Fund's policies on grading and promotion that effectively preclude promotion of staff beyond Grade A5 as long as they are serving in the Secretarial Support Group ("SSG") and the application of these policies in her individual case. Applicant was assigned to SSG following a work-related injury and maintains that her medical condition restricted her ability to obtain positions outside of SSG, while at the same time the Fund's policies on grading and promotion precluded her from attaining a promotion while she remained in SSG. Applicant contends that the Fund's decision to apply these policies in her case was arbitrary and capricious, impermissibly discriminated against her on the basis of her work-related injuries, and was inconsistent with the Fund's promotion criteria. Applicant additionally asserts that Respondent abused its discretion by failing to transfer her out of SSG to a Fund department in which she could have attained a higher-graded position.
3. Respondent, for its part, maintains that staff serving in SSG are subject to the Fund's policies governing promotion and job classification applicable to all staff. The Fund maintains that Staff Assistant positions in SSG are properly classified at Grades A4 and A5, and therefore there are no promotion opportunities within SSG once a staff member has attained Grade A5. The Fund further asserts that Applicant's work-related injuries did not entitle her to exceptional treatment. Finally, Respondent maintains that the Fund made every effort to provide Applicant with suitable temporary assignments and on several occasions offered her opportunities to pursue positions outside of SSG, which she declined.

The Procedure

4. On August 23, 2005, Ms. Shinberg filed an Application with the Administrative Tribunal. Pursuant to Rule VII, para. 6¹ of the Tribunal's Rules of Procedure, the Registrar advised

¹ Rule VII, para. 6 provides in pertinent part:

"If the application does not fulfill the requirements established in Paragraphs 1 through 5 above, the Registrar shall advise the Applicant of

Applicant that the Application did not fulfill all of the requirements of that Rule. Accordingly, Applicant was given fifteen days in which to correct the deficiencies. The Application, having been brought into compliance within the indicated period, is considered filed on the original date.

5. The Application was transmitted to Respondent on September 6, 2005. On September 12, 2005, pursuant to Rule IV, para. (f),² the Registrar circulated within the Fund a notice summarizing the issues raised in the Application. Respondent filed its Answer to Ms. Shinberg's Application on October 21, 2005. Pursuant to Rule VIII, para. 4,³ the Registrar advised Respondent that the Answer did not fulfill all of the requirements of that Rule, and, accordingly, Respondent was given fifteen days in which to correct the deficiencies. The Answer, having been brought into compliance within the indicated period, was transmitted to Applicant on November 9, 2005. On December 14, 2005, Applicant submitted her Reply. The Fund's Rejoinder was filed on January 13, 2006.

Request for Production of Documents

6. Pursuant to Rule VII, para. 2(h)⁴ and Rule XVII⁵ of the Tribunal's Rules of Procedure, in her Application, Ms. Shinberg made the following request for production of documents:

the deficiencies and give him a reasonable period of time in which to make the appropriate corrections or additions. If this is done within the period indicated, the application shall be considered filed on the original date."

² Rule IV, para. (f) provides:

"Under the authority of the President, the Registrar of the Tribunal shall:

...

(f) upon the transmittal of an application to the Fund, unless the President decides otherwise, circulate within the Fund a notice summarizing the issues raised in the application, without disclosing the name of the Applicant, in order to inform the Fund community of proceedings pending before the Tribunal; ..."

³ Rule VIII, para. 4 provides:

"Upon ascertaining that the formal requirements of this Rule have been met, the Registrar shall transmit a copy of the Fund's answer to the Applicant. If these requirements have not been met, Rule VII, Paragraph 6 shall apply *mutatis mutandis* to the answer."

⁴ Rule VII, para. 2(h) provides:

"2. An application instituting proceedings shall be submitted to the Tribunal through the Registrar. Each application shall contain:

...

(h) any request for production of documents as provided by Article X of the Statute and Rule XVII below."

“Any and all documents evidencing a policy against promoting Staff who are members of the SSG, including, but not limited to documents evidencing the date the policy was adopted, by which authority it was adopted, and any minutes of the meetings leading up to the alleged adoption of this policy.”

7. In accordance with Rule XVII and Rule VIII, para. 5⁶, Respondent had the opportunity to present its views on the request. The Fund maintained that there exists no “non-promotion policy” applicable to staff who are members of SSG, but rather that such staff members are subject to the general policies governing promotion and job classification applicable to the staff at large. Respondent included these policies as attachments to its Answer.

8. On November 9, 2005, following consideration of the views of the parties, the Tribunal decided to deny Applicant’s request for production of documents on the ground that Applicant had not proffered any evidence suggesting that the Fund had in its possession additional responsive documents and, accordingly, Applicant had not shown that she had been denied access to requested documents by the Fund, as required by Rule XVII, para. 1. *See Ms. “W”*,

⁵ Rule XVII provides:

“Production of Documents

1. The Applicant, pursuant to Rule VII, Paragraph 2(h), may request the Tribunal to order the production of documents or other evidence which he has requested and to which he has been denied access by the Fund. The request shall contain a statement of the Applicant’s reasons supporting production accompanied by any documentation that bears upon the request. The Fund shall be given an opportunity to present its views on the matter to the Tribunal, pursuant to Rule VIII, Paragraph 5.
2. The Tribunal may reject the request if it finds that the documents or other evidence requested are irrelevant to the issues of the case, or that compliance with the request would be unduly burdensome or would infringe on the privacy of individuals. For purposes of deciding on the request, the Tribunal may examine *in camera* the documents requested.
3. The Tribunal may, subject to Article X, Section 1 of the Statute, order the production of documents or other evidence in the possession of the Fund, and may request information which it deems useful to its judgment, within a time period provided for in the order. The President may decide to suspend or extend time limits for pleadings to take account of a request for such an order.”

⁶ Rule VIII, para. 5 provides:

“The Fund shall include in the answer its views on any requests for production of documents, oral proceedings, or anonymity that the Applicant has included in the application.”

Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2005-2 (November 17, 2005), para. 14.

Request for Oral Proceedings

9. In her Application, Applicant requested oral proceedings, pursuant to Rule VII, para. 2(i)⁷ and Rule XIII⁸ on the ground that the Grievance Committee did not hold hearings on the merits

⁷ Rule VII, para. 2(i) provides:

“An application instituting proceedings shall be submitted to the Tribunal through the Registrar. Each application shall contain:

...

(i) any request for oral proceedings as provided by Article XII of the Statute and Rule XIII below.”

⁸ Rules XIII provides:

“Oral Proceedings

1. Oral proceedings shall be held if, on its own initiative or at the request of a party and following an opportunity for the opposing party to present its views pursuant to Rules VII–X, the Tribunal deems such proceedings useful. In such cases, the Tribunal shall hear the oral arguments of the parties and their counsel or representatives, and may examine them. In accordance with Article XII of the Statute, oral proceedings shall be open to all interested persons, unless the Tribunal decides that exceptional circumstances require that they be held in private.

2. At a time specified by the President, before the commencement of oral proceedings, each party shall inform the Registrar and, through him, the other parties, of the names and description of any witnesses and experts whom the party desires to be heard, indicating the points to which the evidence is to refer. The Tribunal may also call witnesses and experts.

3. The Tribunal shall decide on any application for the hearing of witnesses or experts and shall determine, in consultation with the parties or their counsel or representatives, the sequence of oral proceedings. Where a witness is not in a position to appear before the Tribunal, the Tribunal may decide that the witness shall reply in writing to the questions of the parties. The parties shall, however, retain the right to comment on any such written reply.

4. The parties or their counsel or representatives may, under the direction of the President, put questions to the witnesses and experts. The Tribunal may also examine witnesses and experts.

(a) Each witness shall make the following declaration before giving evidence:

‘I solemnly declare upon my honor and conscience that my testimony shall be the truth, the whole truth and nothing but the truth.’

(continued)

of the issues now before the Tribunal, as it was agreed between the parties to proceed directly to the Tribunal on the basis that her claim involved a challenge to Fund policies.⁹ Therefore, contends Applicant, “[r]eceiving testimony from Ms. Shinberg and even hearing legal argument from counsel would better develop the record and be helpful to the Tribunal in rendering a fair decision.” In her Reply, Applicant renews her request for oral proceedings in view of “significant factual disputes.” In particular, asserts Applicant, it would be relevant and useful for the Tribunal to hear testimony from Human Resources Department (“HRD”) staff concerning the administration of “certain policies and procedures and allowing exceptions thereto,” as well as Applicant’s testimony concerning her duties during her assignment in the Joint Bank-Fund Library and other long-term assignments, as well as accommodations provided by the Fund in view of her injuries.

10. Respondent, having had the opportunity to present its views in accordance with Rule VIII, para. 5 and Rule XIII, opposes Applicant’s request for oral proceedings. In the Fund’s view, Applicant’s challenge is “... in essence to the legality of the Fund’s promotion and grading policies,” which are set forth in the written record before the Tribunal. The Fund therefore contends that hearing testimony from Applicant or legal arguments from counsel is not warranted. The Fund further contends that Applicant has not identified any factual questions that could not be addressed adequately by written submissions, and that Applicant’s duties during her temporary assignments are evident from her Annual Performance Reports (“APRs”) contained in the record and are not in dispute.

11. In accordance with amended Rule XIII of the Tribunal’s Rules of Procedure, “[o]ral proceedings shall be held if, on its own initiative or at the request of a party following an opportunity for the opposing party to present its views pursuant to Rules VII – X, the Tribunal deems such proceedings useful.”

12. In considering the request for oral proceedings, it may be observed that Applicant challenges not only an alleged policy but particularly its application to the circumstances of her employment. Respondent concedes as much by outlining the issues for the Tribunal’s review as: “(i) whether the Fund’s promotion and grading policies are invalid; (ii) whether those policies

(b) Each expert shall make the following declaration before giving evidence:

‘I solemnly declare upon my honor and conscience that my testimony will be in accordance with my sincere belief.’

