ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

JUDGMENT No. 2010-4

Ms. "EE", Applicant v. International Monetary Fund, Respondent

Introduction

1. On October 4, 5 and 6, 2010, the Administrative Tribunal of the International Monetary Fund, composed for this case[1] of Judge Stephen M. Schwebel, President, and Judges Catherine M. O'Regan and Andrés Rigo Sureda, met to adjudge the Application brought against the International Monetary Fund by Ms. "EE", a staff member of the Fund.

2. Applicant contests the Fund's decision to place her on administrative leave with pay pending investigation of misconduct, pursuant to GAO No. 13, Section 9.01. Applicant contends that the proceedings against her were tainted from the start as being based upon false accusations brought by another staff member, that the Ethics Officer acted with bias in examining the accusations, and that she, in turn, improperly influenced the Human Resources Director who failed to exercise independent judgment in taking the contested decision to place Applicant on administrative leave pending the outcome of the misconduct proceedings. Applicant further contends that the Fund violated due process, and the Fund's own regulations, by placing her on administrative leave with pay without first seeking her account of the events at issue. Additionally, Applicant claims that the misconduct investigation had been substantially concluded before the administrative leave decision was taken; accordingly, she questions the timing of that decision and the duration of the leave, which she maintains caused her unreasonable harm. Applicant further asserts that she was humiliated by being escorted off of Fund premises in the circumstances of her case. Applicant seeks compensation for the harm she alleges.

3. Respondent, for its part, maintains that the decision to place Applicant on administrative leave with pay pending investigation of misconduct represented a proper exercise of discretionary authority, carried out in accordance with the applicable rules. In the view of the Fund, the Human Resources Director has broad discretion to place a staff member on administrative leave pursuant to GAO No. 13, Section 9.01, and the decision was amply justified in the case of Applicant. The Fund further maintains that the contested decision was taken free from any bias, animus or other improper motive, and that the leave was neither unnecessary nor

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[1] Article VII, Section 4 of the Tribunal's Statute provides in part:

> "The decisions of the Tribunal in a case shall be taken by a panel composed of the President and two other members designated by the President."

of excessive duration in view of the steps that still remained to be completed in the misconduct proceedings following the administrative leave decision. Applicant had the opportunity to respond to the allegations against her during the period of the administrative leave, and she was escorted from the building in accordance with standard Fund procedures in such cases.

The Procedure

4. On November 30, 2009, Ms. "EE" filed an Application with the Administrative Tribunal. Pursuant to Rule VII, para. 6,[2] 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 a reasonable period of time 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 December 8, 2009. On December 9, 2009, pursuant to Rule IV, para. (f),[3] the Registrar circulated within the Fund a notice summarizing the issues raised in the Application.

6. Respondent filed its Answer to Ms. "EE"'s Application on January 22, 2010. On January 27, 2010, the Administrative Tribunal, pursuant to Rule XVII, para. 3,[4] issued to Respondent a

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[2] 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. . . ."

[3] 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; . . ."

[4] Rule XVII, para. 3 provides:

> "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."

Request for Information seeking documentation that the Tribunal deemed pertinent to the disposition of the case. On February 12, 2010, Respondent submitted its Response, which was transmitted to Applicant together with the Answer.

7. On March 10, 2010, Applicant filed her Reply to the Fund's Answer. The Fund's Rejoinder was submitted on April 9, 2010.

8. On September 15, 2010, the Tribunal, pursuant to Rule XVII, para. 3, issued to Respondent an Additional Request for Information, to which the Fund responded on September 22, 2010. The Fund's Response was transmitted to Applicant, who was given the opportunity to provide a Comment on the Fund's submission. Applicant did not file a Comment.

Applicant's request for anonymity

9. In her Application, the Applicant requests anonymity pursuant to Rule XXII.[5] The Fund responds that it does not oppose the request for anonymity in view of the "highly personal nature" of the facts presented in the case. Additionally, it asks that anonymity also be extended to other individuals referred to in the Tribunal's Judgment.

