ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

JUDGMENT No. 2007-5

Ms. V. Shinberg (No. 2), Applicant v. International Monetary Fund, Respondent

Introduction

1. On November 14 and 16, 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 contests the Fund's decision to deny reimbursement of attorney's fees she incurred in pursuing a successful claim for Workers' Compensation benefits and in forestalling attempts to separate her from the Fund for medical reasons, thereby maintaining those benefits. Applicant contends that, in accordance with the Workers' Compensation law of the District of Columbia ("D.C."), she is entitled to reimbursement of attorney's fees incurred in restoring and maintaining her benefits under the Fund's Workers' Compensation policy. Applicant cites the Fund's internal law governing Workers' Compensation, GAO No. 20, Rev. 3 (November 1, 1982) (Workers' Compensation Policy), which provides in pertinent part: "The Claim Administrator will dispose of claims first on the basis of the provisions of this Order and next, when not specified otherwise in this Order, in accordance with established procedures for disposition of claims under the District of Columbia Workers' Compensation Regulations." Applicant maintains that GAO No. 20 is silent on the matter of attorney's fees, that District of Columbia law therefore applies, and that D.C. law entitles her to attorney's fees in the circumstances of her case. Additionally, Applicant seeks compensation from the Fund for alleged retaliation for asserting her claims to Workers' Compensation benefits.

3. Respondent, for its part, maintains that GAO No. 20 is not silent on the question of attorney's fees. Rather, asserts the Fund, in expressly providing staff members with a right to review by the Grievance Committee of an adverse finding by the Fund's Workers' Compensation Claim Administrator, GAO No. 20 incorporates the attorney's fees provision of GAO No. 31, Rev. 3 (November 1, 1995) (Grievance Committee). Accordingly, in the Fund's view, District of Columbia law in respect of Workers' Compensation attorney's fees does not govern Applicant's claim, and, as Applicant did not prevail in proceedings of the Grievance Committee, she is not entitled to any award of attorney's fees. Alternatively, asserts the Fund, even if District of Columbia law were held to apply, that law would not entitle Applicant to reimbursement of attorney's fees in the circumstances of her case. Finally, Respondent urges the Tribunal to reject Applicant's claim of retaliation on the grounds that she has not exhausted the requisite administrative review procedures in respect of it and that in any event the contention is without merit.

The Procedure

4. On January 25, 2006, Ms. Shinberg filed an Application with the Administrative Tribunal. Pursuant to Rule VII, para. 6[1] of the Tribunal's Rules of Procedure, the Registrar advised 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 February 16, 2006. On February 22, 2006, 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 April 3, 2006. On May 8, 2006, Applicant submitted her Reply. The Fund's Rejoinder was filed on June 12, 2006. At the request of the Registrar, additional documentation that had been referenced in the pleadings was supplied by the parties in August and September 2007 in order to clarify the record.

Requests for Production of Documents

6. Pursuant to Rule VII, para. 2(h)[3] and Rule XVII[4] of the Tribunal's Rules of Procedure, in her Application, Ms. Shinberg requested a complete statement of all Workers'

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[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 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:
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> ...
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> (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 VII, para. 2(h) provides:

> "2. An application instituting proceedings shall be submitted to the Tribunal through the Registrar. Each application shall contain:
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> …
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> (h) any request for production of documents as provided by Article X of the Statute and Rule XVII below."

Compensation benefits she had received since 1999, including salary and any other benefits, as well as a statement of the benefits she would be entitled to in the future. Applicant maintained that she had requested this information in the past, but had received only partial information, asserting that she "cannot calculate with any certainty the amount of [attorney's] fees payable."

7. In accordance with Rule XVII and Rule VIII, para. 5[5], Respondent had the opportunity to present its views on the request for production of documents. The Fund responded that it had provided Applicant with a list of leave and medical benefits paid her under its Workers' Compensation policy for the period August 1987 through December 2004. Respondent has attached to its Answer this listing of Workers' Compensation benefits. It should be noted that this tabulation includes benefits that pre-date those beginning in May 1999 that Applicant contends were secured or restored through the efforts of her attorneys and are, in her view, reimbursable pursuant to D.C. Workers' Compensation law.

8. The accounting Applicant seeks of Workers' Compensation benefits, including any benefits that may have accrued following December 2004, would be material only if she succeeds on the merits of her claim that attorney's fees should be reimbursed pursuant to D.C. Workers' Compensation law, up to 20 percent of the benefits secured. Accordingly, the question

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[4] 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.
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> 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.
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> 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."

[5] 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."

arises whether such an accounting is relevant to the Tribunal's consideration of the issues of the case or only to the calculation of a remedy in the event that Applicant prevails on her claim that District of Columbia law applies.

9. Additionally, in her Reply, Applicant has requested "… any and all documents and/or correspondence evidencing any and all reasons or explanations for attempts to separate Applicant on medical grounds provided to or among HR and/or Departmental staff where Applicant had worked from 2000 until the filing of this Application." In its Rejoinder, the Fund maintains that this request should be denied on the ground that Applicant has not exhausted available channels of administrative review in respect of alleged wrongful attempts to terminate her employment[6] and therefore such documents are not relevant to the issues of the case. In any event, asserts the Fund, "… during the course of this and other litigation, Applicant has had access to and been provided with copies of all personnel records requested by her, and she is thus fully aware of the documentation in those files relating to her medical separation."

10. On November 8, 2007, following consideration of the views of the parties, the Tribunal decided:

> 1. Applicant's request for documentation relating to the Fund's attempts to separate her for medical reasons is denied on the ground that Applicant has not proffered any evidence suggesting that the Fund had in its possession responsive documents additional to those already made available to her. *See* Mr. "F", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2005-1 (March 18, 2005), para. 9.
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> 2. The Tribunal will defer, until rendering its Judgment on the merits of the Application, its decision on Applicant's request for production of a full accounting of her Workers' Compensation benefits relevant to the claim for attorney's fees.

11. The Tribunal decided that oral proceedings, which neither party had requested,[7] would not be held as they were not deemed useful to the disposition of the case.[8]

The Factual Background of the Case

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

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[6] *See infra* Consideration of the Issues of the Case.

[7] Although Applicant made no formal request for oral proceedings, she suggested in her Reply matters upon which she might testify should the Tribunal decide to hold hearings.

[8] Article XII of the Tribunal's Statute provides that the Tribunal shall "… decide in each case whether oral proceedings are warranted." Rule XIII, para. 1 of the Rules of Procedure provides that such proceedings shall be held "… if … the Tribunal deems such proceedings useful."

Overview

13. Applicant began her employment with the Fund in 1976 as a clerk/typist at the equivalent of Grade A2. Following several promotions and changes in job title, in 1990, Applicant became a Staff Assistant at Grade A5, in which position and grade level she served until beginning a separation leave from the Fund for medical reasons in 2006. Applicant's separation leave will conclude at the end of May 2008, at which time she will become eligible to draw a Fund pension.

14. This is the second Application brought by Ms. Shinberg in the Administrative Tribunal arising out of work-related injuries sustained during her employment with the Fund. Applicant's work history is set out in detail in Ms. V. Shinberg, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2007-2 (March 5, 2007) ("Shinberg I"), paras. 16-34.[9] The events relevant to the claims raised in the instant Application are elaborated below.

Injuries of 1987 and 1997

15. In May 1987, Applicant suffered the first of two work-related injuries when a file cabinet fell from a dolly and struck her back. As a result of the 1987 injury, Ms. Shinberg received benefits pursuant to the Fund's Workers' Compensation policy, GAO No. 20, Rev. 3 (November 1, 1982) (Workers' Compensation). These benefits included coverage of her medical expenses, in accordance with GAO No. 20, Section 8.01, which provides "[i]n the event of an illness, accidental injury or death of a staff member arising out of, and in the course of, Fund employment, the Fund shall pay all reasonable medical, hospital and directly related costs." In order to accommodate medical restrictions resulting from her injury, Applicant worked on a part-time schedule from July 1987 until February 1988, while receiving full-time compensation through the use of sick leave and extended sick leave.[10]

16. In August 1997, Ms. Shinberg sustained a second work-related injury when she slipped and fell on the Fund cafeteria floor, injuring her back and knee. Applicant again was awarded Workers' Compensation benefits, which reimbursed her for associated medical expenses and covered the cost of injury-related absences through the use of "special sick leave," which provides paid leave (independent of sick leave and extended sick leave) when an injury or illness deemed compensable under the Fund's Workers' Compensation policy necessitates absence from

[9] In Shinberg I, the Tribunal dismissed Applicant's contentions that the Fund's policies on grading of positions within the Secretarial Support Group ("SSG"), in which Applicant served, and on promotion, as well as the application of these policies to Applicant were discriminatory or otherwise an abuse of discretion. The Tribunal further concluded that Ms. Shinberg's rights were not 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. Finally, on the facts of the case, the Tribunal was not able to conclude that the Fund failed to accommodate Applicant to the extent that her work-related capabilities allowed or that it actionably mismanaged her career.

[10] "Special sick leave," also known as Workers' Compensation leave, was not introduced by the Fund until 1989. *See* below.

work. *See* GAO No. 13, Rev. 5 (June 15, 1989) (Leave Policies), Section 4.07.[11] In rendering its decision on Ms. Shinberg's 1997 claim, the Workers' Compensation Claim Administrator also referred to Applicant's earlier (1987) injury, confirming that "… any treatment for that [1987] injury which is reasonable, necessary, and causally related is covered under that workers' compensation claim." (Letter from Claim Administrator to Applicant, February 17, 1998.)