5. The President is empowered to issue such orders and decide such matters as are necessary for the orderly disposition of cases, including ruling on objections raised concerning the examination of witnesses or the introduction of documentary evidence.

6. The Tribunal may limit oral proceedings to the oral arguments of the parties and their counsel or representatives where it considers the written evidentiary record to be adequate.”

⁹ See *infra* The Channels of Administrative Review.

have been improperly applied to Applicant; and (iii) whether, as Applicant requests, she should be afforded treatment not available to other staff members and be promoted on an exceptional basis without regard to the Fund's promotion policies."

13. In Mr. "O", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2006-1 (February 15, 2006), para. 13, in denying the Applicant's request for oral proceedings, this Tribunal noted that although the Grievance Committee proceedings did not involve a full evidentiary hearing, they did offer the Applicant "the opportunity to set out his understanding of the facts in dispute." Similarly, in the present case, the Grievance Committee hearing on the Fund's Motion to Dismiss provided Applicant an opportunity to offer her account of relevant facts and her counsel an opportunity to present oral arguments. Furthermore, Applicant has not identified any factual issues that have not been adequately developed in the written submissions.

14. For the foregoing reasons, the Tribunal decides not to hold oral hearings.

The Factual Background of the Case

15. The relevant factual background may be summarized as follows.

16. Applicant began her employment with the Fund in 1976, when she was appointed to the staff as a clerk/typist at Grade A (equivalent to current Grade A2); later that year, her title was changed to Secretary. In 1977, Applicant was promoted to Grade B (equivalent to current Grade A4) and, in 1979, her job title was changed to Bilingual Secretary in one of the Fund's departments. In January 1986, following the Fund-wide Job Grading Exercise, Applicant's grade was changed to A5 in recognition of her level of experience. Ms. Shinberg remained at Grade A5 until beginning her separation leave from the Fund for medical reasons in 2006.

17. In May 1987, Applicant suffered a work-related injury when a file cabinet fell and struck her back, for which she received Workers' Compensation benefits, including coverage of her medical expenses. In order to accommodate work-related medical restrictions resulting from her injury, including a requirement of part-time work, Applicant was formally assigned¹⁰ to what later became known as the Secretarial Support Group ("SSG"),¹¹ which provides temporary assistants or "floaters" to departments throughout the Fund.

18. Accordingly, from July 1987 until February 1988, Applicant worked on a part-time basis in SSG. On February 8, 1988, according to a memorandum prepared by an official of the Staff Development Division of the Administration Department (subsequently the Human Resources Department ("HRD")), Applicant met with him and another representative of the Fund in order to "understand Mrs. Shinberg's current situation and ability to work, and explore with her

¹⁰ According to her 1987 Annual Performance Report, Applicant had begun working as a supernumerary in SSG shortly before the accident. At the Grievance Committee hearing on the Motion to Dismiss, Applicant stated that it had not been her intention to stay in SSG but that as a result of her injury she became "stuck" there.

¹¹ The group is now called Special Office Support ("SOS").

possible options for future assignments.” According to the memorandum, Applicant’s medical restrictions and potential work assignments were considered as follows:

“Ms. Shinberg explained that as a result of her back injury she is unable to sit for more than 2-3 hours in a row at the typewriter. She said that ideally she needs a ten minute break after one hour of secretarial work at a desk. ...

Ms. Shinberg said that [a Fund official] had told her that the Fund would take ‘exceptional’ steps to deal with her ‘exceptional’ situation. She understood this as meaning that the Fund would be prepared to look at other job streams outside the secretarial one and provide any training which might be required. She mentioned, for example, proofreading positions Ms. [] and I indicated that we would look at positions on a Fund-wide basis at Mrs. Shinberg’s current level (A5); that an assignment would not preclude the future possibility of a promotion, but that the search would focus on jobs at her current grade level. We added that the Fund would be prepared to provide training which might be required to increase her versatility at this level consistent with Fund policies, but not to embark on a major retraining program.”

As reflected in the memorandum, it was agreed that efforts to identify a suitable position for Applicant would involve exploring the possibility of assigning her to another position through the Vacancy List and of “loaning” her from SSG to a Fund department to assess her suitability for potential openings in that department, that another meeting would be held shortly to review progress in the job search, and that Applicant would avail herself of Fund training opportunities to sharpen her technical skills in the meantime.

19. Applicant’s work history from the time of her 1987 injury through 2004, including the evolution of her medical condition, associated work restrictions and the respective roles of Applicant and the Fund in responding to these restrictions, is chronicled in Ms. Shinberg’s Annual Performance Reports (“APRs”), which have been included in the record before the Tribunal.

20. In her 1988 APR, Ms. Shinberg’s supervisor noted Applicant’s “continuing need for absences from duty to attend medical therapy as a result of a job-related injury.” The reviewing officer observed: “Clearly, the existing situation serves neither the Fund’s nor Mrs. Shinberg’s best long-term interest. It is essential, therefore, that we review all the circumstances with the aim of taking whatever steps are necessary to resolve the situation.” The 1988 APR further noted that the Administration Department proposed to Applicant a lateral transfer to a permanent position in one of the Fund’s departments, which Applicant declined:

“A recent effort to resolve this ‘temporary’ work situation by proposing consideration of a lateral transfer to a permanent staff position in [one of the departments] was declined by Mrs. Shinberg as she perceived it a ‘difficult position.’”

With reference to this comment, Applicant made the following annotation on her APR:

“This was a clerical position, well below my status as bilingual secretary. This position was located in the basement of the building, plus the supervisor had the reputation of being quite unreasonable. After a while this assignment would have caused me, I believe, all kinds of problems, since at the time I had to go to therapy quite often. Anyway I had no intention of accepting such an undesirable position.”

The 1988 APR also reflects the following additional comment by Applicant’s supervisor:

“Mrs. Shinberg wished to disagree with the implication in Section 4A above that she was suitable for the ... position and felt strongly that such a proposal would have done nothing to solve her problem.”

Applicant remained in SSG.

21. For approximately three years following her 1987 injury, Applicant’s medical condition and its effect on her work capabilities appear to have remained problematic. In her 1989 APR, Ms. Shinberg noted that the injury “continues to restrict my ability to put in a normal 40-hour work week.” Her supervisor noted, however, that as of March 29, 1989 Applicant was “now available for assignment on a full-time basis as required.” Nonetheless, on her 1990 APR, Applicant cited “a very bad recurrence of back problems,” requiring her to “miss quite a bit of work due to doctors’ appointments and therapy relating to my back.” Accordingly, she concluded: “...I feel that the least that the Fund can do for me at this stage is to provide me with continuous work. I do not want to find myself once again in a position where I am unable to receive assignments and be stuck all day with nothing to do. This cannot be good for me physically, morally, or in any other way; at the same time it is the Fund’s loss as well.” The overall assessment by Applicant’s supervisor for 1990 reflected the following observation on her performance: “Given the opportunity and a simultaneous respite from the distress her back problem sometimes causes, Mrs. Shinberg has admirably demonstrated an interest, competence, enthusiasm and a dependability to any assignment.” The reviewing officer advised that “Mrs. Shinberg should be given longer assignments whenever possible.” In 1990, Applicant’s title was changed to Staff Assistant, while her grade remained at A5.

22. Applicant’s Annual Performance Reports for 1991 and 1992 reflect what appears to be an improved level of functioning, as well as discussion of her potential to move to a position outside of SSG. Applicant undertook two mission assignments during these years, and her assignments through SSG included work in the Immediate Office of one of the Fund’s departments. In 1991, her SSG supervisor opined that “Mrs. Shinberg has benefited from the stability of several longer assignments,” and that she “... utilizes her now considerable Fund experience in the dispatch of her assignment duties.” As to their annual performance discussion, the supervisor commented, “Mrs. Shinberg also noted that she was planning to continue her efforts to find a permanent position and would actively pursue this through the vacancy list procedures. No doubt, with her

experience, she should find success soon.” Similarly, Applicant remarked on her 1991 APR: “I hope that in 1992 I will get more exposure in different departments, where perhaps a permanent position within or higher grade might materialize.” An evaluation by a departmental supervisor under whom Ms. Shinberg worked during 1992 observed that in an assignment that “require[d] the ability to work independently and to manage complex tasks,” Ms. Shinberg “showed an unusual degree of initiative and dedication.”

23. Applicant’s APRs reflect that from November 1994 until May 1997, Ms. Shinberg worked on a part-time basis. There is no indication in the record that this arrangement was dictated by medical restrictions or that Applicant was dissatisfied with her assignment in SSG. Her 1994 APR noted that “[i]n November Mrs. Shinberg was granted permission to work part-time for a specific period of time. This schedule has precluded her participation in longer assignments, but she has remained busy in day-to-day assignments. Once she returns to full-time status, she should indicate if her interest remains in finding a longer term assignment.” Applicant’s supervisor summarized their performance discussion, noting that “[s]he is appreciative that her request for part-time status was granted,” and Applicant commented: “Again, I would like to thank the Fund for allowing me the opportunity to work part-time, and look forward to my full-time career in the future.” In 1994, Applicant commented that “[o]verall I enjoyed working in the pool.” Her supervisor’s assessment for 1994 characterized Applicant as a “seasoned, experienced floater who knows Fund procedures well. ... [S]he is able to work well under pressure in demanding divisions of heavy departments....” On her 1995 APR, Ms. Shinberg remarked: “I have enjoyed working part-time and wish to continue indefinitely.”