10. The Tribunal recently has reaffirmed that granting anonymity to an applicant stands as an exception to the general rule of making public the names of parties to a judicial proceeding. *See Ms. C. O'Connor, Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2010-1 (February 8, 2010), para. 10. '"International administrative tribunals generally have granted anonymity only in cases such as those involving alleged misconduct . . . or matters of personal privacy such as health . . . or family relations . . . ."' *Mr. S. Ding, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2009-1 (March 17, 2009), para. 9, quoting *Ms. "AA", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2006-5

[5] Rule XXII provides:

> *"Anonymity*
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> 1. In accordance with Rule VII, Paragraph 2(j), an Applicant may request in his application that his name not be made public by the Tribunal.
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> 2. In accordance with Rule VIII, Paragraph 6, the Fund may request in its answer that the name of any other individual not be made public by the Tribunal. An intervenor may request anonymity in his application for intervention.
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> 3. In accordance with Rule VIII, Paragraph 5, and Rule IX, Paragraph 6, the parties shall be given an opportunity to present their views to the Tribunal in response to a request for anonymity.
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> 4. The Tribunal shall grant a request for anonymity where good cause has been shown for protecting the privacy of an individual."

(November 27, 2006), para. 14. *See also Ms. "BB", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-4 (May 23, 2007), para. 20 (allegations of misconduct against applicant; allegations by applicant of mistreatment by supervisor); *Ms. "CC", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-6 (November 16, 2007), para. 7 (disability retirement and alleged misconduct); *Mr. "N", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2007-7 (November 16, 2007), para. 8 (child support dispute affecting benefits under Staff Retirement Plan); and *Mr. "DD", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-8 (November 16, 2007), para. 7 (health of applicant and allegations of mistreatment by supervisor).

11. The instant case and the evidence brought out in the course of it concern matters relating to sexual relations between staff members and personal conflicts arising from those relationships. Moreover, the case relates to misconduct proceedings and Applicant makes accusations relating to the conduct of other staff members. In the light of the subject matter of the present proceedings, the Tribunal grants the Applicant's request that her name not be made public. As to the Fund's request for anonymity of other persons, the Tribunal, in accordance with its usual practice, will not make public the names of other individuals referred to in its Judgment.

Applicant's request for production of documents

12. Pursuant to Rule VII, para 2(h),[6] and Rule XVII[7] of the Tribunal's Rules of Procedure, in her Application, Ms. "EE" made the following request for production of documents:

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[6] 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."

[7] Rule XVII provides:

> "*Production of Documents*
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> 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.

(continued)

1. Ethics Officer's report to the external risk assessment firm.

2. 2007 report by Human Resources Department (HRD) official reviewing Applicant's 2007 Annual Performance Review (APR), following Applicant's complaint that she had been unfairly assessed by Mr. "X".

3. Exchange of 2005 to 2008 emails from Ms. "Y" to the Senior Administrative Assistant.

4. Applicant's emails to Ms. "Y" from June 15, 2007 to September 15, 2007.

5. Exchange of emails between Mr. "X", Ms. "Y", and Office Manager from May 2007 to August 2008.

13. In accordance with Rule XVII and Rule VIII, para. 5,[8] of the Tribunal's Rules of Procedure, Respondent was provided the opportunity to present its views as to whether the request for documents should be granted. Respondent opposed Applicant's request, as considered below.

Requested Document No. 1

14. As to Requested Document No. 1, for the report by the Ethics Officer to the external risk assessment firm, Respondent asserts that there was no "report" as such. While the Ethics Officer and others provided information to the firm in undertaking its assessment, according to the Fund, "any documents provided were the same as those annexed to the Ethics Officer's Report [Ethics

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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.

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."

[8] Rule VIII, para. 5 provides:

"5. 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."

Officer's Report of Investigation, November 17, 2008] and provided to Applicant" during the course of the misconduct proceedings.[9]

15. The report by the external firm does not suggest otherwise. It states that its risk assessment was based upon (a) telephone conversations and email exchanges with the security officer, the Ethics Officer, and the Ethics Officer's Administrative Assistant, (b) review of materials provided by the same individuals, and (c) meetings with "senior staff." (External risk assessment report, August 4, 2008, p. 1.) Likewise, the Ethics Officer indicated that the external risk assessment was made "[a]fter review of relevant documents and conversations with the undersigned [Ethics Officer]." (Ethics Officer's Report of Investigation, p. 8.) Neither makes mention of a written report by the Ethics Officer.