Events of May 1999 and following

17. The facts surrounding the cessation of Ms. Shinberg's Workers' Compensation benefits in May 1999 and the subsequent restoration of benefits as the result of a third Workers' Compensation claim (filed in January 2001 for a medical condition arising out of Applicant's two earlier injuries) are central to the consideration of the issues raised by the instant Application before the Administrative Tribunal seeking attorney's fees under the Fund's Workers' Compensation policy. In January 2000, Applicant filed a Grievance, which was revised in July 2000 to challenge *inter alia* the May 1999 termination of her Workers' Compensation benefits. Ms. Shinberg's Revised Grievance, which raised a number of contentions, was not fully resolved until October 2005. Meanwhile, in February 2002, the Fund's Workers' Compensation Claim

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[11] GAO No. 13, Rev. 5 (June 15, 1989), Section 4.07, which governed during the period of the events in this case, provided:

> "4.07 *Special Sick Leave.* In the case of an illness or injury which is covered under GAO No. 20 (Workers' Compensation Policy) sick leave will be accounted for under a separate category entitled 'special sick leave.' When special sick leave is used no other category of sick leave can be used subsequently for the same illness or injury.
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> 4.07.1 (i) The maximum period of special sick leave is equivalent to the staff member's entitlement for sick leave with full and reduced pay provided in Sections 4.03 and 4.04 above when such entitlement exceeds two years;
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> (ii) The maximum period of special sick leave is two years for a staff member whose entitlement for sick leave with full and reduced pay provided in Sections 4.03 and 4.04 above does not exceed two years.
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> 4.07.2 Whether the staff member's entitlement for special sick leave is (i) or (ii) above, there shall be no salary reduction during the first two years in such leave status.
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> 4.078.3 Subject to the provisions of this Section 4.07, the basic principles and procedures applicable to sick leave, in particular Sections (including subsections) 4.01, 4.08, 4.09, 4.10 and 4.11, shall apply to special sick leave as well. If the staff member is not able to return to duty after having been on special sick leave for the maximum period, the provisions of Annex I of this Order shall apply, unless he is placed on administrative leave without pay in accordance with Section 9 below."

(The current GAO No. 13, Rev. 6 (September 29, 2006), Section 4.08 provides for "special sick leave" in similar terms.)

Administrator granted Applicant's third Workers' Compensation claim, restoring medical benefits retroactive to May 1999. The portion of Applicant's Grievance that had challenged the termination of Workers' Compensation benefits accordingly was deemed to have been resolved. Later, Applicant sought attorney's fees in connection with her Workers' Compensation dispute, both through the Grievance Committee process and directly from the Claim Administrator. These requests were denied when the Fund acted on the basis of the Grievance Chairman's Order and the Claim Administrator declined to take any action on the request pending the disposition on the matter in the Tribunal.

18. Also in May 1999, the Fund undertook a fitness-for-duty evaluation of Applicant, determining that she was fit for duty only on a part-time basis. That finding initiated a process that led ultimately to Applicant's separation from the Fund for medical reasons. In 2002, Ms. Shinberg was advised of her potential separation in view of (a) her medical condition, (b) the time limitations on Workers' Compensation benefits, and (c) the limited possibilities for part-time employment within the Fund. In 2003, the Fund decided to proceed with separation; however, the process was halted when Ms. Shinberg invoked the medical panel review process of GAO No. 13, Rev. 5 (June 15, 1989), Annex I[12] and she was again found fit for duty with a restriction of part-time work. In 2006, however, apparently without protest, Ms. Shinberg began her separation leave from the Fund for medical reasons.

19. The intersecting events of the cessation and restoration of Applicant's Workers' Compensation benefits, the disposition of her Grievance, and Applicant's separation from the Fund for medical reasons are detailed below.

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[12] GAO No. 13, Rev. 5 (June 15, 1989), Annex I, which governed during the period of the events in this case, provided in pertinent part:

> "2.02 *Procedures*
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> 2.02.3 If the staff member notifies the Director of Administration in writing of his objection to the proposed separation before the date specified in the communication, a further medical opinion shall be sought from a panel of experts constituted in accordance with Section 2.03 below.
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> ….
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> 2.04 *Decision*
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> 2.04.1 On the basis of the medical opinion rendered by the panel of experts, the Director of Administration shall decide whether there are sufficient grounds for having the staff member separated for medical reasons.
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> ...."

(The same provisions are found at GAO No. 13, Rev. 6 (September 29, 2006), Annex I.)

May 1999 termination of Workers' Compensation benefits

20. By letter of May 18, 1999, the Fund's Workers' Compensation Claim Administrator notified Applicant that her Workers' Compensation benefits were being terminated because it was the opinion of an independent medical examiner ("IME") engaged by the Claim Administrator that Applicant was no longer impaired by a medical condition arising from her employment:

> "…'there is no objective evidence of any residual or permanent impairment on [an] anatomical basis' as related to your work-related injuries, and no limitation on your physical capacity as a result of any anatomical abnormalities that occurred in these work injuries. Based on the job function evaluation, the doctor believes that you have the physical capacity to perform the type of activity required on a full time basis as a Staff Assistant."

The Claim Administrator accordingly concluded that "… effective 5/9/99, any absences from work due to your back will be considered as non-industrial in nature and not chargeable to Workers' Compensation …." (Letter from Claim Administrator to Applicant, May 18, 1999.)

21. In view of this determination, on May 20, 1999, an official of the Human Resources (then "Administration") Department ("HRD") informed Ms. Shinberg by email during an absence from work that her absences would no longer be covered by Workers' Compensation leave but rather by regular sick leave supported by a doctor's certificate. In the same exchange, Ms. Shinberg was informed that "[i]n order to clarify your medical situation we are asking the Health Services Division to conduct a fitness for duty examination." (*See* below.)

Applicant's response to 1999 termination of Workers' Compensation benefits, 1999 engagement of counsel, and filing of January 2000 Grievance

22. By letter of the same date on which Ms. Shinberg was notified of the termination of her Workers' Compensation coverage, i.e. May 20, 1999, Ms. Shinberg's husband responded to the HRD official as follows:

> "As far as the report from the independent medical examiner retained by [the Fund's Workers' Compensation Claim Administrator] is concerned, we would like the Fund to know that we are in total disagreement with it, and with the decision by [the Claim Administrator] to terminate my wife's insurance coverage. We intend to appeal it. We are sending a copy of [the report of] the independent medical examiner to my wife's doctors and they will be contacting [the Claim Administrator] in due time."

(Letter from Applicant's husband to Fund, May 20, 1999.[13])

23. Later in 1999, Applicant retained counsel in an effort to resolve disputes relating to her employment with the Fund. Correspondence that has been made part of the record before the Administrative Tribunal does not reflect that Applicant's 1999 counsel contested the May 1999 termination of Ms. Shinberg's Workers' Compensation benefits. Nor was any allegation relating to the termination of Workers' Compensation coverage raised in a Grievance filed by Ms. Shinberg with the Fund's Grievance Committee on January 3, 2000.[14]

February/March 2000 exchange of correspondence with Staff Benefits Division

24. Following the filing of her January 3, 2000 Grievance, Ms. Shinberg by memorandum of February 23, 2000 requested of the Fund official responsible for Staff Benefits that her Workers' Compensation benefits be "immediately reinstated," that she be reimbursed for medical expenses, and that her sick leave be restored:

> "Based on the report from the doctor to whom I was sent by [the representative of the Fund's Workers' Compensation Claim Administrator], my Workers' Compensation insurance was terminated. It was determined later on by the specialist from Hopkins (whom I saw at the request of the Medical Department), that I was indeed sick. I believe, based on all information I have received and gathered, that my condition was likely triggered by my work-related injury, and work situation, since Fibromyalgia is often the result of physical trauma and stress. I hereby request that my insurance be immediately reinstated, and that I am reimbursed for all the medical expenses that I have incurred as a result of my illness, and not just for some of them, as I understand has been the case. I would also like to request that all my sick leave be accordingly restored."

(Memorandum from Applicant to Fund, February 23, 2000.) In the same memorandum, Applicant also protested an alleged breach of confidentiality in respect of her medical records and expressly stated that she was "… pursuing administrative remedies under General Administrative Order No. 31." (*Id.*)

25. Approximately two weeks later, on March 8, 2000, the responsible Fund official responded that Ms. Shinberg's request for review of the May 18, 1999 decision of the Workers' Compensation Claim Administrator to cease benefits was not timely under GAO No. 31, Section 6.03,[15] which requires that requests for review of staff benefits decisions be filed within three

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[13] In addition, Applicant's husband raised an issue as to an alleged breach of confidentiality of Ms. Shinberg's medical records, an issue that she later pursued in the Grievance Committee.

[14] The January 2000 Grievance did request "reimbursement of my attorney fees," without making any reference to a dispute relating to Workers' Compensation benefits.

[15] GAO No. 31, Rev. 3, Section 6.03 provides in full:

(continued)

months of the contested decision. At the same time, noting that Applicant also requested "… workers' compensation coverage for a current medical condition which you claim is related to your previous work-related injury," the Fund official wrote:

> "Before coverage can be provided, this request would need to be reviewed by the claims administrator to determine if your medical condition and resulting medical expenses as of 5/9/99 are compensable under workers' compensation. In order to facilitate this, we would appreciate if you would complete and sign the attached claim form and medical records release authorization and return to [the Claim Administrator] at your earliest convenience."[16]

(Fund's Memorandum to Applicant, March 8, 2000.)

Engagement of new counsel and filing of July 2000 Revised Grievance

26. According to the invoice for attorney's fees for which Applicant seeks reimbursement in the instant proceeding before the Administrative Tribunal, on the day following Applicant's February 23, 2000 Memorandum protesting the cessation of her Workers' Compensation benefits, Ms. Shinberg took part in an "[i]nitial consultation re Workers' Compensation and other issues" with her new counsel. According to the invoice, consultation with this counsel continued on a nearly monthly basis from February 24, 2000 through the filing of her post-hearing brief in the Grievance Committee on July 6, 2005. (The same counsel continued to represent Applicant thereafter in seeking review by the Administrative Tribunal.)