24. For approximately six months spanning 1996-1997, Applicant undertook a “TAP”¹² assignment as a Special Projects Assistant in one of the Fund’s departments, also at Grade A5. She noted on her 1996 APR: “As it has been pointed out to me that there are administrative difficulties related to my part-time status in [that department], I would like to return to SSG at the conclusion of my TAP assignment, with the understanding that it will be on a full-time basis. I will continue to look for part-time or full-time positions in the Fund, and in the meantime I am looking forward to staying in the Support Group for the foreseeable future.” In her overall assessment for 1996, Applicant’s supervisor noted that “... it is expected that Mrs. Shinberg’s experience and talents will be more fully utilized upon her return to the Support [Group] on a full-time basis.” She added: “However, I’d like to reiterate that Mrs. Shinberg continue seeking other positions outside the Pool where she would have the opportunity for growth and find responsibilities commensurable with her experience and skills. Mrs. Shinberg has often expressed her desire to be assigned to departments where she would be given more meaningful work.” Her supervisor further noted that “the changing role and vision of SSG would not be conducive to part-time work on an indefinite basis.” Applicant commented: “Hopefully I will find a suitable and attractive post some place else in the Fund, but if I don’t I will be satisfied to continue in my present position.”

¹² As currently described on the Fund’s intranet: “The Temporary Assignment Program (TAP) gives staff the opportunity to broaden their experience and skills by taking on new duties and responsibilities on a short-term basis. The assignment may be in a staff member’s current department or in a different department.” See <http://www-intapps.imf.org/HRW/cmt/t1/pageView.cfm?menu=1562&page=1562> (Posted on 8/14/06).

25. In May 1997, Ms. Shinberg returned from her TAP to work in SSG on a full-time schedule. In August of that year, however, Applicant sustained a second work-related injury when she slipped and fell on the Fund cafeteria floor, for which she also received Workers' Compensation benefits. From the time of her 1997 injury until she began her separation leave from the Fund in 2006, it appears that various medical conditions hampered Applicant's work ability and occasioned significant periods of absence, leading Applicant to comment on her 2004 APR that she had "essentially [been] away from the Fund since 1999." According to Respondent, since 1999, Applicant continued to receive full-time compensation through a combination of administrative leave with pay, accrued sick leave, extended sick leave, and Workers' Compensation benefits. Respondent further asserts, and Applicant has not disputed, that when no suitable assignments were available, Applicant was not required to report for work, while continuing to receive full-time compensation and benefits.

26. In May 1999, Applicant began a period of administrative leave with pay during which time the Fund's Human Resources Department sought a fitness-for-duty evaluation from the Joint Bank-Fund Health Services Department ("HSD"). On September 30, 1999, the Assistant Director of HRD informed Applicant by letter that her administrative leave with pay would end as of October 1, 1999, in light of her fitness for duty with continuing medical restrictions, in particular, part-time work in a stable environment:

"[I]t is HSD's opinion that you are fit for duty to work in a part-time position until further notice. HSD also has informed us of the [independent medical] examiner's opinion that you would benefit from a stable work environment. ...

We are presently looking for possible part-time assignments for you, including job sharing arrangements. It may take some time until we can identify such a position and make the necessary arrangements, but in the meantime we expect you to report for work in the SSG on a part-time basis. We recommend that you make an appointment with Mrs. [] on return to work to discuss with her options for part-time assignments."

Similarly, on October 5, 1999, an HRD official documented in a "Memorandum for Files" a meeting of the same date in which Applicant was informed that

"... on the basis of the medical report we had received that indicated she needed to work in a more stable environment, we were looking at possibilities of long-term part-time work. Initially, she will be stationed in the Support Group while the search takes place. ... Mrs. [] cautioned that part-time positions were few in the Fund, and finding a suitable position could be difficult."

The memorandum reflects that Applicant agreed that she would benefit from training to update her skills after her prolonged absence.

27. Accordingly, in late 1999, Ms. Shinberg returned to part-time status in SSG. In January 2000, she took up an assignment in the Joint Bank-Fund Library. On her 1999 APR, Applicant recorded that she "...welcome[d] the opportunity that has been granted me recently to work on a long-term basis in the Joint Library. ... I have confidence that in the year 2000, HRD will finally succeed in its efforts to find me a permanent part-time accommodation."

28. The long-term viability of the Library assignment, however, and the respective undertakings of Applicant and the Fund to seek an ongoing arrangement to accommodate her medical constraints appeared to remain uncertain. In the "overall assessment" section of the 1999 APR, a Fund official noted: "While HRD will continue to make concerted efforts to find a part-time position for Mrs. Shinberg, it is incumbent on her to seek and apply for part-time positions that are advertised. Since there are few part-time positions in the Fund, finding a suitable position has proven to be difficult. Every effort will be made to continue her assignment in the Joint Library depending on the available budgetary resources." Ms. Shinberg, for her part, responded: "Although I intend to apply for suitable permanent part-time positions that become available, it is my understanding that the Medical Department has requested HRD to search for a more stable part-time accommodation for me, which also accommodates my medical condition. Due to that fact, I am surprised to learn that my position in the Joint Library is contingent on available budgetary resources." On Applicant's 2000 APR, the reviewing officer noted: "We are actively working on ensuring a continuity of this assignment."

29. In January 2001, Applicant filed an additional Workers' Compensation claim. On February 6, 2002, the Workers' Compensation Claim Administrator confirmed Ms. Shinberg's continuing need for work restrictions, concluding that Applicant had sustained "... myofascial pain syndrome associated with low back pain as a result of her traumatic injuries of 5/28/87 and 8/7/97. It is further accepted that this myofascial pain syndrome associated with low back and neck pain has rendered her capable of working only on a regular part-time basis."

30. Additionally, in July 2001, Applicant suffered a new illness that occasioned further sick leave. By memorandum of November 5, 2001, the Compensation and Benefits Policy Division noted that, following her sick leave, "HSD approved staff member's return to work on 10/01/01 with the following restriction: low stress, stable position (preferably continuance in library)."

31. Again in August 2002, Applicant was placed on sick leave and then administrative leave until January 2003, during which time her assignment in the Library ended, according to Respondent, for budgetary reasons. Applicant's 2002 APR notes: "In 2002, Ms. Shinberg was only able to work a short period of time in the Joint Library." Ms. Shinberg commented: "It is evident that HRD has decided to abandon its obligation to make a concerted effort to find a reasonable accommodation for me. At this point I am left with no other choice but to continue trying to find another part-time position in the Fund on my own."

32. At the conclusion of the Library assignment, in December 2002, a Human Resources Officer responsible for SSG transmitted to Applicant via email a vacancy announcement for a part-time position as a Staff Assistant/Document Assistant within one of the Fund's departments, with a grade range of A4/A5/A6, and urged Applicant to apply, noting that it would entail "a

stable environment and part-time work on alternate days.” The attached vacancy announcement stated:

“[T]he successful candidate will provide administrative support and is required to work extended hours during the ministerial and Annual Meetings, including office coverage when these meetings are held abroad. The personal qualities needed for this position include accuracy; resourcefulness and flexibility; the ability to work independently and in close collaboration with others as part of a team; and willingness to respond to a variety of requests quickly and efficiently. The candidate must have the capacity to work well under pressure, particularly to carry out assigned tasks efficiently, at times when several different requests must be dealt with simultaneously. ...”

It is not disputed that Applicant did not apply for the vacancy.

33. According to Respondent, in 2002, having surveyed all the departments within the Fund, HRD determined that there were no part-time positions to which Applicant could be assigned. Accordingly, by letter of February 28, 2003, the Fund initiated proceedings to separate Applicant on medical grounds, pursuant to GAO No. 16, Rev. 5 (July 10, 1990), Section 11. As Applicant objected to the Fund’s separation decision, her case was reviewed by a medical panel, pursuant to GAO No. 13, Rev. 5, Annex I (June 15, 1989).¹³ On November 3, 2003, the Medical Panel issued its report, which confirmed that Applicant was able to work on a part-time basis with the following restrictions:

“[Ms. Shinberg] requires a lifting restriction of 10 pounds and a sitting duration of one hour (with the necessity to get up and stretch every hour). She is capable of working only a half-time schedule.

...

Moreover, the panel opined that Ms. Shinberg could only work five half days in a ‘stable environment.’ ‘Stable’ was defined as being employed by one supervisor in one location, and having her performance evaluated by a single supervisor.”

(“Consensus Opinion of the Medical Panel,” November 3, 2003.)

34. In July 2004, following an extended period of administrative leave with full pay, which had commenced in January 2003, the Fund proposed and Applicant accepted a “TAP” assignment as a part-time Special Projects Assistant in one of the Fund’s departments. The

¹³ GAO No. 13, Annex I, Section 2.03.2 provides that “[t]he task of the panel shall be to provide a medical opinion about the staff member’s condition and the prognosis in the context of the work demands that are placed on him and the standard of performance required of staff members.”

medical separation proceedings were accordingly suspended. In April 2005, Applicant requested termination of this assignment, and, on her 2004 APR, Applicant stated: “I hope that soon HRD will make a good faith effort to find a new position for me in a supportive environment where I will be accommodated with regard to my work-related injury (now under the purview of Workers’ Compensation benefits).” Subsequently, Ms. Shinberg was assigned to perform functions in another department on a part-time basis. In 2006, when this assignment came to an end, Respondent proceeded with medical separation. Applicant was placed on separation leave beginning August 1, 2006, receiving the maximum 22.5 months of separation leave based upon her years of service, and bridged to a Fund pension. According to Respondent, as a result of her work-related injuries, “Applicant has not suffered any loss of salary throughout her career, as her part-time absences have been fully covered either by worker’s compensation leave, sick leave or administrative leave at full pay.”

The Channels of Administrative Review

35. On January 3, 2000, Applicant filed a Grievance with the Fund’s Grievance Committee and subsequently filed a revised Grievance on July 10, 2000. The revised Grievance raised a number of claims, including “discrimination in [Applicant’s] past assignment.”