16. Accordingly, Applicant's request is denied on the ground that she has not put forward any evidence indicating that the Fund had in its possession "a report by the Ethics Officer" additional to the documents already made available to her. *See Ms. V. Shinberg (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-5 (November 16, 2007), para. 10; *Mr. "F", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005), para. 9.

Requested Document No. 2

17. As to Requested Document No. 2, for the Human Resources Department (HRD) report reviewing Applicant's 2007 Annual Performance Review (APR) following her complaint that she had been unfairly assessed by Mr. "X", Respondent objects that the report is not relevant to the issues of the case. As Respondent notes, the requested document was prepared to resolve an element of an earlier ethics complaint brought by Applicant against Mr. "X".[10] In the view of the Fund, there is "no reasonable nexus" between the requested document and any of the matters at issue in the present case.

18. Applicant alleges bias and retaliation on the part of the Ethics Officer, which she contends influenced the HRD Director in taking the administrative leave decision. She maintains that the Ethics Officer retaliated against her for her counsel's earlier letter protesting the Ethics Officer's failure to pursue a misconduct investigation against Mr. "X".

19. The Tribunal notes that good employment practice would in ordinary circumstances require the report reviewing the Applicant's APR to be made available to the Applicant. Transparency in employment practice encourages a relationship of trust between employer and staff member. Nonetheless, the content of the review of Applicant's 2007 APR by an official of the Human Resources Department is not material to the claim in this case.

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[9] *See infra* The Factual Background of the Case: Subsequent misconduct proceedings.

[10] *See infra* The Factual Background of the Case: Events preceding Ms. "Y"'s complaint of misconduct against Applicant.

20. For the foregoing reasons, Applicant's request is denied on the ground that the requested document is not relevant to the issues of the case, which is limited to Applicant's challenge to the decision to place her on administrative leave pending investigation of misconduct. *See* Rule XVII, para. 2.

Requested Document No. 3

21. As to Requested Documents Nos. 3, 4 and 5, the Fund objects on the ground of relevancy, as well as the privacy interests of other staff members. In the view of the Fund, while Applicant may be seeking these email exchanges to support a claim of a conspiracy to bring "false accusations" against her, the only decision at issue in this case is the decision by the HRD Director to place Applicant on administrative leave with pay pending the misconduct investigation. Even if the emails might be relevant to the outcome of the disciplinary process, asserts the Fund, they are not relevant to the decision challenged in the instant case. Accordingly, the Fund maintains that Requested Documents Nos. 3, 4 and 5 should be denied.

22. As to Requested Document No. 3, for the 2005 to 2008 emails exchanged between Ms. "Y" and the Senior Administrative Assistant, Applicant states that "there are not many" such emails. Applicant apparently requests the purported documents to call into question Ms. "Y"'s own conduct and to support Applicant's assertion that other staff members had circulated sexually explicit materials.

23. The above contentions, however, are not material to the question of whether the Fund abused its discretion in placing Applicant on paid administrative leave and undertaking a misconduct investigation into whether Applicant's conduct amounted to harassment of Ms. "Y". Accordingly, Requested Document No. 3 is denied as not relevant to the consideration of the issues of the case.

Requested Document No. 4

24. Requested Document No. 4, for Applicant's emails to Ms. "Y" from June 15, 2007 to September 15, 2007, appears to be intended to support Applicant's contention that she and Ms. "Y" were on good terms during 2007 and that Ms. "Y" did not regard Applicant's communications to her at that time as "harassment" but only "reinterpreted" them later as such. As these documents do not bear directly on the question before the Tribunal, namely, the modalities of the administrative leave decision, Requested Document No. 4 is denied.

Requested Document No. 5

25. Requested Document No. 5, for the exchange of emails between Mr. "X", Ms. "Y" and the Office Manager from May 2007 to August 2008, appears to relate to Applicant's contention that several staff members conspired to bring "false accusations" against her. Again, the issue before the Tribunal is the challenge to the administrative leave decision. The relevance of the

emails requested is at best tangential to that question.[11] Accordingly, Requested Document No. 5 is denied.