> "6.03 *Grievances Regarding Staff Benefits*. For decisions regarding the application of a staff benefit, the staff member shall first submit a request for review in writing to the division chief in the Administration Department whose division is responsible for the administration of the benefit in question, clearly indicating that he or she is pursuing the administrative remedies under General Administrative Order No. 31. The request must be submitted within three months after the staff member was informed of the intended application of the benefit. The division chief shall have 15 days to respond in writing."

[16] As to Applicant's contention that the confidentiality of her medical records had been breached by the Fund, the official stated:

> "You should be aware that, as per GAO No. 20, Sec. 10.01, the Fund follows District of Columbia workers' compensation law with respect to the disposition of claims, unless otherwise provided in the GAO. Under DC workers' compensation law, a claimant who puts her medical condition into issue by filing a claim automatically waives the confidentiality of the medical records relevant to that claim, and medical records may be disclosed to the employer in order *inter alia* to review or defend the claim, or to enable supervisors and managers to take appropriate decisions regarding assignment of work in light of the medical condition at issue…."

(Fund's Memorandum to Applicant, March 8, 2000.)

27. On July 10, 2000, Ms. Shinberg's new counsel filed a Revised Grievance, raising four principal issues, including "continued medical problems which Grievant relates to her original back injury covered by Worker's Compensation." The Grievance maintained that "… her current medical condition is directly related to and has grown out of her original back injury that occurred in the course of her employment and until May 1999 was covered by Workers' Compensation. Therefore, Grievant claims that the decision to remove her from Workers' Compensation was an abuse of discretion." (*Id*., p. 5.) The Revised Grievance further elaborated Ms. Shinberg's claim contesting the withdrawal of her Workers' Compensation benefits as follows:

> "Grievant alleges that Respondent has wrongfully withdrawn her coverage under Workers' Compensation. … Grievant underwent a medical examination at the request of the Workers' Compensation Administrator, and on the basis of that examination her benefits were withdrawn. The findings of that examination are contested by Grievant and she seeks restoration of her benefits under Workers' Compensation. When she contested the decision, she was informed that her protest was untimely because she had failed to protest within three months. Alternatively, Respondent is on notice that Grievant intends to file a new Workers' Compensation claim for Fibromyalgia and back pain."

(*Id*., p. 5.)

28. In the Revised Grievance, Ms. Shinberg additionally sought "payment of all her legal costs, i.e. $5,041.00 paid to [her 1999 counsel] and such other costs as may be incurred in pursuing this Grievance." (*Id.*, p. 8.) The request for attorney's fees did not refer to D.C. Workers' Compensation law.

29. Following the filing of Ms. Shinberg's July 2000 Revised Grievance, it was agreed that the Grievance proceedings would be suspended, in Respondent's words, "… to allow the parties an opportunity to try to resolve the workers' compensation issue, and to attempt to reach settlement on the other elements of the grievance." Following a July 3, 2001 pre-hearing conference, the Grievance proceedings remained suspended until 2005.

January 2001 Claim for Workers' Compensation benefits

30. While Applicant's Grievance remained pending and consultations with counsel continued, in January 2001, following her February/March 2000 exchange with the Fund's Staff Benefits Division challenging the May 1999 cessation of Workers' Compensation benefits, Applicant submitted a new claim for Workers' Compensation benefits, as had been suggested by the Staff Benefits official.

31. The January 2, 2001 Workers' Compensation claim was transmitted by Applicant's counsel directly to counsel for the Fund via a cover letter asserting that the 2001 claim "effectively updates [Ms. Shinberg's] claim which goes back to 1987." The claim form, dated January 2, 2001, gave May 1999 as the "accident/illness date" and sought coverage for

"fibromyalgia/cervical problems," stating that "Claimant was injured in 1987 and [the] condition has been chronic and exacerbated by stress leading to fibromyalgia." In seeking benefits, Applicant attributed the cause of her current illness to: "Accident on the job (already accepted by Worker's Compensation) and stress from hostile working environment." (Workers' Compensation claim, January 2, 2001.)

32. Initially, Ms. Shinberg declined to execute an unrestricted medical release in connection with the 2001 Workers' Compensation claim, and the Claim Administrator advised that no action on the new claim could be taken until such authorization was submitted. (Letters from Claim Administrator to Applicant's counsel, February 13 and 22, 2001.) On May 24, 2001, however, counsel for the Fund confirmed to Applicant's counsel the Fund's understanding that an authorization for the release of medical records to the Workers' Compensation Claim Administrator had now been submitted by Ms. Shinberg. The Fund accordingly communicated its view that the "… Grievance should continue to be held in abeyance pending the completion of the review of the workers' compensation claim, as this may have a bearing on the other claims made in the Grievance." (Letter from Fund's counsel to Applicant's counsel, May 24, 2001.) Following a July 3, 2001 pre-hearing conference, formal proceedings in the Grievance Committee did not resume until 2005. (*See infra* The Channels of Administrative Review.)

2002 Decision on 2001 Workers' Compensation claim

33. On February 6, 2002, the Workers' Compensation Claim Administrator rendered its decision on Applicant's January 2, 2001 claim, concluding as follows:

> "It is accepted that the Claimant sustained myofascial pain syndrome associated with low back and neck 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."

(Letter from Workers' Compensation Claim Administrator to Applicant's Counsel, February 6, 2002.) At the same time, the Claim Administrator denied coverage for fibromyalgia as not causally related to the earlier injuries or to an alleged hostile working environment. (The Claim Administrator additionally denied Applicant's claim that her myofascial pain syndrome was caused by stress as a result of a hostile working environment.) (*Id.*)

34. The Claim Administrator accordingly requested that Applicant provide documentation of her covered expenses arising from myofascial pain syndrome:

> "Your client alleged in her Claim filed on 1/2/01 that she was capable at that time of working only reduced hours. Please provide me with your claim, if any, for disability benefits attributable to your client's reduced hours caused by the myofascial pain syndrome, being sure to specify the dates when your client was able to work only reduced hours because of the myofascial pain syndrome [and the wage loss which she is claiming for all such lost

> time].[17] Please also provide copies of all bills for medical treatment received by your client since May of 1999, the date of illness stated in her Claim Form, which are alleged to have been related to the diagnosis, care and/or treatment of the myofascial pain syndrome and which are reasonable and necessary."

(*Id.*)

35. Finally, the Claim Administrator advised Applicant of her right to review, in accordance with the Fund's Workers' Compensation policy: "If your client wishes to appeal any part of her claim which has been denied, she should refer to Section 10.02 of General Administrative Order No. 20, Rev. 3." (*Id.*)

36. Following the Claim Administrator's decision of February 6, 2002, the Fund confirmed to Applicant's counsel steps for its implementation:

> "Ms. Shinberg's absences from work resulting from the myofascial pain syndrome are covered by, and calculated in accordance with, her entitlement to special sick leave under Section 4.07 of GAO No. 13, Rev. 5. …. Any medical expenses which she incurs that are causally related to her myofascial pain syndrome and that are reasonable and necessary will be handled by the Workers' Compensation Claims Administrator as these expenses remain subject to GAO 20."

(Letter from Fund's counsel to Applicant's counsel, March 19, 2002.) An attached memorandum set out Applicant's Workers' Compensation leave entitlement beginning May 10, 2001, calculating a total of $20,121.20 in salary and benefits owing to Ms. Shinberg from that date through March 13, 2002. An additional sum of $12,940 owing in education allowances was later included. (Letter from Fund's counsel to Applicant's counsel and attachment, April 9, 2002.)

37. In respect of Applicant's pending Grievance, the Fund's counsel's letter of March 19, 2002 concluded: "The Fund considers that the resolution of Ms. Shinberg's Workers' Compensation claim renders moot the grievance [in respect of the Workers' Compensation issue] pending with the Grievance Committee." (Letter from Fund's counsel to Applicant's counsel, March 19, 2002.)

Applicant's Fitness for Duty and Separation for Medical Reasons

1999 Fitness-for-Duty Evaluation

38. On March 25, 1999, a senior Administration Department official requested of the Staff Benefits Division a "medical assessment of the ability of Ms. Shinberg to perform the duties associated with an administrative assistant position," in light of her indication that she continued

[17] Brackets in original.

to experience chronic back pain. In May 1999, Applicant was placed on administrative leave with pay during which time she underwent a fitness-for-duty evaluation by the Joint Bank-Fund Health Services Department ("HSD"). On September 30, 1999, the Assistant Director of HRD informed Applicant that her administrative leave with pay would end as of October 1, 1999, as she had been found fit for duty with continuing medical restrictions, in particular, part-time work in a stable environment. Accordingly, in late 1999, Applicant returned to work on a part-time basis. *See* Shinberg I, paras. 26-27.

39. In July 2001, Applicant suffered a new illness (which she did not contend was work related) that occasioned further sick leave. Thereafter, by memorandum of November 5, 2001, the Compensation and Benefits Policy Division noted: "HSD approved staff member's return to work on 10/01/01 with the following restriction: low stress, stable position (preferably continuance in library)." Shinberg I, para. 30.

2002 Advice of potential separation

40. The Fund's letter of March 19, 2002, which set out the benefits to which Ms. Shinberg was entitled as a result of the 2002 decision of the Workers' Compensation Claim Administrator, additionally advised Applicant of the potential for her separation from the Fund in view of (a) her medical condition, (b) the time limitations on Workers' Compensation benefits, and (c) the limited possibilities for part-time employment within the Fund:

> "As you will see from the attached memorandum, Ms. Shinberg's special sick leave entitlement is for a maximum of two years. Therefore, her part-time absences from work that are attributable to myofascial pain syndrome will be covered by special sick leave until such leave is exhausted, or until a part-time position is no longer available for Ms. Shinberg, whichever is earlier. At that point, if it is determined that Ms. Shinberg is unable to return to work full-time, and an ongoing part-time position cannot be found for her in the Fund, she will be separated from the Fund for medical reasons in accordance with Section 4.07.3 of GAO 13. Similarly, if a part-time position is no longer available before her special sick leave is exhausted, Ms. Shinberg will have to be separated from the Fund for medical reasons."