36. Following suspension of the Grievance proceedings to allow the parties to attempt a resolution of the Workers’ Compensation issues and to settle the remaining claims, on October 5, 2001, the Fund filed a Motion to Dismiss that portion of Applicant’s Grievance “challenging the Fund’s policies and rules governing promotion and mobility for staff assigned to the Secretarial Support Group (the ‘SSG’) on the grounds that the Grievance Committee lacks jurisdiction to review the legality of rules and regulations governing the employment of staff.”¹⁴ On October 26, 2001, Applicant filed an Opposition to the Fund’s Motion, contending that she was challenging not only policies but their application in her individual case. Attempts to reach a settlement continued over an extended period of time.

37. On May 24, 2005, the Grievance Committee held a hearing on the Motion to Dismiss, at which it was agreed that Applicant would seek review by the Administrative Tribunal of her challenge concerning the Fund policies that had been applied to her as a member of SSG. Accordingly, the Grievance Committee issued the following Order:

“At the hearing of the above-referenced matter on May 24, 2005, it was stipulated by and between counsel that Grievant may proceed directly to the Fund’s Tribunal having agreed that the administrative remedies were exhausted with respect to Grievant’s career progression claim.”

38. On August 23, 2005, Ms. Shinberg filed her Application with the Administrative Tribunal.

¹⁴ See Ms. “G”, Applicant and Mr. “H”, Intervenor v. International Monetary Fund, Respondent, IMFAT Judgment No. 2002-3 (December 18, 2002), para. 20 (distinguishing jurisdiction of the Administrative Tribunal from that of the Grievance Committee).

Summary of Parties' Principal Contentions

Applicant's principal contentions

39. The principal arguments presented by Applicant in her Application and Reply may be summarized as follows.

1. The Fund's policies on grading and promotion, which effectively preclude promotion of staff in SSG beyond Grade A5, discriminate against injured staff.
2. The application of these policies to Applicant, who had been assigned to SSG as a result of a work-related injury caused by the Fund's negligence, is unfair, discriminatory, and inconsistent with the Fund's promotion criteria. The rationale cited by Respondent as the basis for these policies does not apply in Applicant's case.
3. Respondent should have made an exception to these policies in view of the compelling circumstances of Applicant's case.
4. Respondent abused its discretion by failing to transfer Applicant out of SSG in order to afford her opportunity for promotion.
5. Respondent mismanaged Applicant's career by denying her promotion opportunities.
6. Applicant seeks as relief:
 - a. promotion to Grade A6 retroactive to 1990 or another date the Tribunal deems fair and appropriate;
 - b. salary and pension contribution adjustments commensurate with any retroactive promotion;
 - c. two years' salary for moral damages; and
 - d. legal costs.

Respondent's principal contentions

40. The principal arguments presented by Respondent in its Answer and Rejoinder may be summarized as follows.

1. There is no policy against promoting staff who serve in SSG. Rather, such staff are subject to the Fund's general policies governing promotion and job classification. Staff Assistant positions in SSG are properly classified below Grade A6, and therefore there are no promotion opportunities within SSG once a Staff Assistant has attained Grade A5.

2. The Fund's policies on the grading and promotion of Staff Assistants and their application to Applicant are a valid exercise of the Fund's discretion. The Fund's promotion policies have been applied to Applicant fairly and properly.
3. Applicant's work-related injuries do not entitle her to exceptional treatment outside the parameters of the Fund's promotion policy.
4. The Fund has fulfilled with regard to Applicant its duty to provide injured staff, to the extent possible, the required work accommodations recommended by medical personnel. The Fund has made every effort to provide Applicant with suitable temporary assignments. The Fund either has offered Applicant positions or brought to her attention vacancies outside of SSG, yet Applicant has refused to avail herself of these opportunities. Part-time assignments and positions within the Fund that would satisfy Applicant's medical restrictions are very limited.
5. The record belies Applicant's assertion that the Fund mismanaged her career.

Consideration of the Issues of the Case

Are the Fund's policies on grading of positions within SSG, and on promotion, as well as the application of these policies to Applicant, discriminatory or otherwise an abuse of discretion?

41. Applicant contends that the application to her of the Fund's policies that effectively preclude promotion of staff serving in SSG beyond Grade A5 was arbitrary and capricious and impermissibly discriminated against her on the basis of her injuries, since she had been assigned to SSG following a work-related injury and, in her view, her medical condition hindered her from obtaining positions outside of SSG. Applicant asserts that these policies, therefore, discriminate against injured staff members. Applicant further contends that the application of these policies in her case is inconsistent with the Fund's promotion criteria, and that the rationale cited by Respondent as the basis for these policies does not apply in her case. Applicant asserts that, in any event, the Fund should have made an exception to these policies in her favor in view of the compelling circumstances of her case, i.e. since "Respondent's negligence directly led to the initial placement [in SSG] and because Respondent's subsequent negligence ensured an ongoing need for the part-time schedule" Additionally, Applicant asserts that Respondent abused its discretion by failing to transfer her out of SSG in order to afford her an opportunity for promotion.

42. Respondent counters that the Fund's policies on grading and promotion and their application to Applicant as a staff member serving in SSG are supported by valid managerial reasons and therefore constituted a valid exercise of the Fund's discretionary authority. Respondent additionally maintains that Applicant's work-related injuries do not entitle her to exceptional treatment outside the parameters of the Fund's promotion policy.

43. As this Tribunal recognized in Mr. "R", Applicant, International Monetary Fund, Respondent, IMFAT Judgment No. 2002-1 (March 5, 2002), para 65, "[t]he management of the Fund necessarily enjoys a managerial and administrative discretion which is subject only to limited review by this Tribunal." See also Ms. "J", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2003-1 (September 30, 2003), para. 105. In cases involving

the review of individual decisions taken in the exercise of managerial discretion, the Administrative Tribunal consistently has invoked the standard set forth in the Commentary on the Statute as follows:

“... with respect to review of individual decisions involving the exercise of managerial discretion, the case law has emphasized that discretionary decisions cannot be overturned unless they are shown to be arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or carried out in violation of fair and reasonable procedures.”

(Report of the Executive Board, p. 19.) *See* Ms. “J”, para. 106; Mr. “R”, para. 32; Ms. “Y” (No. 2), Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2002-2 (March 5, 2002), para. 53. At the same time, however, this Tribunal also has recognized that “the rule of nondiscrimination imposes a substantive limit on the exercise of discretionary authority in both the policy-making and administrative functions of an international organization.” Mr. “R”, para. 30. *Accord* Ms. “G”, Applicant and Mr. “H”, Intervenor v. International Monetary Fund, Respondent, IMFAT Judgment No. 2002-3 (December 18, 2002), para. 76; Mr. “F”, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2005-1 (March 18, 2005), para. 81; Ms. “M” and Dr. “M”, Applicants v. International Monetary Fund, Respondent, IMFAT Judgment No. 2006-6 (November 29, 2006), para. 127.

44. The Fund’s internal law governing nondiscrimination expressly encompasses discrimination on the ground of disability. The Discrimination Policy announced by the Fund on July 3, 2003, which was designed by its terms to “consolidate in one document the policies and safeguards in place” with respect to discrimination, defines discrimination within the context of the Fund as follows:

“In the Fund, discrimination should be understood to refer to differences in the treatment of individuals or groups of employees where the differentiation is not based on the Fund’s institutional needs and:

- is made on the basis of personal characteristics such as age, creed, ethnicity, gender, nationality, race, or sexual orientation;
- *is unrelated to an employee’s work-related capabilities, qualifications, and experience—this may include factors such as disabilities or medical conditions that do not prevent the employee from performing her or his duties;*
- is irrelevant to the application of Fund policies; and
- has an adverse impact on the individual’s employment, successful job performance, career opportunities,

compensation, or other terms and conditions of employment.

Discrimination can occur in various ways, including but not limited to the following:

- basing decisions that affect the career of an employee—such as salary adjustments, assignments, performance evaluations, *promotions*, and other types of recognition on grounds other than professional qualifications or merit

....

Discrimination can be manifested in different ways, for example, by a **single decision** that adversely affects an individual or through a **pattern** of words, behaviors, action, or inaction (such as the failure to take appropriate action in response to a complaint of discrimination), the cumulative effect of which is to deprive the individual of fair and impartial treatment.

While the former may be readily identified (e.g., a decision not to convert a fixed-term appointment, a denial of a promotion), the latter may be less obvious, as there is no specific act or decision at issue. Nevertheless, the failure to provide fair and impartial treatment, even if through inaction, can have harmful effects on an employee’s career.”

(Discrimination Policy, July 3, 2003, p. 4.) (Bold in original; italics supplied.) *See generally* Mr. “F”, para. 84; Ms. “M” and Dr. “M”, para. 126.

45. It is undisputed that application of the Fund’s policies on grading and promotion effectively precludes promotion of staff serving within SSG beyond Grade A5. In accordance with GAO No. 11, Rev. 4 (Grading of Positions, Assignment of Staff, and Salary Administration) (January 16, 2004), Section 5.08, a staff member may be promoted to a higher grade through (a) a promotion within the grade range established for the staff member’s current position (“career-progression promotion”); (b) promotion by selection into a new or vacant position at a higher grade (“selective promotion”); or (c) promotion resulting from the reclassification of the position to which the staff member is assigned. Since the grade range of the Assistant positions in SSG does not extend beyond Grade A5¹⁵ (and there has been no reclassification of these positions during the relevant time period), SSG staff at Grade A5, including Applicant, may attain a promotion only by applying for, and being selected to, another position at a higher grade outside SSG (i.e. through “selective promotion”). As it is this cumulative effect of the Fund’s policy on grading of positions and its policy on promotion that is

¹⁵ With the limited exception of certain staff members who transfer into SSG from a higher-graded position.

at the heart of Applicant’s claim, these two aspects of Applicant’s challenge will be addressed in turn.