(Letter from Fund's counsel to Applicant's counsel, March 19, 2002.)

41. In August 2002, Applicant again was placed on sick leave and then administrative leave until January 2003, during which time her assignment in the Joint Bank-Fund Library ended. According to Respondent, in the fall of 2002, another fitness-for-duty evaluation was undertaken after Ms. Shinberg requested to work off-site to accommodate her medical condition. In November 2002, HSD again advised that Applicant could work on a limited part-time basis with a flexible schedule.

42. In December 2002, a Human Resources Officer transmitted to Applicant a vacancy announcement for a part-time position as a Staff Assistant/Document Assistant within one of the

Fund's departments. It is not disputed that Applicant did not apply for the vacancy. 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. Shinberg I, paras. 31 - 33.

2003 Separation proceedings and medical panel review

43. By letter of January 15, 2003, the Fund notified Applicant via counsel that the Fund was proceeding with separation for medical reasons in accordance with GAO 16, Revision 5, Section 11, [18] as the recent fitness-for-duty evaluation had determined that she would not be able to return to work on a full-time basis in the foreseeable future and efforts to identify suitable part-time

[18] GAO No. 16, Rev. 5 (July 10, 1990), Section 11 provides:

> "Section 11. Separation for Medical Reasons
>
> 11.01 General. The provisions governing temporary incapacity are contained in Section 4 of General Administrative Order No. 13, Rev. 5 (Leave Policies). In case of permanent incapacity, when a determination has been made in accordance with the provisions of Annex I to General Administrative Order No. 13 that a staff member shall be separated for medical reasons, the procedures outlined below shall apply.
>
> 11.02 Effective Date. The separation of a staff member for medical reasons who is a participant in the Staff Retirement Plan shall not be implemented until it has been determined, in accordance with the relevant provisions of the Staff Retirement Plan, that the staff member will receive a disability pension. The following effective dates shall apply:
>
> 11.02.1 Staff Members Eligible for a Disability Pension. When a staff member is eligible for a disability pension under the Staff Retirement Plan, the date of separation shall be set one calendar day prior to the date of commencement of the disability pension. The commencement of the pension is determined in accordance with the provisions of the Plan.
>
> 11.02.2 Staff Members Ineligible for a Disability Pension. When the staff member is not a participant in the Staff Retirement Plan or when it is determined that no disability pension is payable to him under the Plan, the effective date of separation shall be determined by the Director of Administration. The staff member shall be entitled to a minimum of 60 calendar days notice.
>
> 11.03 Resettlement Benefits. A staff member who is separated for medical reasons shall be eligible for resettlement benefits. However, the minimum period of service required as specified in General Administrative Order No. 8 (Relocation Benefits and Separation Grant) shall not apply in such a case.
>
> 11.04 Payments from Separation Benefits Fund. When a staff member who is separated for medical reasons does not receive a disability pension under the Staff Retirement Plan, he will be granted a separation payment from the Separation Benefits Fund in accordance with the provisions of Section 4.06."

positions had not been successful. (Letter from Fund's counsel to Applicant's counsel, January 15, 2003.) Proceedings to separate Applicant on medical grounds were confirmed in a follow-up letter of February 28, 2003 on behalf of the HRD Director. That letter also advised Applicant of her right to object to the medical separation decision in accordance with Annex I of GAO No. 16. (Letter from HRD Deputy Director to Applicant, February 28, 2003.)

44. Applicant challenged the Fund's 2003 separation decision by exercising her right to review by a medical panel, pursuant to GAO No. 13, Rev. 5, Annex I (June 15, 1989).[19] On November 3, 2003, the Medical Panel issued its report, concluding that Ms. Shinberg was able to work on a part-time basis in a "stable environment" with certain restrictions. *See* Shinberg I, para. 33.

Conclusion of Applicant's employment with the Fund

45. Following an extended period of administrative leave with full pay (which had commenced in January 2003), the Fund in July 2004 proposed and Applicant accepted a part-time assignment in one of the Fund's departments. The medical separation proceedings were suspended. In April 2005, however, Applicant requested termination of this assignment. Later in 2005, she was assigned to perform functions in another Fund department on a part-time basis. Shinberg I, para. 34. In 2006, when this latter assignment came to an end, the Fund proceeded with medical separation.

46. On March 9, 2006, Applicant signed her confirmation of the administrative arrangements for the 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 as of the end of May 2008. (Letter from HRD Associate Director to Applicant, March 7, 2006.)

The Channels of Administrative Review

47. As described above, Applicant first filed a Grievance, and later a Revised Grievance, in 2000. Following a pre-hearing conference of July 3, 2001, formal proceedings of the Grievance Committee were suspended in order to allow the parties the opportunity to resolve the multiple issues in dispute. Proceedings of the Grievance Committee resumed in 2005.

48. In neither her original (January 2000) nor her Revised (July 2000) Grievance, did Applicant seek attorney's fees pursuant to D.C. Workers' Compensation law.[20] That issue apparently developed off the record. Later, in the course of the Grievance Committee's hearing of May 24, 2005, the Workers' Compensation attorney's fee claim was the subject of a brief

[19] GAO No. 13, Rev. 5, 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."

[20] While both Grievances sought reimbursement of attorney's fees, neither invoked D.C. Workers' Compensation law in support of that request.

exchange between counsel.[21] The issue was considered more extensively in post-hearing briefs before the Grievance Committee, in which the parties set out argumentation similar to that now presented to the Administrative Tribunal. Applicant's post-hearing brief additionally raised an issue of retaliation, alleging that "[t]he Fund violated D.C. law when it tried to separate Ms. Shinberg in retaliation for claiming workers compensation benefits."

49. On July 7, 2005, the day following the date of Ms. Shinberg's post-hearing brief in the Grievance Committee, her counsel initiated a request directly to the Fund's Workers' Compensation Claim Administrator for reimbursement of attorney's fees, attaching an itemized invoice totaling $31,461.40 for the period February 24, 2000 though July 6, 2005.

50. While Ms. Shinberg's fee request remained pending with the Workers' Compensation Claim Administrator, on October 26, 2005, the Grievance Committee Chairman issued an Order denying Ms. Shinberg's request for reimbursement by the Fund of attorney's fees "with respect to this grievance and with respect to her workers' compensation claims." The Grievance Chairman set out his reasoning as follows:

> "… the Fund is correct when it asserts that the question of legal fees arises only at the conclusion of the Committee's considerations, and cannot be considered as a separate element of the claim at the outset.
>
> ….
>
> … GAO No. 31, as part of the internal law of the Fund, is incorporated and made part of GAO No. 20; and under the provisions of Section 7.05 of GAO No. 31, the Committee's consideration of fees can only follow the Committee's determination of validity of the grievance."

(Grievance Order, October 26, 2005.) The Grievance Order also considered, in the alternative, the possible applicability of the attorney's fees provisions of D.C. Workers' Compensation law, concluding that there was "… no basis for the granting of legal fees under either of the claims for attorney's fees…." In so recommending, the Grievance Chairman endorsed the Fund's view that "… Grievant has not claimed that [the Fund] refused to pay compensation on a workers' compensation claim that was later found to be compensable," but rather that the claim had been held in abeyance pending her submission of the required medical authorization.[22] (*Id.*)

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[21] The principal subject of the hearing was the Fund's Motion to Dismiss the part of the Grievance that resulted in the Tribunal's Judgment in Shinberg I.

[22] In the same Order, the Grievance Chairman, applying D.C. law and the Fund's internal rules, also denied Applicant's claim that the confidentiality of her medical records had been breached when the Workers' Compensation Claim Administrator transmitted a medical report to HRD staff. Applicant has not sought review of this claim by the Administrative Tribunal.

51. On October 27, 2005, in a follow-up communication to the Claim Administrator, Applicant's counsel referred directly to District of Columbia Workers' Compensation law: "On July 7, 2005, I submitted to [the representative of the Claim Administrator] a statement of fees and costs directly attributable to securing and protecting workers compensation benefits which under D.C. Law are payable to this office. I have not received any written correspondence from [the representative] with respect to those fees and costs." (Letter from Applicant's counsel to Claim Administrator, October 27, 2005.)

52. A week later, by letter of November 2, 2005, Applicant's counsel brought the claim for attorney's fees to the attention of the Chief of the Fund's Staff Benefits Division, attaching a copy of his July 7, 2005 request to the Workers' Compensation Claim Administrator, and asserting:

> "… it is Ms. Shinberg's position that the Grievance Committee is not the sole venue for addressing fees and costs incurred in connection with a workers compensation claim. D.C. law is clear: fees and costs are recoverable for services that secured and protected workers compensation benefits. *See* D.C. Code 32-1530 (2001)."

(Letter from Applicant's counsel to Chief, Staff Benefits Division, November 2, 2005.) The Staff Benefits Chief replied on the same date, informing Applicant's counsel that his correspondence was being referred to the Fund's Legal Department. (Letter from Chief, Staff Benefits Division to Applicant's counsel, November 2, 2005.)

53. On November 10, 2005, counsel for the Fund notified Applicant's counsel that the Fund declined the request for reimbursement of attorney's fees, in light of the Grievance Chairman's Order of October 26:

> "As you aware, the question of payment of legal fees related to workers compensation claims was recently decided by the Grievance Committee, which in its Order dated October 26, 2005, found that there was no basis for granting Ms. Shinberg's claims for attorneys fees including with respect to her workers' compensation claims. This is to advise you that in light of the Grievance Committee's decision, the Fund declines your request for payment of attorneys' fees and costs."

(Letter from Fund's counsel to Applicant's counsel, November 10, 2005.)

54. Shortly thereafter, by letter of November 18, 2005, the Workers' Compensation Claim Administrator informed Applicant's counsel: "… I have been instructed by the International Monetary Fund to advise you that you are to contact them directly regarding your legal bill in the amount of $31,461.40."

55. On January 25, 2006, Ms. Shinberg filed her Application with the Administrative Tribunal.[23]

Summary of Parties' Principal Contentions

Applicant's principal contentions

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

1. GAO No. 20 is silent on payment of attorney's fees. Accordingly, by the terms of GAO No. 20, District of Columbia Workers' Compensation law applies.

2. In accordance with D.C. Workers' Compensation law, Applicant is entitled to reimbursement by the Fund of reasonable attorney's fees and costs incurred as a result of securing, reinstating, protecting and maintaining her Workers' Compensation benefits, as well as fees incurred in defending the attorney's fee claim, not to exceed 20 percent of benefits secured.

3. D.C. law requires employers to reimburse attorney's fees and costs incurred as a result of securing and protecting Workers' Compensation benefits when an employer controverts a claim and the claimant employs an attorney to obtain or restore benefits.

4. The Fund wrongfully terminated Applicant's Workers' Compensation benefits in 1999 and thereafter wrongfully attempted to separate her on medical grounds in 2002 and 2003. In each instance, Applicant's attorneys intervened to restore or maintain her Workers' Compensation benefits.

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[23] Subsequent to the filing of Ms. Shinberg's Application with the Administrative Tribunal, the Claim Administrator on March 29, 2006 responded directly to Applicant's counsel's request of July 7, 2005 for reimbursement of attorney's fees:

> "I acknowledge receipt of … a statement of your law firm's fees and costs that you have described as being '… directly attributable to securing and protecting workers' compensation benefits which under D.C. law are payable to this office.'
>
> …
>
> As to your request for payment in the amount of $31,461.40 for services rendered by various members of your firm from 2/24/00 to 7/6/05, I am advised that the matter is currently under litigation before the IMF Administrative Tribunal. It would therefore be inappropriate for me to take any action on your request pending final resolution of that issue by the Administrative Tribunal."

(Letter from Claim Administrator to Applicant's counsel, March 29, 2006.)

5. The issue of attorney's fees is a separate and distinct element of a Workers' Compensation claim that the Claim Administrator and the Grievance Committee should have decided pursuant to GAO No. 20 and D.C. law and not according to GAO No. 31 or the advice of the Fund.

6. The Fund acknowledged the merit of Applicant's Workers' Compensation Grievance; the underlying claim for benefits was resolved in Applicant's favor without the Grievance Committee's rendering a decision on the merits of that claim.

7. Applicant's case was complex and required the expertise of attorneys. The fees incurred were reasonable in view of the nature and complexity of the claim, the customary rates for such services and the experience of Applicant's counsel.

8. D.C. law also prohibits retaliation by an employer against an employee for claiming Workers' Compensation benefits. With the assistance of counsel, Applicant twice thwarted "retaliatory attempts" by the Fund to separate her on medical grounds "in an attempt to circumvent its workers' compensation obligations." Applicant should be compensated for Respondent's wrongful attempts to separate her after it became aware that she had filed her Workers' Compensation claim.

9. Applicant seeks as relief:

    a. attorneys' fees and costs pursuant to GAO No. 20 and D.C. Workers' Compensation law, i.e. payment of all fees and costs up to 20 percent of the benefits secured;

    b. attorney's fees and costs incurred in pursuing the instant claim before the Administrative Tribunal;

    c. two years salary for moral injury "due to the retaliatory actions (wrongful attempts to separate on medical grounds) taken by Respondent;" and

    d. any other relief deemed fair and just by the Tribunal.

Respondent's principal contentions

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

1. GAO No. 20 is not silent on the question of Workers' Compensation attorney's fees but rather incorporates the provisions of GAO No. 31 that specifically address that issue. As the review procedures of GAO No. 31 are incorporated by

reference in GAO No. 20, the attorney's fees provisions of GAO No. 31 govern awards of attorney's fees in relation to Workers' Compensation claims.

2. The Grievance Committee's consideration of attorney's fees can only follow its determination of the validity of a Grievance.

3. The attorney's fees provisions of the D.C. law are intended to apply within a specific procedural system for resolution of Workers' Compensation claims, which does not have jurisdiction over claims arising in the Fund.

4. Even if D.C. law applied, the provision upon which Applicant relies is inapposite because the Fund did not refuse to pay Applicant's third Workers' Compensation claim but rather held it in abeyance until Applicant submitted the required medical authorization.

5. Applicant's claim of retaliation is not properly before the Tribunal for review, as she has not exhausted available channels of administrative review with respect to that claim.

6. Applicant has not shown that under D.C. law she was discharged in retaliation for making Workers' Compensation claims. Applicant was properly separated under the Fund's policy on medical separation.

Consideration of the Issues of the Case

58. The Administrative Tribunal is enjoined by its Statute to apply the "… internal law of the Fund, including generally recognized principles of international administrative law concerning judicial review of administrative acts." (Statute, Article III.) In the case of the Fund's Workers' Compensation policy, the internal law of the Fund expressly incorporates some, but not all, elements of the Workers' Compensation law of the District of Columbia, as follows: "The Claim Administrator will dispose of claims first on the basis of the provisions of this Order and next, when not specified otherwise in this Order, in accordance with established procedures for disposition of claims under the District of Columbia Workers' Compensation Regulations." (GAO No. 20, Rev. 3 (November 1, 1982) (Workers' Compensation Policy), Section 10.01.)

59. The principal controversy in this case requires the Tribunal to decide, as a threshold matter, whether GAO No. 20, Section 10.01 requires the Fund to apply District of Columbia law in respect of Workers' Compensation attorney's fees, or whether, as the Fund maintains, Section 10.02[24] of the same General Administrative Order, which provides for a right to review by the

[24] GAO No. 20, Rev. 3, Section 10.02 provides:

"*Section 10. Disposition of Claims*

….

(continued)

Grievance Committee of an adverse finding by the Fund's Workers' Compensation Claim Administrator, incorporates the attorney's fees provision of GAO No. 31, Rev. 3 (Grievance Committee) so as to preclude the applicability of the D.C. statute. In other words, has the issue of attorney's fees in disputes arising under the Fund's Workers' Compensation policy been "specified otherwise in this Order" by virtue of Section 10.02, which provides for a "right of appeal" to the Grievance Committee and states that the "normal procedures" of that Committee shall apply?

60. In the event that the Tribunal were to conclude that D.C. law governs in the circumstances of Applicant's case, the question would remain whether she has met the requirements for an award of attorney's fees pursuant to the applicable D.C. Code provisions. Alternatively, if D.C. law is held not to govern, would Applicant have a tenable claim for attorney's fees pursuant to the Fund's internal law?

61. These matters will be considered in turn.

62. Thereafter, the Tribunal will address Applicant's secondary contention, i.e. that the Fund retaliated against her for asserting her claims to Workers' Compensation benefits.

> Is Applicant entitled to reimbursement by the Fund of attorney's fees incurred in pursuing a successful claim for Workers' Compensation benefits and in forestalling subsequent attempts to separate her from the Fund for medical reasons, thereby maintaining those benefits?
>
> > Does GAO No. 20, Section 10.01 require the Fund to apply District of Columbia law in respect of Workers' Compensation attorney's fees?

63. The Fund's Workers' Compensation policy provides, without regard to considerations of fault, 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), Section 1.)

64. The Fund has provided Workers' Compensation coverage to its staff members since at least 1950 when GAO No. 20 was first issued under the title "Workmen's Compensation Insurance." In its original version, as well as under Revision 1 (1959) and Revision 2 (1969), GAO No. 20 "… set forth the terms of the coverage under the Workmen's Compensation insurance policy which the Fund has voluntarily secured…." *See* GAO No. 20 (July 19, 1950), Rev. 1 (October 29, 1959), and Rev. 2 (November 1, 1969), Section 1. That policy "… provide[d] benefits consistent with the terms of the District of Columbia Workmen's Compensation Act...." (*Id.*, Section 2.) The GAO was "… for information purposes only and in

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> 10.02 *Right of Appeal.* A staff member may appeal the Claim Administrator's finding to the Grievance Committee under the procedures set forth in subsection 4.01 of General Administrative Order No. 31, Rev. 1. The normal procedures of the Grievance Committee shall apply."

no way confer[red] any rights on staff members." (*Id.*, Section 8.) By the terms of GAO No. 20, Rev. 2, Section 8, the "[r]ights of staff members with respect to workmen's compensation [were] defined exclusively by the applicable law and regulations." As to the settlement of claims, from its 1st Revision in 1959 until its 3rd Revision in 1982, GAO No. 20 provided that claims would be forwarded to the insurance company for settlement; if the insurer denied liability, the staff member would be "… so informed by the Deputy Commissioner of the Bureau of Employees' Compensation for the District of Columbia." The staff member then had the right to contest the insurance company's denial of liability "… through prescribed administrative procedures before the Deputy Commissioner with final appeal to the courts …." (GAO No. 20, Rev. 1 and Rev. 2, Section 7.)

65. The Fund's Workers' Compensation system was substantially refashioned, however, in 1982, with the issuance of Revision 3 of GAO No. 20, titled "Workers' Compensation Policy." That Revision governs the instant case and continues in force to the present time. Whereas earlier iterations of the GAO provided for settlement of claims by the insurer with recourse through the D.C. agency and courts, Revision 3 provides instead for a "Claim Administrator," defined as "the company which has been engaged to administer the provisions of this Order" (GAO No. 20, Section 2.01.5) and recourse through the Fund's internal dispute resolution system.

66. The Claim Administrator is responsible for the disposition of claims[25] pursuant to Section 10 of GAO No. 20, Rev. 3, as follows:

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[25] Section 9 of GAO No. 20, Rev. 3 prescribes procedures for reporting work-related illnesses and injuries and for the submission of claims:

> "Section 9 (*Report of Injury or Illness*)
>
> ….
>
> 9.01.2 *Report to the Staff Benefits Division.* If, in the judgment of the staff member, or his attending physician, an illness or injury is in any way the consequence of, or aggravated by, the staff member's employment, even though this connection was not immediately apparent or even though no medical expenses have been incurred, it shall be the staff member's responsibility to inform the Staff Benefits Division, in writing, without delay. If he has been absent from duty because of a service-connected injury or illness, he shall notify the Staff Benefits Division upon his return to work, or not later than 30 days after the occurrence of the accident or illness, whichever is earlier or applicable.
>
> ….
>
> 9.03 *Submission of Claim for Disposition.* For the purpose of claim disposition the staff member shall submit a certified statement by the attending physician with details as to the nature of the accident or illness, diagnosis and treatment. Bills and receipts for medical expenses related to the accident or illness will be required if reimbursement is claimed."