Grading

46. In Mr. M. D’Aoust, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1996-1 (April 2, 1996), the Tribunal observed:

“23. That classification and grading is an exercise of discretionary authority, subject to judicial review only for irregularity, is settled jurisprudence. (Lyra Pinto v IBRD, WBAT Reports 1988, Part I, Decision No. 56, para. 36.) International administrative tribunals have emphasized the importance of observance by an organization of its procedural rules, for instance, on the internal publication of vacancies so as to enable the staff members of the organization to apply for the vacant position. (In re Diotallevi and Tedjini, ILOAT, 75th Session, Judgment No. 1272, paras. 12, 15-17). ...

....

26. International administrative tribunals have regularly held that the assignment of grades to posts is an exercise of discretionary authority. Tribunals have been reluctant to interfere in the grading of posts, holding that the evaluation of the work to be done and the degree of responsibility involved, factors on which the grading depends, should be performed by persons trained to apply the relevant technical criteria. (In re Dunand and Jacquemod, ILOAT, 65th Session, Judgment No. 929, para. 5). They have substituted their own assessment or required that a new assessment be made only where the evaluation of a post was tainted by irregularity (In re Garcia, ILOAT, 51st Session, Judgment No. 591, paras. 3-4).”

See also Ms. “J”, para. 112 (“... a decision on classification and grading ... calls for the exercise of judgment in the appreciation of a number of factors”). The question at issue is whether the Fund abused its discretion in classifying positions in SSG below Grade A6 or in applying to Applicant its policy on grading and classification of positions.

47. Respondent maintains that the rationale underlying the grading of positions in SSG is valid and fully applicable to Applicant, and that her work-related injuries do not justify exceptional treatment outside the parameters of the Fund’s promotion policy. Respondent asserts, and the record indicates, that staff assigned to SSG are subject to the policies governing all Staff Assistants in the Fund, including the policies on grading and promotions contained in GAO No. 11, Rev. 4, which provides in relevant part:

“3.02 *Grading of A1-A15 Positions*. The grading of positions at Grades A1-A15 is subject to the authority of the Director of Human Resources, after consultation with the relevant Department Head in which the position is located.

Section 4. Grading of A1-A15 Positions: Policy and Responsibilities

4.01 Grading of Positions. The Director of Human Resources shall be responsible for maintaining, and modifying as appropriate, a system for grading positions, the purpose of which is to provide a consistent basis – across departments and in respect to different career streams – for establishing the level of positions and differentiating among levels on grounds of job content (the functions, duties, and responsibilities of positions), and qualifications. After consultation with departments, the Director of Human Resources shall assign a specific grade or range of grades to each position within a ‘job ladder,’...

....

4.03 Departmental Responsibilities. Heads of Departments shall be responsible for: (i) defining and documenting the job content of each position in their department; [and] (ii) maintaining consistency between the defined job content and the duties actually performed by the staff members assigned to the positions....”

48. Generic duties and responsibilities of positions within the Fund are reflected in the “job standards,” which describe similar positions in the same “job ladder” and are revised periodically by HRD’s Compensation and Benefits Policy Division (“CBD”), which is responsible for developing and maintaining the Fund’s position classification system. Consistent with GAO No. 11, the HRD website states that one of the functions of the job standards is to “support internal equity by ensuring that jobs with similar[ly] weighted job content are accurately graded.” The Job Standard¹⁶ for Grade A5 Staff Assistant positions and Grade A6 Administrative Assistant positions provides:

“At Grade A5 the Assistant applies intermediate level skills and procedures appropriate within the assigned functional area. Duties and tasks require a good command of procedures, processes, and techniques applicable in the Fund, since the Assistant is required to resolve nonroutine questions and problems, referring the more complex issues to higher levels. The Assistant works under limited supervision from, and as necessary substitutes for, higher-level Assistants.

At Grade A6, the Assistant applies higher-level skills and additional institutional knowledge to the position within the assigned functional area. Duties and tasks are frequently

¹⁶ The date noted on the job standard submitted by Respondent in its pleadings before the Tribunal is October 20, 2005.

nonroutine. The Assistant resolves most questions and problems, and refers only the most complex issues to higher levels. The Assistant works under minimal supervision, and may assist in orienting and training employees at lower grade levels. In an immediate office, in addition to providing administrative and secretarial support to a senior staff member, the Assistant carries out significant department-wide administrative responsibilities or projects. In a division, the Assistant is responsible for the timely completion of the division's secretarial and administrative work."

49. Respondent maintains that the Fund's policy on the grading of positions in SSG serves a valid business purpose and is "rationally related both to the purpose of SSG and to the efficient functioning of the Fund." Respondent describes the function of SSG as follows:

"The [SSG] was formally organized in 1980 in order to provide temporary administrative (or 'floater') assistance to the Fund's departments and to the Offices of Executive Directors ('EDs'), to be used in situations where, for example, a regularly assigned staff member is temporarily absent on leave. The SSG ... [currently] comprises regular staff who have been transferred there for a variety of reasons, former assistants to EDs who have taken up staff positions following their service in the Office of an Executive Director, [footnote omitted] and contractual employees who have been recruited by the Fund for up to two years with the objective of having them secure a permanent position in the Fund.

The SSG was not intended to provide permanent career placement for individuals. To the contrary, all staff members who transfer into the group are encouraged to seek an alternative position through the vacancy process.... The ability of SSG members to find a permanent position in another Fund department is dependent on a number of factors, including the availability of positions, the individual's willingness to be proactive in seeking such positions as they arise, and the individual's performance record."

Respondent further maintains that the grades assigned to positions in SSG are consistent with the nature of the work that the SSG Staff Assistants perform, stating:

"The grade range [assigned to positions within SSG] reflects HRD's assessment of the level of the position based upon its job content, *i.e.*, its functions, duties and responsibilities.

....

[T]he grades assigned to the SSG are consistent with the nature of work that the SSG Staff Assistants perform. As seen in the Job Standards for different levels of administrative staff ..., Grade A6,

the level to which Applicant is seeking to be promoted, requires the Assistant, among other things, to apply ‘higher-level skills’ to tasks that are ‘frequently non-routine,’ to work under ‘minimal supervision,’ and to carry out ‘significant department-wide administrative responsibilities or projects.’ An assistant in the SSG simply does not regularly and continuously carry out such functions as would be required from an A6 level Administrative Assistant. Thus, Applicant’s implicit suggestion that promotion to a higher grade should be granted without regard to the function being carried out by the individual is wrong and would be contrary to the Fund’s promotion policy.”

Respondent asserts that Applicant “has made no showing ... that she is carrying out on an on-going basis the functions of an A6 assistant”

50. Applicant counters that the rationale cited by Respondent for grading positions in SSG at or below Grade A5, and the very premise of SSG (i.e. in Applicant’s words, “a place for returning staff to re-acclimate or a temporary grooming ground for new staff to gain exposure by floating from one department to another for short-term assignments”), do not apply to Applicant, since “she was placed in the SSG after serving 10 years and has remained there almost 20 years more.” In addition, asserts Applicant, during her assignment in the Joint Library, she “had plenty of occasion to perform ‘higher level’ non-floater skills and use ‘institutional knowledge’ and work with minimal supervision for nearly three years.” Applicant also stated before the Grievance Committee that in her assignments through SSG she sometimes filled in for staff who held higher-graded positions.

51. As reviewed above, Applicant’s Annual Performance Reports indicate that Ms. Shinberg was recognized as a “seasoned, experienced floater who knows Fund procedures well” and that she successfully performed in a variety of assignments, on occasion discharging responsibilities that “require[d] the ability to work independently and to manage complex tasks.” At the same time, such assignments were limited, and limited at least in part by Ms. Shinberg’s medical condition, which appears to have grown more problematic over time. Indeed, the record reveals that as to Applicant’s long-term assignment in the Joint Library, her failing health, especially in 2001 and 2002, precluded Ms. Shinberg from performing her duties for a significant portion of the duration of that assignment. Accordingly, the Tribunal is not able to sustain the view that over the course of her service in SSG Applicant consistently carried out functions and responsibilities at the A6 level. Moreover, it is significant that, as far as the record reveals, Ms. Shinberg never sought reclassification of her position during the course of her employment.

52. In the view of the Tribunal, Applicant has not established that Respondent abused its discretion in maintaining, and applying to Applicant, a grading policy that sets Grade A5 as the maximum grade level for Assistants serving in SSG. Applicant’s argument for making an exception in her favor is addressed more fully below, at paras. 58 – 68.

Promotion

53. Applicant further contends that Respondent abused its discretion by “blindly” applying to her the Fund’s policy on promotions. Applicant asserts that the application of this policy in her case “produces an unfair and discriminatory result and otherwise conflicts with the Fund’s official promotion criteria.”

54. Respondent counters:

“The Fund firmly rejects the notion that it abused its discretion or violated any obligation to Applicant simply because it did not offer her a promotion within the SSG, where her job content did not warrant it, or by failing to place her in a higher graded position other than through the normal competitive selection process.

....

Applicant has made no showing either that she is carrying out on an on-going basis the functions of an A6 assistant such as would warrant promotion, or that the Fund has improperly failed to select her for any vacancy to which she applied.”

55. GAO No. 11, Rev. 4, Section 5.08 defines career-progression promotion and selective promotion as follows:

“5.08.1. *Career-Progression Promotion*. When there is an established range of two or more grades for a position, a staff member may be promoted within that range, without competing with others, if he or she performs the duties and meets the qualifications and promotion requirements for the higher grade.

5.08.2. *Selective Promotion*. A staff member will be promoted if he or she is selected for a new or vacant position at a higher grade for which an established procedure for the selection of candidates and the assessment of their suitability has been followed. ...”