> "*Section 10. Disposition of Claims*
>
> 10.01 *Procedure for the Disposition of Claims*. The Staff Benefits Division is responsible for assisting staff in filing claims with the Claim Administrator who handles claims on behalf of the Fund. Claims will be forwarded by the Staff Benefits Division to the Claim Administrator for disposition. The Claim Administrator will dispose of claims first on the basis of the provisions of this Order and next, when not specified otherwise in this Order, in accordance with established procedures for disposition of claims under the District of Columbia Workers' Compensation Regulations. If the Administrator finds liability under the provisions of this Order, the claims will be paid in accordance with subsection 10.03 [[26]] below. If the Administrator finds no liability, the staff member will be so informed by the Staff Benefits Division."

In addition, Revision 3 of GAO No. 20 provides for appeal by an adversely affected staff member to the Fund's Grievance Committee:

> "10.02 *Right of Appeal.* A staff member may appeal the Claim Administrator's finding to the Grievance Committee under the procedures set forth in subsection 4.01 of General Administrative Order No. 31, Rev. 1. The normal procedures of the Grievance Committee shall apply."

67. Accordingly, Revision 3 of GAO No. 20 placed the mechanism for resolving disputes arising from Workers' Compensation claims within the Fund's internal dispute resolution system as it existed in 1982. The Grievance Committee had been established in 1980 (and the Administrative Tribunal was later established, pursuant to its Statute, in 1994). At the time that GAO No. 20, Rev. 3 was promulgated, the Fund's Grievance Committee was governed by GAO No. 31, Rev. 1 (December 1, 1981). GAO No. 20, Section 10.02's provision for appeal to the Grievance Committee expressly refers to GAO No. 31, Rev. 1, Section 4.01, which set out the Grievance Committee's jurisdiction; the succeeding subsections of Section 4 described administrative review requirements prior to the filing of a Grievance, including for Grievances regarding staff benefits. The procedures by which the Grievance Committee operated were specified in Section 5.

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[26] GAO No. 20, Rev. 3, Section 10.03 provides:

> "10.03 *Channel of Payments.* Normally, payments by the Administrator on an approved claim shall be made to the staff member through the Fund. Payments for professional medical services are made to the physician or the hospital concerned or, if appropriate, reimbursed to the staff member."

68. Notably, pursuant to both Revision 1 and Revision 2 (May 1, 1985) of GAO No. 31, assistance of counsel before the Grievance Committee was contemplated only in "exceptional circumstances." In such cases, the Grievance Committee was authorized to determine the "proportion of costs involved which are to be borne by the Fund:"

> "5.02 *Assistance for Grievance Presentation*. A staff member may seek the assistance of other staff members in presenting his complaint or grievance to the Committee. In exceptional circumstances, and at the initiative, or with the approval, of the Grievance Committee, a staff member may seek the assistance of individuals who are not Fund staff members in presenting his complaint or grievance to the Committee. In such cases, the Grievance Committee shall determine the proportion of costs involved which are to be borne by the Fund."

(GAO NO. 31, Rev. 1 (December 1, 1981).)

69. It was not until 1995, with Revision 3 of GAO No. 31, that a fee-shifting provision was clearly incorporated in the Grievance Committee's procedures, providing that when a Grievance is "well-founded in whole or in part" the Committee may recommend an award of attorney's fees against the Fund:

> "7.05 *Assistance of Counsel or Others*. A staff member may seek the assistance of other staff members or individuals who are not Fund staff members in presenting the grievance to the Committee. At the conclusion of the case, if the Committee concludes that a grievance is well-founded in whole or in part, it may recommend that the Fund reimburse the grievant for some or all of the reasonable costs, including legal fees, incurred by the grievant in pursuing the grievance. In deciding whether to recommend reimbursement, the Committee shall take into account the nature and complexity of the case, the nature and quality of the work performed, and the reasonableness of the fees charged in relation to prevailing rates."

(GAO No. 31, Rev. 3 (November 1, 1995).) At the same time, it may be noted that when GAO No. 20, Rev. 3 (Workers' Compensation Policy) was issued in 1982, the D.C. Workers' Compensation Act already included the provision for attorney's fee awards[27] that currently

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[27] The attorney's fees provision of the D.C. Workers' Compensation Act provides:

> **"§ 32-1530. Attorney fees**
>
> (a) If the employer or carrier declines to pay any compensation on or before the 30th day after receiving written notice from the Mayor that a claim for compensation has been filed, on the grounds that there is no liability for compensation within the provisions of this chapter, and the person seeking benefits thereafter utilizes the services of an attorney-at-law

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in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the Mayor, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

(b) If the employer or carrier pays or tenders payment of compensation without an award pursuant to this chapter, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the Mayor shall recommend in writing a disposition of the controversy. If the employer or carrier refuse to accept such written recommendation, within 14 days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation and thereafter utilizes the services of an attorney-at-law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation. The foregoing sentence shall not apply if the controversy relates to degree or length of disability, and if the employer or carrier offers to submit the case for evaluation by physicians employed or selected by the Mayor, as authorized in § 32-1507(e), and offers to tender an amount of compensation based upon the degree or length of disability found by the independent medical report at such time as an evaluation of disability can be made. If the claimant is successful in review proceedings before the Mayor or court in any such case, an award may be made in favor of the claimant and against the employer or carrier for a reasonable attorney's fee for claimant's counsel in accordance with the above provisions. In all other cases any claim for legal services shall not be assessed against the employer or carrier.

(c) In all cases, fees for attorneys representing the claimant shall be approved in the manner herein provided. If any proceedings are had before the Mayor or any court for review of any actions, award, order or decision, the Mayor or court may approve an attorney's fee for the work done before him or it, as the case may be, by the attorney for the claimant. An approved attorney's fee, in cases in which the obligation to pay the fee is upon the claimant, may be made a lien upon the compensation due under an award, and the Mayor or court shall fix in the award approving the fee such lien and manner of payment.

(d) In cases where an attorney's fee is awarded against an employer or carrier there may be further assessed against such employer or carrier as costs, fees and mileage for necessary witnesses attending the hearing at the instance of claimant. Both the necessity for the witness and the reasonableness of the fees of expert witnesses must be approved by the Mayor, or the court, as the case may be. The amounts awarded against the employer or carrier as attorney's fees, costs, fees and mileage of witnesses shall not in any respect affect or diminish the compensation payable under this chapter.

(continued)

obtains[28] and which Applicant contends should have been applied in the circumstances of her case. It is against this historical background that the issues for resolution in this case arise.

70. Accordingly, the question arises whether the 1982 enactment of GAO No. 20, Rev. 3, incorporating a right of appeal to the Fund's Grievance Committee, may be interpreted as incorporating the 1995 revision of GAO No. 31 providing for attorney's fee awards to prevailing Grievants. In interpreting whether a matter has been "specified otherwise" by GAO No. 20, Rev. 3, may the Tribunal take account of the evolution of the Grievance Committee's procedures and apply those procedures in effect at the time that Ms. Shinberg's attorney's fee claim arose? "As a general rule, when a statute adopts a part or all of another statute, domestic or foreign, general or local, by a specific and descriptive reference incorporated by reference, the adoption takes the statute as it exists at that time, and does not include subsequent additions or modifications of the adopted statute, where it is not expressly declared by the adopting statute." 73 Am. Jur. 2d Statutes § 17 at pp. 242-43 (2001). "However, if the reference in the adopting statute is to the general law regulating a subject, the incorporation is of that general law as exists from time to time, unless the general law referred to is part of the same statute or enactment." *Id.* In this regard, what may be more significant is the final sentence of GAO No. 20, Section 10.02, which provides: "The normal procedures of the Grievance Committee shall apply." The question then is whether implicit in that statement is that the "normal procedures" shall apply as they may from time to time be amended. In the view of the Tribunal, the answer to that question is that "normal procedures" are to be assessed as they evolve. The dispute settlement structure of the Fund in the Grievance Committee, and with the establishment of the Administrative Tribunal, has significantly developed over the years and those developments must be taken into account.

71. It may be noted that while Section 10.01 of GAO No. 20, Rev. 3 expressly references the applicability of "*procedures* for disposition of claims under the District of Columbia Workers' Compensation Regulations" (emphasis supplied), the procedures governing the Fund's and the District of Columbia's Workers' Compensation systems are dissimilar. The Fund maintains that

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> (e) Any person who receives any fees, other consideration or any gratuity on account of services rendered as a representative of a claimant, unless such consideration or gratuity is approved by the Mayor or court, or who makes it a business to solicit employment for a lawyer, or for himself in respect of any claim or award for compensation, shall upon conviction thereof for each offense be punished by a fine of not more than $1,000 or by imprisonment for not more than 1 year, or by both such fine and imprisonment.
>
> (f) At no time shall an attorney's fee be approved in excess of 20% of the actual benefit secured through the efforts of the attorney. This provision applies to all benefits secured through the efforts of an attorney, including settlements provided for under this chapter.
>
> (July 1, 1980, D.C. Law 3-77, § 31, 27 DCR 2503; 1981 Ed., § 36-330.)"