56. It is undisputed that Applicant’s assignment to SSG following her initial injury in 1987 constituted an effort by the Fund to accommodate her injury-related medical restrictions, and Applicant does not contend that this decision was tainted by discrimination or other improper motive. Applicant maintains, rather, that Respondent abused its discretion by failing to promote her to Grade A6 while she remained in SSG or, in the alternative, failing to transfer her to a department in which she might have been considered for promotion. In Applicant’s view, she has been eligible for promotion as of 1990 in light of the promotion criteria prescribed in the Fund’s

internal rules.¹⁷ Accordingly, she seeks as relief a promotion retroactive to 1990. In particular, Applicant asserts that her performance has been fully satisfactory and that, after almost thirty years of service, she has demonstrated the ability to assume responsibilities at the Grade A6 level.

57. Pursuant to the Fund’s policy on promotions, however, meeting some or all of the minimum eligibility criteria for consideration for promotion does not entitle a staff member to a promotion. Consistent with promotion rules prescribed in GAO No. 11, Applicant could not (and evidently did not) seek a career-progression promotion to Grade A6 in her position as Staff Assistant in SSG, since the grade range for this position extends only to Grade A5. *See generally* Staff Bulletin No. 03/3 (Promotion Policy for Non-Managerial A-Level Positions) (February 11, 2003, revised May 20, 2003).¹⁸ In order to have been considered for promotion to another position at the Fund, Applicant would have had to have applied and been selected for a vacant position at a higher grade through the Career Opportunities Vacancy List process. *Id.*, pp. 4-5. Applicant does not allege that she applied for and was improperly denied such a promotion. Accordingly, in the view of the Tribunal, the Fund did not abuse its discretion in applying its promotion policy to Applicant. The question of exceptional treatment is taken up below.

Did the Fund abuse its discretion in failing to make an exception in Applicant’s favor?

58. Applicant contends that Respondent should have made an exception to the personnel policies that preclude promotion of staff in SSG beyond Grade A5, in view of the “compelling circumstances” of her case. Applicant elaborates this contention as follows:

¹⁷ Applicant submitted a document entitled “Promotion Criteria,” which was posted on the Fund’s internal website. The document states:

“Eligibility for Promotion

For a staff member to be eligible for promotion, three basic requirements must be satisfied.

1. The staff member’s performance in his or her current position must be fully satisfactory.
2. The staff member must have demonstrated the potential to assume successfully the responsibilities of a higher-graded position.
3. The staff member must have satisfied the applicable time-in-grade requirements.”

¹⁸ Staff Bulletin No. 03/3 provides in relevant part:

“Promotions in positions that span several grades

A staff member may be promoted in his or her current position to the next higher grade when the position is classified at a range of grades ... and the incumbent’s current grade is below the highest grade in the range for the position.”

“The circumstances landing Applicant in what should have been a temporary assignment are unique, and because the Respondent’s negligence directly led to the initial placement and because Respondent’s subsequent negligence ensured an ongoing need for the part-time schedule, the circumstances are compelling and exceptional.”

In Applicant’s view, “... Respondent should make an exception to [the relevant personnel policies] for a long-serving and loyal staff [member] who has a solid performance record, but was unfortunately injured by the Fund’s negligence.”

59. Respondent, for its part, while not accepting Applicant’s contention that her injuries resulted from the Fund’s negligence, maintains that Applicant’s work-related injuries do not entitle her to exceptional treatment outside the parameters of the Fund’s promotion policy, and that “an exceptional, personal promotion is not the appropriate compensation for a work-related injury.” Respondent further maintains that there is no Fund policy that entitles any staff member to promotion or obligates the Fund to create a permanent part-time position where none exists. Respondent asserts:

“Here, Applicant not only failed to make a persuasive showing of why her situation constitutes ‘compelling circumstances’, but the exceptional treatment she argues for would ... give rise to an inconsistent administration of personnel policies; it would be contrary to the purpose of the promotion rules which is to grant promotions to the best qualified candidates based on merit; and it would be inconsistent with the promotion policy, which does not provide for exceptions.”

60. Applicant’s contention raises the question whether the circumstances of Applicant’s case constitute grounds for an exception to the Fund’s policies on grading and promotion.

61. In Mr. “R”, the Tribunal upheld the Fund’s decision to deny an exception to its benefit policy applicable to staff posted abroad, based on the Tribunal’s determination that this decision was reasonable in light of the rationale proffered by the Fund. The Tribunal observed:

“65. The management of the Fund necessarily enjoys a managerial and administrative discretion which is subject only to limited review by this Tribunal. If it is the Fund’s considered decision that differences in the functions and recruitment of Resident Representatives and Office Directors justify a consequential difference in the benefits accorded those officials--even while uniquely serving in the same city overseas--it is not for the Tribunal to overrule that decision. This conclusion applies as well to the refusal of the Fund to make an exception to its policy in favor of the Applicant. ...”

See also Ms. “G”, in which the Tribunal commented as follows on the Fund’s authority to grant exceptions to policies governing employment of the Fund’s staff:

“91. ... the expatriate benefits policy adopted by the Executive Board does not expressly empower the Administration of the Fund to grant exceptions to the application of that policy. Administration of the Fund is based on the Articles of Agreement and the policies in pursuance of those Articles adopted by the organs of the Fund. While the Managing Director and his associates necessarily enjoy a measure of appreciation in the exercise of their authority, that discretion does not extend to granting exceptions to a Fund policy which, if granted, would run counter to its essential objectives.”

62. However, in Bernstein v. International Bank for Reconstruction and Development, WBAT Decision No. 309 (2004), para. 21, the World Bank Administrative Tribunal (“WBAT”), in the context of a claim made under the World Bank’s past pension credit policy, formulated as follows an approach to deciding whether the Bank improperly denied an exception to the policy in the applicant’s case:

“... the Bank’s prerogative to develop policies by rules of general application does not preclude the Tribunal from examining specific instances of arbitrariness or unreasonableness in the application of such policies. Although it would be improper for the Tribunal to require that the Bank adopt policies on a case-by-case basis without setting general rules, it would be equally wrong for the Tribunal to decide specific cases without considering extraordinary circumstances. The Tribunal has often conducted a fact-specific review in respect of the business rationale invoked in the application of a policy in question.”

In Bernstein, the WBAT concluded that while the Bank’s rules on past pension credit were “not unreasonable as such[,] [t]he facts of Applicant’s case are sufficiently unusual, however, to warrant review of their application” (Para. 22.) Citing “recognized international standards,” the WBAT concluded that “... it is clear that it was *only because* of her pregnancy and childbirth that the Applicant lost her status as a Long-Term Consultant and was consequently affected by the four-year rule,” (para. 30) (emphasis supplied), and accordingly held that, for the purposes of pension benefits, the Bank should have treated the applicant as if her Long-Term contractual status was continuous, without regard to the breaks that were the consequence of her pregnancy and childbirth. The result, concluded the WBAT, was that the four-year rule should not be applied to the applicant. (Para. 33.)

63. In the instant case, Applicant contends that application to her of the Fund’s policies on grading and promotion “produced an unfair and discriminatory result” in view of her injuries and resultant work limitations. In Mr. “R”, para. 36, this Tribunal observed that cases of alleged discrimination may arise in different ways and that “... a policy, neutral on its face, may result in some kind of consequential differentiation between groups.” The question therefore arises whether any impermissible discrimination arose from the application to Ms. Shinberg of the

Fund's policies on grading and promotion, and whether, accordingly, an exception should have been drawn in Applicant's favor.

64. It is additionally noted that GAO No. 11, Rev. 4 (Grading of Positions, Assignment of Staff, and Salary Administration) (January 16, 2004), which governs grading of positions and assignment of staff in the Fund, provides at Section 8.01:

“The Director of Human Resources shall administer this Order
When special and unusual circumstances exist that are not explicitly covered by this Order, the Director of Human Resources may authorize any necessary action that is in line with the purposes of this Order.”

Applicant does not argue that she had requested and was denied an exception by the Fund's management. Nevertheless, whether this provision may properly be interpreted as authorizing the Director of Human Resources to grant an exception to the aforesaid policies because of “special and unusual circumstances,” as long as such an exception is “in line with the purposes of this Order,” merits consideration.¹⁹ In light of the particular circumstances of Applicant's case, would a change in her Grade from A5 to A6 have been consistent with the essential objectives of the Fund's policies on grading and promotion? *See also Ms. “G”*, para. 91 (holding that the Fund management's administrative discretion does not extend to “granting exceptions to a Fund policy which, if granted, would run counter to its essential objectives”).

65. In contending that Applicant is not entitled to exceptional treatment in respect of its policies on grading and promotion, Respondent also refers to the Fund's policy on separation of staff for medical reasons. Citing GAO No. 16, Rev. 5, Section 11 (“Separation for Medical Reasons”), Respondent maintains that

¹⁹ The parties discuss the document entitled “Summary: The Report of the External Panel on the Fund's Dispute Resolution Systems and Implementation Plans” (April 15, 2002), prepared by the Fund's Human Resources and Legal Departments, which notes as to the observations of an External Panel engaged to survey the Fund's dispute resolution system:

“Dispute Prevention as an Objective in Human Resources Policies and Procedures

....

24. On **HRD's decision making**, the Panel emphasizes, on grounds of legal certainty and equal treatment, the importance of the consistent administration of policies and procedures; either the fact or the appearance of inconsistency may lead to disputes and to perceptions of unfair treatment. The Panel accordingly endorses HRD's approach of allowing exceptions to personnel policies for which it is responsible only if there are compelling circumstances, and the exception would not be contrary to the purpose of the rule.”

(Pp. 10-11.) (Emphasis in original.) The document further states that “[i]n addition, the rule itself would have to provide for the possibility of exceptions to be made.” (*Id.*, note 6.)

“... there is no Fund policy that entitles any staff member to promotion or obligates the Fund to create a permanent part-time position where none exists. If a staff member is unable to carry out his duties satisfactorily due to medical reasons and is not able to perform his required duties in the foreseeable future, he may be separated for medical reasons.”

In obligating the Fund to seek a suitable alternative position as a precondition to separation of a staff member on medical grounds, GAO No. 13, Rev. 5, Annex I (“Separation for Medical Disability”) (June 15, 1989), Section 2.01.2²⁰ references GAO No. 11, which provides in relevant part:

“6.04 Performance Impeded for Medical or Other Personal Reasons. If it is determined that, for medical or other personal reasons beyond his or her control, the staff member is unable to perform in full the duties of his or her position, and if no other vacant position is available at the same grade with duties that the staff member could reasonably be expected to perform, a staff member may, as an alternative to separation, be assigned to a vacant position at a lower grade where the staff member could be expected to perform the duties in full. ...”

This provision by its terms does not obligate the Fund to create a position at the same grade (or grade range) where none exists: if a suitable position at the same or a lower grade²¹ cannot be found (or is refused by the staff member), the Fund’s obligation -- in the context of medical separation -- is deemed exhausted. The question of accommodation of an injured staff member, outside the parameters of the medical separation policy, is addressed below.

²⁰ GAO No. 13, Annex I, Section 2.01.2 provides:

“2.01.2 Unsatisfactory Performance Due to Medical Reasons. Regardless of the extent to which sick leave may have been utilized, if the Head of a staff member’s department determines that over a prolonged period the staff member has been prevented, for medical reasons, from performing the duties assigned to him in an acceptable manner, and if another position suitable for the staff member is not found in accordance with the provisions of GAO No. 11 (Salary Administration), the Director of Administration shall seek the advice of the Fund’s Health Services Department on the prospects for improvement within a reasonable period of time. If, on the basis of this advice, the Director of Administration forms the opinion that the staff member should be separated for medical reasons, the procedures outlined below shall be initiated.”

²¹ GAO No. 11, Section 7.06.1 attenuates the effects of an assignment to a lower grade under Section 6.04 by providing that a staff member so assigned “shall retain the higher grade, and his or her salary shall be administered in the salary range corresponding to that higher grade, for a period of two years.” The same regulation prescribes the approach to salary administration upon the expiration of the two-year period.

66. Applicant repeatedly asserts that the circumstances surrounding her assignment in SSG are compelling and exceptional because “Respondent’s negligence directly led to the initial placement and because Respondent’s subsequent negligence ensured an ongoing need for the part-time schedule” Respondent counters that Applicant’s assertion that her injuries were caused by the Fund’s negligence is unsubstantiated. As Respondent notes, “coverage of claims under a workers’ compensation program is not an admission of negligence on the part of the employer.”²²

67. As considered above at para. 51, it is also significant that Applicant did not show that in the course of her service in SSG she regularly carried out functions and responsibilities at the A6 level. Thus, Applicant requests as relief retroactive promotion essentially without regard to the functions of her position, in view of such factors as her limited career mobility caused by work-related injuries, length of service, and performance record.

68. The Tribunal recognizes that Applicant’s situation is unusual not only in her sustaining two work-related injuries, but in her serving almost two decades without promotion, the possibility of which escaped her at least in some measure because of her injuries. Nevertheless, the Tribunal recognizes as well that the Fund’s promotion policies are to be applied uniformly and that, as shown below, the limited possibilities Applicant may have had to transfer to a department offering a potential for promotion were apparently not seized by her. It accordingly concludes that the Fund did not abuse its discretion in failing to make an exception to its grading and promotion policies in favor of Applicant. Applicant’s claim of discrimination is addressed more fully below.

Did the Fund, in the case of Applicant, fulfill the obligations of its internal law to accommodate an injured staff member?

69. Applicant contends that Respondent abused its discretion by failing to transfer her out of SSG, an assignment that was never intended to be permanent. Applicant asserts that “Respondent should be held to a heightened duty to place Applicant or any injured SSG staff outside SSG so that she could have a fair opportunity for promotion.” Applicant further asserts that “without significant institutional backing and cooperation” her work-related injuries made it difficult to find a suitable assignment that offered fair opportunities for advancement. Accordingly, maintains Applicant, the Fund should have accommodated her injuries by transferring her to another department or by “otherwise creat[ing] a permanent part-time position in another Department,” where she would have had opportunities for promotion that would have been available to her but for her injuries. Finally, Applicant contends that the Fund mismanaged her career.

70. Respondent acknowledges that “one of its primary duties to injured staff is to provide, to the extent possible, the required work accommodations recommended by medical personnel in

²² The Fund’s Workers’ Compensation policy provides staff members with benefits and compensation “... in the event of illness, accidental injury or death arising out of, and in the course of, their employment.” GAO No. 20, Rev. 3 (November 1, 1982) (Workers’ Compensation Policy). *See generally* A. Larson, Larson’s Workers’ Compensation §1.03 (2004).

light of his or her medical condition.” Respondent maintains that “the Fund has endeavored over the years to fully accommodate Applicant’s injuries and the limitations on her ability to perform her duties as a Staff Assistant.” Respondent further maintains that the Fund has made “good faith and extensive efforts to identify suitable positions for her” and that Applicant was actively encouraged to seek a suitable part-time position. Respondent asserts that while there are very few permanent part-time positions in the Fund,²³ let alone part-time positions that could have accommodated Applicant’s restrictions, Applicant “refused to apply for or consider the few permanent part-time positions that arose.” Respondent additionally asserts that

“... there is no Fund policy that ... obligates the Fund to create a permanent part-time position where none exists. If a staff member is unable to carry out his duties satisfactorily due to medical reasons and is not able to perform his required duties in the foreseeable future, he may be separated for medical reasons. ... The Fund has made every effort to assign Applicant to temporary assignments which have avoided the need for medical separation However, these assignments cannot be prolonged if there is no business need for their continuation”

Finally, Respondent maintains that the record belies Applicant’s allegation of career mismanagement, as the Fund “did make efforts to assist Applicant in identifying assignments that would, first and foremost, accommodate her medical condition ... while providing her with career advancement opportunities.”

71. The record shows that, from the time of Applicant’s assignment to SSG in 1987 following her initial work-related injury until the beginning of her separation leave in 2006, the Fund ensured Applicant’s continued employment by providing her with temporary assignments. Although in 2003 the Fund initiated proceedings to separate Applicant on medical grounds, these proceedings were challenged by Applicant and subsequently suspended when a suitable assignment was identified in July 2004. Applicant does not challenge the decision made by the Fund in 2006 to separate her on medical grounds, a decision that was made subsequent to the filing of her Application in the instant case. Accordingly, the Tribunal is not called upon to review a challenge to a medical separation decision but rather to consider a claim that the Fund failed to provide adequate opportunities for Applicant’s career advancement in light of her

²³ According to Respondent, as of January 2006, there were 23 staff members holding part-time positions, out of a total staff of over 2,700. Part-time employment in the Fund is governed by GAO No. 32 (May 2, 1988), which provides *inter alia* that full-time staff may request part-time status for a fixed period of time. Section 3.02 of GAO No. 32 provides that such a request “... shall normally be approved if: (i) in the judgment of the Head of the department in which the staff member would be working on a part-time basis, the reduced number of hours worked by the staff member would not hamper the efficient conduct of the work for which the department is responsible; ...” The staff member may also be transferred, with his agreement, to a department or position different from the one in which he last worked as a full-time staff member. (GAO No. 32, Section 3.03.) In 1995, by Staff Bulletin No. 95/12 (September 7, 1995), the Fund re-affirmed that there is “no entitlement to work part time,” while at the same time abolishing both the two-year limit that had existed on such part-time service and the limit on the number of staff members who may be permitted to work part-time (*see* GAO No. 32, Section 3.02 (ii)).

medical limitations. It is undisputed that Applicant's career mobility was restricted due to her medical condition. The record reflects that, in addition to reduced hours, Applicant's medical restrictions included a low-stress, stable work environment.

72. As discussed above, the internal law of the Fund addresses the Fund's obligations with respect to staff members who become disabled in the course of their employment with the Fund in the context of establishing a procedure for separation of staff on medical grounds. It is recalled that the provisions governing medical separation apply only when a staff member is in sick leave status and "will not be able to return to duty in the foreseeable future" or, irrespective of sick leave status, when "... over a prolonged period the staff member has been prevented, for medical reasons, from performing the duties assigned to him in an acceptable manner."²⁴ The Fund's obligations with regard to a staff member who sustains a work-related injury are further reflected in the Fund's Workers' Compensation policy set forth in GAO No. 20, Rev. 3 and its policy on "special sick leave" set forth in GAO No. 13, Rev. 5, Section 4.07. While acknowledging a duty to provide injured staff "to the extent possible, the required work accommodations," Respondent has not cited any pertinent internal regulation.²⁵ (The question raised by the Fund's Discrimination Policy is considered below.)

73. As to the "duty" that the Fund acknowledges it has to provide injured staff "to the extent possible, the required work accommodations recommended by medical personnel," the Tribunal observes that, arguably, the Fund had an extended period of years to attempt to find for Ms. Shinberg a suitable position outside of SSG. Applicant's assignment in SSG placed her at risk for separation for medical reasons in the absence of suitable temporary assignments, as illustrated by the Fund's attempt to separate her in 2003. Under the circumstances of Applicant's case, did the Fund have a further obligation to seek a suitable part-time position for Applicant outside of SSG that would have offered a possibility of a career-progression promotion? If so, were the Fund's efforts in this regard sufficient to meet this obligation?