[28] D.C. Code § 32-1530 (2001) (Attorney fees) was formerly codified as § 36-330 (1981). *See* Providence Hospital v. District of Columbia Dep't of Employment Services, 855 A.2d 1108, 1111- 12 (D.C. 2004).

the attorney's fees provisions of the District of Columbia Workers' Compensation Act are not applicable within the Fund because their application would be "illogical from a jurisdictional standpoint" as they are intended to apply only within a specific procedural system, which does not have jurisdiction over claims arising in the Fund. Respondent in effect suggests that, given the procedural nature of the D.C. system of which the Fund is not a part, it could not have been intended that GAO No. 20, Rev. 3 would mandate that the Fund apply the attorney's fees provisions that obtain under that system.

72. An essential difficulty in applying the provisions for reimbursement of attorney's fees under the D.C. Code in the context of the Fund is that the private firm engaged as Claim Administrator essentially acts as the Fund's agent in its disposition of Workers' Compensation claims. That is, the Fund implements the Claim Administrator's decision; only the claimant, not the Fund, may contest a decision through the Fund's dispute resolution procedure. The Fund's system is to be contrasted therefore with the resolution and adjudication of claims by a governmental agency and courts.

73. It may be further contended that, as a result of the identity between the Claim Administrator and the Fund in resolving claims, the essential requirement for reimbursement of attorney's fees under the D.C. statute as interpreted by the D.C. Court of Appeals, i.e. that the employer either fails to follow a decision by the D.C. governmental agency responsible for resolving and adjudicating claims or denies liability for a claim that is later found by that agency to be compensable, can never be met by the Fund. In revising GAO No. 20 in 1982 to bring disputes arising under the Fund's Workers' Compensation policy within the Fund's internal dispute resolution process, the Fund created a system within its internal law that makes the application of some elements of its Workers' Compensation system (including the matter of attorney's fees) incompatible with the D.C. system.

74. Moreover, in interpreting the meaning of GAO No. 20, Section 10.01, the Fund's internal law remains paramount and inconsistencies must be reconciled in favor of the provisions of the Fund's own law. By its terms, GAO No. 20, Section 10.01 provides that Workers' Compensation claims are to be disposed of "first on the basis of the provisions of this Order."

75. This Tribunal has held in another context that the elements of the Fund's internal dispute resolution system are meant to be "complementary and effective," Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2001-1 (March 30, 2001), para. 102, and interpreted to avoid "anomalous result[s]." *Id.*, para. 84. When the Fund refashioned its Workers Compensation Policy to bring it within the dispute resolution system internal to the organization, did it also exclude the possibility of awards of attorney's fees pursuant to D.C. law? In the view of the Tribunal, the answer to that question is affirmative.

76. The Tribunal recognizes that the question of attorney's fees is not specifically addressed in GAO No. 20, Rev. 3. It accordingly may be argued that that Order has not "specified otherwise" in respect of attorney's fees. However, when that question is considered in the context of the Order as a whole and the intent of that Order to give primacy to the Fund's internal law is weighed, the more persuasive interpretation, in the view of the Tribunal, is that the Order's reference to the Grievance Committee suffices to bring into play the Grievance Committee's authority to recommend payment of attorney's fees.

77. Accordingly, the Tribunal concludes that the matter of attorney's fees in cases arising under the Fund's Workers' Compensation policy has been "specified otherwise" by GAO No. 20 insofar as it provides a right of review in the Grievance Committee and that the "normal procedures" of that Committee shall apply. The "normal procedures" of the Grievance Committee include its authority to recommend an award of attorney's fees when a Grievance is "well-founded in whole or in part." (GAO No. 31, Rev. 3, Section 7.05.)

As the Tribunal holds that D.C. law does not govern the question, does Applicant have a tenable claim for attorney's fees pursuant to the Fund's internal law?

78. The circumstances of Applicant's case present the question whether the Fund's internal law provides ground for granting an award of attorney's fees when a staff member contests a Workers' Compensation decision through the Fund's Grievance procedure but an intervening decision of the Workers' Compensation Claim Administrator renders the Grievance moot. Do the unusual circumstances presented by Applicant's case permit an award of attorney's fees?

79. As set out in detail above, the essential facts are as follows. In July 2000, Applicant filed a Revised Grievance to contest the May 1999 termination of her Workers' Compensation benefits, that is, Ms. Shinberg appealed, pursuant to the provisions of GAO No. 20, Section 10.02 and GAO No. 31, the Claim Administrator's decision terminating benefits. In January 2001, she also filed a new Workers' Compensation claim in which she sought continuity of coverage from the date of the 1999 termination of benefits, alleging a continuing illness arising from her work-related injuries of 1987 and 1997. It is recalled that the Fund had suggested to Applicant that she submit this new claim for a "current medical condition," while at the same time notifying her that it regarded her request for review of the May 1999 termination of benefits to be untimely under GAO No. 31.[29] Nonetheless, the Revised Grievance filed in July 2000, which contested *inter alia* the May 1999 termination of Workers' Compensation benefits, was allowed to go forward. Once the 2001 Workers' Compensation claim had been filed and the required medical authorization secured, however, the Fund took the position that the Grievance should be held in abeyance until the outcome of the Claim Administrator's review of the new claim was known. In 2002, after that claim was resolved, in part, in Applicant's favor, restoring continuity of medical benefits, Respondent informed Applicant's counsel that "[t]he Fund considers that the resolution of Ms. Shinberg's Workers' Compensation claim renders moot the grievance pending with the Grievance Committee." (Letter from Fund's counsel to Applicant's counsel, March 19, 2002.) Accordingly, the Grievance Committee never had the opportunity to rule on Applicant's appeal pursuant to GAO No. 20, Section 10.02 and GAO No. 31.

80. In the view of the Tribunal, the question of Applicant's Workers' Compensation attorney's fees is disposed of not by reference to D.C. law but by the governing Orders of the Fund. The Grievance Committee did not award legal fees because the Fund itself, at the stage when the Grievance Committee acted, had treated the Grievance as moot insofar as it raised an issue under the Workers' Compensation policy. Earlier, the Fund had asked the Grievance

[29] As noted above, on May 20, 1999, Applicant's husband had written to an HRD official stating that "… we would like the Fund to know that we are in total disagreement … with the decision … to terminate my wife's [Workers' Compensation] insurance coverage. We intend to appeal it."

Committee to hold the proceedings in abeyance until the Claim Administrator could rule. In substance, the claim raised by Applicant in the Grievance Committee was resolved in her favor by the action of the Claim Administrator on her third Workers' Compensation application, which effectively reached back to the origins of her earlier claims.

81. It is recalled that the May 1999 termination of benefits had been based on the report of an independent medical examiner that there was "no objective evidence of residual or permanent impairment. … as related to [Ms. Shinberg's] work-related injuries." (Letter from Claim Administrator to Applicant, May 18, 1999.) In her July 2000 Revised Grievance, Applicant explained that she contested this medical finding:

> "Grievant alleges that Respondent has wrongfully withdrawn her coverage under Workers' Compensation. … Grievant underwent a medical examination at the request of the Workers' Compensation Administrator, and on the basis of that examination her benefits were withdrawn. The findings of that examination are contested by Grievant and she seeks restoration of her benefits under Workers' Compensation.

In 2002, in rendering its decision on the new claim, the Claim Administrator concluded that Ms. Shinberg had "sustained myofacial pain syndrome … as a result of her traumatic injuries of 5/28/87 and 8/7/97 … [which had] rendered her capable of working on a regular part-time basis." The Claim Administrator's determination that Applicant's condition arose from her earlier injuries, and the restoration of medical benefits retroactively to their termination in May 1999, supports the view that the decision on the third claim effectively reversed the termination of benefits that had been the subject of Ms. Shinberg's Grievance.

82. The fee statement of Applicant's counsel indicates substantial legal assistance rendered to Applicant during the period from Applicant's first consultation with counsel in respect of the Workers' Compensation issue in February 2000 through the resolution of Applicant's third Workers' Compensation claim by the Workers' Compensation Claim Administrator and related consultation with counsel of February 2002. In the view of the Tribunal, it was inequitable for the Fund to deny Applicant attorney's fees for this period on the basis that the Grievance Committee did not uphold her claim. The Committee did not deny her claim; rather, the intervening act of the Claim Administrator rendered moot the issue in the Grievance Committee, while establishing that Applicant's claim was indeed well-founded. Accordingly, Applicant is entitled to attorney's fees for the pertinent portion of her representation in the Grievance Committee.

83. The circumstances presented by the case of Ms. Shinberg may be distinguished from a case in which a Grievance, with the assistance of counsel, is resolved through a negotiated settlement between the parties without the Grievance Committee's having the opportunity to make a recommendation on its merits. In the instant case, Ms. Shinberg did not reach a settlement with the Fund prior to the ruling of the Grievance Committee. Rather, the Workers' Compensation Claim Administrator issued a decision on Applicant's third claim, vindicating Ms. Shinberg's right to continuation of Workers' Compensation benefits from the time of their termination in 1999.

Did the Fund impermissibly retaliate against Applicant for asserting her claims to Workers' Compensation benefits?

84. In addition to seeking reimbursement of attorney's fees incurred in securing her Workers' Compensation benefits, Applicant seeks separate relief in the form of monetary compensation on the ground that the Fund allegedly retaliated against her for asserting her claims to Workers' Compensation benefits by "… twice … starting termination proceedings against her which were found to be unjustified" in an effort to "avoid its workers compensation obligations." Respondent urges the Tribunal to reject this claim, maintaining that Applicant has not exhausted the requisite administrative review procedures in respect of it and that in any event the contention is without merit.

Admissibility

85. Respondent contests the admissibility of Applicant's retaliation claim on the ground that she has not met the requirement of Article V, Section 1 of the Tribunal's Statute, which provides: "When the Fund has established channels of administrative review for the settlement of disputes, an application may be filed with the Administrative Tribunal only after the applicant has exhausted all available channels of administrative review." The Fund asserts that Applicant is "… seeking review on the issue of alleged 'retaliatory discharge' or wrongful separation from the Fund for the first time in this Application …, and the claim should therefore be dismissed on jurisdictional grounds." Applicant, for her part, states that she never claimed that there had been a "retaliatory discharge," but rather that "attempts" at discharge were wrongfully undertaken in retaliation for her efforts to maintain Workers' Compensation coverage.