74. Applicant contends that the Fund's efforts in identifying suitable positions for Applicant were insufficient. Applicant asserts that "Respondent pretends that over the last 17 to 18 years, the required flexibility could only be found in the SSG and nowhere else in the Fund;" she further asserts that suitable assignment should have been found in the Fund's Human Resources Department. Respondent, in turn, maintains that "[o]n various occasions throughout the years, the Fund has either offered her permanent placement outside the SSG or brought to her attention positions to which she could apply which would offer her greater promotion potential. Applicant has consistently refused to avail herself of these opportunities." Respondent further maintains

²⁴ GAO No. 13, Rev. 5, Annex I, Sections 2.01.1 and 2.01.2.

²⁵ The Tribunal recalls a statement, quoted at greater length in its Judgment in Ms. "J", para. 89, contained in the Twenty-third Annual Report of the Fund's Ombudsperson (October 1, 2001 – September 30, 2002), pp. 6-7, that "[t]here is no single source for a manager or staff member to go to for information on how to deal with a disability situation." More recently, the Fund's Diversity Advisor, in her Annual Report for 2003, p. 3, included in her "Recommendations for CY 2004" that the Fund "[i]ssue transparent documentation on existing mechanisms, and develop new approaches as needed, that accommodate staff who are permanently or temporarily disabled to ensure that these staff members can perform to their fullest potential."

that “the scope of part-time assignments which offer a unique combination of flexibility and stability is limited due to the nature of the Fund’s work and to budgetary considerations.”

75. Respondent specifically cites only two instances when opportunities of permanent assignment outside of SSG were presented to Applicant. As detailed above, in 1988, the Administration Department proposed to Applicant a lateral transfer to a permanent assignment in one of the Fund’s departments, which Applicant declined. In Applicant’s 1988 APR, her supervisor stated that Applicant refused the transfer because “she perceived it a ‘difficult position.’” The same APR contains the following annotation by Applicant:

“This was a clerical position, well below my status as bilingual secretary. This position was located in the basement of the building, plus the supervisor had the reputation of being quite unreasonable. After a while this assignment would have caused me, I believe, all kinds of problems, since at the time I had to go to therapy quite often. Anyway I had no intention of accepting such an undesirable position.”

76. In addition, in December 2002, a Human Resources Officer responsible for SSG transmitted to Applicant via email a vacancy announcement for a part-time position as a Staff Assistant/Document Assistant within the Secretary’s Department, with a grade range of A4/A5/A6, and urged Applicant to apply, noting that it would entail “a stable environment and part-time work on alternate days.” The attached vacancy announcement stated:

“[T]he successful candidate will provide administrative support and is required to work extended hours during the ministerial and Annual Meetings, including office coverage when these meetings are held abroad. The personal qualities needed for this position include accuracy; resourcefulness and flexibility; the ability to work independently and in close collaboration with others as part of a team; and willingness to respond to a variety of requests quickly and efficiently. The candidate must have the capacity to work well under pressure, particularly to carry out assigned tasks efficiently, at times when several different requests must be dealt with simultaneously.”

Applicant did not apply for the vacancy, and her pleadings provide no explanation. Respondent, however, did not explain why this position would have been suitable (with or without accommodations) in light of an apparent conflict between the position requirements of “extended hours during the ministerial and Annual Meetings” and “capacity to work well under pressure,” on the one hand, and Applicant’s medical restrictions of part-time work in a low-stress environment, on the other hand.

77. The record indicates, and Applicant acknowledges, that she was encouraged to identify and apply for positions outside of SSG and to avail herself of Fund training opportunities to

enhance her versatility. At the same time, the record likewise reveals that Applicant did undertake training and, furthermore, on a number of occasions indicated in her APRs²⁶ that she sought to attain a suitable, long-term part-time work arrangement that would accommodate her medical limitations, as set out by medical personnel. She appears to have focused much of her effort, unsuccessfully, upon the possibility of making permanent her assignment in the Bank-Fund Library.

78. In her pleadings before the Tribunal, Applicant states that she “began to believe that applying to identified opportunities was an exercise in futility” and that “applying to other suitable jobs has been unsuccessful even with HRD support and likely an exercise in futility” Similarly, during the Grievance Committee hearing, Applicant’s counsel asserted that “[a]ny attempts to apply for positions outside of SSG are met with objection and hesitance with respect to Ms. Shinberg’s injury.” However, Applicant did not substantiate these assertions in her pleadings before the Tribunal. She alleges, but does not substantiate, only one instance in which the Fund is said to have identified a “seemingly suitable” position but then failed to give Applicant adequate support in attaining it. Nor has Ms. Shinberg indicated that specific positions were in fact available that would have been suitable with proper accommodations (e.g., changes in working hours, reduction of intensity and stress, provision of training). *Cf. Mr. “F”*, para. 117 (while applicable regulations required the Fund to make efforts to reassign to another position a staff member whose position had been abolished, the responsibility in that case was to be borne by both parties for “failure to energetically pursue such possibilities” and compensation to the Applicant was accordingly denied).

79. Based on the foregoing, the Tribunal does not find, on the facts of the case, that the Fund was obliged to afford Ms. Shinberg opportunities to transfer to another department which had promotion possibilities beyond the opportunities that did arise of which Ms. Shinberg was informed. The evidence shows that the Fund did make efforts to find positions for Ms. Shinberg in other departments and that Ms. Shinberg, for her part, was not energetic in pursuing the particular positions identified. Furthermore, it appears that during some of her years in SSG, especially 1994-1997, prior to her second injury, Applicant indicated that she was not dissatisfied with her assignment there. In later years, the record suggests that Applicant concentrated her interest on securing permanent assignment with the Bank-Fund Library. During that same period, however, her health, and consequent ability for work, appear to have declined.

²⁶ GAO No. 11, Rev. 4, Section 5.01 (“Assignment of Staff to Positions”) provides in part:

“Staff members shall be given adequate opportunity to express their preferences and interests about their assignments and their views on the development of their careers, and these interests and views will be taken into account to the extent they can be reasonably accommodated within the criteria of (i) [the staff member’s education, training, experience, performance, and other factors that may be relevant to the duties of the position] and (ii) [the overall interests, staffing, work requirements, and budgetary considerations of the Fund and of the department to which the staff member is assigned] Staff members shall be encouraged to express their preferences and interests during their annual performance reviews....”

80. Nonetheless, it may be that, in a span approaching 20 years, the Fund could have been more enterprising than it seems to have been in creating opportunities in other departments of the Fund for a staff member who had medical disabilities. The Fund acknowledges that SSG was not designed to provide permanent placement for staff members, and the record reveals that the changing role of SSG in later years made it less conducive to providing the stable, part-time work arrangement that Applicant's medical condition indicated. That said, on the facts of this case, the Tribunal is unable to conclude that Ms. Shinberg's rights were transgressed by the Fund's not having taken greater efforts to create alternative assignment opportunities for her, including ones that might have led to a career-progression promotion.

81. It is essential to recall what the Tribunal has *not* been called upon to review in this case. As noted above, Applicant is not contending that she applied for and was denied any position or that she requested and was denied reclassification of her position at Grade A5. Moreover, she is not contesting her ultimate separation from service for medical reasons. Nonetheless, the Tribunal observes that the Fund's Discrimination Policy protects staff members against a "... pattern of ... action or inaction ..., the cumulative effect of which is to deprive the individual of fair and impartial treatment." *See Mr. "F"*, para. 90 and Decision (awarding compensation for Fund's failure to take effective measures in response to religious intolerance and workplace harassment of which Mr. "F" was an object).

82. The Fund's Discrimination Policy, set out above at para. 44, defines discrimination as differences in treatment, where the differentiation is "not based on the Fund's institutional needs" and "is unrelated to an employee's work-related capabilities, qualifications and experience," which may include "disabilities or medical conditions that *do not prevent the employee from performing her or his duties.*" (Emphasis supplied.) Applicant's medical condition, as assessed by the Health Services Department, did partially "prevent [her] from performing her duties." In view of the facts of Applicant's case, the Tribunal is not able to conclude that the Fund failed to accommodate Applicant to the extent that her "work-related capabilities" allowed. Accordingly, the Tribunal does not find that any differential treatment that Ms. Shinberg may have experienced was, in the words of the Fund's Discrimination Policy, "unrelated to [Applicant's] work-related capabilities, qualifications and experience."

83. Applicant additionally asserts that the Fund "failed to manage Applicant's career so that she would have advanced at least one grade level in 20 years." In support of this claim, Applicant invokes jurisprudence of the World Bank Administrative Tribunal awarding compensation for "career mismanagement." In Chhabra v. International Bank for Reconstruction and Development, WBAT Decision No. 139 (1994), paras. 55-57, the WBAT cited the Bank's actions in assigning the applicant to a position that did not match her skills following a reorganization and failing to make adequate efforts to remedy such a mismatch. The WBAT concluded that "... although no particular decision of the Respondent is to be quashed, the Respondent's behavior towards the Applicant from the Reorganization onwards, taken as a whole, constitutes mismanagement of the Applicant's career. It reveals errors of judgment which taken together amount to unreasonableness and arbitrariness," for which the Tribunal ordered compensation to the applicant. Similarly, in Barnes v. International Bank for Reconstruction and Development, WBAT Decision No. 176 (1997), para. 29, the WBAT awarded compensation, concluding that "... while the Applicant did not have a right to conversion or extension of her

contract, ... inconsistencies and instances of mismanagement of the Applicant's career by the Respondent reveal 'errors of judgment which amount to unreasonableness and arbitrariness.'

84. While as suggested above, it may be that the Fund could have been more enterprising in seeking or constructing a position for Ms. Shinberg outside the SSG, for the reasons stated the Tribunal does not find that the Fund actionably mismanaged Applicant's career.

Decision

FOR THESE REASONS

The Administrative Tribunal of the International Monetary Fund unanimously decides that:

The Application of Ms. Shinberg is denied.

Stephen M. Schwebel, President

Nisuke Ando, Associate Judge

Michel Gentot, Associate Judge

Stephen M. Schwebel, President

Celia Goldman, Registrar

Washington, D.C.
March 5, 2007