86. It is not disputed that the facts relating to Applicant's claim of retaliation did not arise until after the filing of her Grievances in 2000, and she does not contend that any separate administrative review procedure was initiated in respect of it.[30] She appears to have raised it for the first time in her post-hearing brief in the Grievance Committee, to which the Fund did not have the opportunity to respond. In that brief, Applicant maintained: "In addition to withdrawing Ms. Shinberg's workers compensation benefits unjustifiably, the Fund also tried twice to retaliate unlawfully against Ms. Shinberg by trying to separate her for medical reasons and thereby circumvent its lawful workers compensation benefits obligations." (Grievant's Post-Hearing Brief, pp. 6, 9-10.) Ms. Shinberg did not, however, seek any separate relief on that count in the Grievance Committee proceedings, and the Grievance Chairman did not refer to an allegation of retaliation in his Order of October 26, 2005.

87. This Tribunal has emphasized the importance of the requirement of its Statute that an Application may be filed only after exhaustion of all available channels of administrative review, *see, e.g.*, Ms. "W", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2005-2 (November 17, 2005), para. 116, and has observed that the exhaustion of remedies

[30] As described above, Applicant challenged separation proceedings in 2003 through the medical panel review process. Applicant does not contend, however, that this review included any review of a claim of retaliation. By its terms, GAO No. 13, Rev. 5, Annex I, Section 2.03 (Panel Process) is limited to providing a medical assessment relevant to the separation decision.

requirement serves "… the twin goals of providing opportunities for resolution of the dispute and for building a detailed record in the event of subsequent adjudication." Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2001-1 (March 30, 2001), para. 66. The Tribunal has held, however, that when a later arising claim is (a) closely linked with the principal decision contested in the Tribunal and (b) has been given some measure of review prior to the Application in the Tribunal, it may in some circumstances be justiciable. The Tribunal took such an approach in Ms. "W", explaining its decision as follows:

> "118. ….The Tribunal considers the following factors to be determinative. Applicant's additional contentions, i.e. that the Fund failed to implement fully the remedial action granted under the DRE process and improperly used the review team's report to influence the denial of a promotion, arose in the unique circumstance of the pendency of a complex review procedure, including voluntary mediation, designed to achieve a final resolution of the DRE complaints. This procedure ensued after Applicant lodged her Grievance with the Fund's Grievance Committee. *Moreover, the Grievance Committee, during its subsequent hearings in Ms. "W"'s case, admitted testimony as to the allegations that she now seeks to raise before the Tribunal, allegations that were closely related to but nonetheless postdated the Grievance. The Tribunal accordingly has the benefit of this evidentiary record and the parties have had the opportunity to settle their claims, thereby fulfilling policies underlying the requirement for exhaustion of administrative review.*"

(Emphasis supplied.)

88. The question accordingly arises whether Ms. Shinberg's retaliation claim is (a) "closely linked" (Ms. "W", para. 119) with her challenge to the decision to deny reimbursement of Workers' Compensation attorney's fees, and (b) has been given some measure of review in the dispute resolution process. In other words, have the twin purposes of the exhaustion of remedies requirement, to provide opportunities for the resolution of the dispute and to build an evidentiary record, been fulfilled in this case?

89. The Tribunal concludes that Applicant did not exhaust available channels of administrative review in respect of her claim of retaliation because it was not given any measure of review through the Fund's dispute resolution process. Accordingly, the claim of retaliation is inadmissible.

90. Even if the Tribunal were to reach the merits of Applicant's retaliation claim, she has not substantiated that contention. To the contrary, this Tribunal's Judgment in Shinberg I documents the Fund's accommodation of Applicant's medical conditions from the time of her initial injury in 1987. While observing in that Judgment that it had "… not [been] 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 medical limitations, " para. 71, this Tribunal held: "… 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…." (Para. 80.) The Tribunal additionally examined Applicant's contentions in the light of the Fund's Discrimination Policy, deciding that "… the Tribunal is not able to conclude that the Fund failed to accommodate Applicant to the extent that her 'work-related capabilities' allowed." (Para. 82.)[31] Finally, the Tribunal in Shinberg I dismissed Applicant's contention that the Fund had actionably "mismanaged" her career. (Para. 83.)

91. The Tribunal's decision in Shinberg I that the Fund met its obligations to accommodate Ms. Shinberg as an injured staff member is plainly inconsistent with a conclusion that Respondent attempted to discharge her in retaliation for filing Workers' Compensation claims. Nor has Applicant put forward any evidence of alleged animus in order to make such a showing.

Remedy

92. Article XIV, Section 1 of the Tribunal's Statute provides:

> "If the Tribunal concludes that an application challenging the legality of an individual decision is well-founded, it shall prescribe the rescission of such decision and all other measures, whether involving the payment of money or otherwise, required to correct the effects of that decision."

93. Having concluded that Applicant has prevailed on her claim that she should be reimbursed for attorney's fees incurred in maintaining her Workers' Compensation coverage through the successful pursuit of her 2001 Workers' Compensation claim -- not on the ground of application of D.C. law but under the internal law of the Fund -- the Tribunal must consider how to correct the effects of the decision of the Fund to deny her those fees.

94. Applicant's pleadings include a detailed invoice recording her counsel's efforts on a nearly monthly basis from February 24, 2000 through the filing of her post-hearing brief in the

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[31] "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.'"

Shinberg I, para. 82.

Grievance Committee on July 6, 2005. Having examined that invoice, the Tribunal concludes that Applicant is entitled to an award of $12,838.90 in attorney's fees and costs for her counsel's efforts in resolving her Workers' Compensation dispute. This sum covers the period from Applicant's first consultation with counsel in respect of the Workers' Compensation issue in February 2000 through the resolution of Applicant's third Workers' Compensation claim by the Workers' Compensation Claim Administrator and related consultation with counsel of February 2002.[32]

Attorney's Fees and Costs in the Administrative Tribunal

95. Having prevailed in substantial part on the merits of her claims in this Tribunal, the Tribunal further awards Applicant the majority of her costs incurred in that legal representation, in accordance with Article XIV, Section 4 of the Statute:

> "If the Tribunal concludes that an application is well-founded in whole or in part, it may order that the reasonable costs incurred by the applicant in the case, including the cost of applicant's counsel, be totally or partially borne by the Fund, taking into account the nature and complexity of the case, the nature and quality of the work performed, and the amount of the fees in relation to prevailing rates."

96. The Tribunal observes that while seeking to reserve the right to present further comments in the event that the Tribunal rendered a Judgment concluding that Ms. Shinberg's Application was well-founded in whole or in part, the Fund has supplied detailed argumentation maintaining that the costs requested are "unreasonable" in light of the applicable statutory criteria. Accordingly, no further comment on the matter by the Fund shall be admitted.

97. The Tribunal takes note of Respondent's contention that the pleadings submitted in the Administrative Tribunal bear similarity to earlier work done before the Grievance Committee. At the same time, it is recalled that the Tribunal has held that "… a request for costs deriving from representation in proceedings antecedent to the Tribunal's review has been found to be within the scope of the Tribunal's remedial authority." Mr. "F", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2005-1 (March 18, 2005), para. 124, quoting Ms. "C", Applicant v. International Monetary Fund, Respondent (Interpretation of Judgment No. 1997-1), IMFAT Order No. 1997-1 (December 22, 1997):

> "The phrase 'legal representation' in para. 'Third' of the Decision in Judgment No. 1997-1 embraces Applicant's representation in

[32] The Tribunal recognizes that issues in addition to the dispute regarding Workers' Compensation coverage are reflected in the attorney's charges; however, these issues are sufficiently interwoven with the Workers' Compensation dispute as to merit their inclusion in the fee award. *Cf.* Ms. "J", Applicant v. International Monetary Fund, Respondent (Assessment of compensable legal costs pursuant to Judgment No. 2003-1), Order No. 2003-1 (December 23, 2003) (applying attorney's fees provision of the Tribunal's Statute, fees awarded for claim of an "intersecting nature" with the principal claim on the ground that "at the applicable stage of consultation, both complaints were reasonably being considered in tandem.")

> the administrative review that she had to exhaust pursuant to Article V of the Statute prior to the filing of an Application with the Tribunal, as well as the proceedings before the Tribunal."

See also Mr. "V," Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1999-2 (August 13, 1999), para. 136 (unless awards of attorney's fees under the Tribunal's own remedial provision "… could encompass costs incurred in pressing such claims in the Grievance Committee, the statutory purpose of giving all staff members access to the Tribunal would not be well served.") The work in the Grievance Committee that is similar to that performed in the Administrative Tribunal is not encompassed in the award of Workers' Compensation attorney's fees for the period February 2000-February 2002 granted above.

98. Having reviewed Applicant's statement of attorney's fees and costs in the Administrative Tribunal, the Tribunal concludes that Applicant is entitled to an award of the reasonable costs of her legal representation, in the sum of $5,512.86, which is 90 percent of the fees and costs requested.

Decision

FOR THESE REASONS

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

The Application of Ms. Shinberg is granted in part and denied in part, as follows:

1. Applicant's claim that the Fund wrongfully denied her an award of attorney's fees incurred in maintaining her Workers' Compensation coverage is granted. Accordingly, Applicant is awarded the sum of $12,838.90.

2. Applicant's contention that the Fund retaliated against her for asserting claims to Workers' Compensation benefits is denied.

3. Applicant, having prevailed in substantial part on the merits of her claims before the Administrative Tribunal, is awarded the reasonable costs of her legal representation, in the sum of $5,512.86, which is 90 percent of the fees and costs requested.

Stephen M. Schwebel, President

Nisuke Ando, Associate Judge

Michel Gentot, Associate Judge

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Stephen M. Schwebel, President

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Celia Goldman, Registrar

Washington, D.C.
November 16, 2007