Oral proceedings

26. The Tribunal decided that oral proceedings, which neither party had requested, would not be held as they were not deemed useful to the disposition of the case.[12] The Tribunal had the benefit of a transcript of oral hearings before the Grievance Committee at which Applicant, the Director of Human Resources, and a Fund security officer testified. The Tribunal has held that it is ". . . authorized to weigh the record generated by the Grievance Committee as an element of the evidence before it." *Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1996-1 (April 2, 1996), para. 17.

The Factual Background of the Case

27. The relevant factual background, some of which is disputed between the parties and among the various persons involved, may be summarized as follows. Additional factual elements may be included in the consideration of the issues of the case.

Events preceding Ms. "Y"'s complaint of misconduct against Applicant

28. Applicant began her employment with the Fund some years ago. She currently serves as an Administrative Assistant at Grade A6.[13]

29. In December 2004 or January 2005, under circumstances that are disputed, Applicant and her then manager Mr. "X" commenced a sexual relationship. The relationship, according to Applicant, continued until May 2007 when she broke it off, dissatisfied with her Annual Performance Review (APR), which Mr. "X" was responsible for preparing. The relationship resumed briefly later in the year and terminated completely in November 2007, according to Applicant's account.

30. Following the May 2007 APR, Applicant lodged a complaint of sexual harassment against Mr. "X" with the Fund's Ethics Officer, maintaining that Mr. "X" had initiated the relationship and later deliberately underrated her work performance in comparison with another staff member in order to conceal the affair. (*See* Applicant's report of June 29, 2007.) According to the Ethics Officer's later Report, she undertook a preliminary inquiry into Applicant's complaint against Mr. "X" but the then Human Resources Director declined to authorize a full

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[11] *See infra* Consideration of the Issues of the Case: Applicant's contention that the misconduct investigation was improperly based upon "false accusations."

[12] 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."

[13] Detailed facts concerning Applicant's employment have not been included to protect the identity of the Applicant and other persons involved in these events.

investigation on the ground that Mr. "X" would shortly retire from the Fund and be beyond the reach of the Fund's standards governing misconduct. (Ethics Officer's Report of Investigation, November 17, 2008, pp. 2, 4-5 and note 2.)

31. The Ethics Officer communicated to the Applicant the disposition of her complaint against Mr. "X", and the related challenge to her performance assessment, via memorandum of July 30, 2007. A review of Applicant's 2007 APR by an official of the Human Resources Department concluded that the overall ratings fairly reflected Applicant's performance during the assessment period. Applicant was given a "fresh start," working with a new manager and new senior administrative assistant. The Ethics Officer further advised: "If you continue to be dissatisfied with your APR, you may wish to consider the Fund's administrative and grievance channels that are available to you. Given that your former manager has now[14] retired from the Fund, it would not be productive to pursue your allegations of harassment." (Memorandum from Ethics Officer to Applicant, "Ethics Concerns," July 30, 2007.)

32. The following spring, Applicant again raised an issue of her performance ratings. According to Applicant, on March 5, 2008, the management of her Department informed her that she was at risk of mandatory separation pursuant to the Fund's 2008 downsizing exercise, based upon her Merit-to-Allocation Ratio (MAR), a calculation that took account of her 2007 APR ratings.[15] According to Applicant, on March 13, 2008, following her renewed concern over Mr. "X"'s previous assessment of her work performance, she left an angry phone message on his home voicemail, stating that she would reveal their then-concluded affair to his wife and to Ms. "Y", another staff member with whom Mr. "X" maintained a long-term extramarital relationship.

33. Approximately two weeks later, counsel for Applicant notified the HRD Director that Ms. "EE" intended to bring a complaint against the Fund "and specifically against her supervisor Mr. ["X"] and the Ethics Officer" for failing to provide her with a workplace free from sexual harassment. Applicant's counsel asserted that the Ethics Officer had "abused the powers of her office in denying [Applicant] the right to a fair and transparent review of her misconduct complaint [against Mr. "X"]." Referring to the Ethics Officer's notification to Ms. "EE" that it "would not be productive to pursue your allegations of harassment" in view of Mr. "X"'s retirement, counsel asserted: "In effect, [the Ethics Officer] was advising [Applicant] to drop the matter and not pursue her grievance. . . . I consider her advice to be both inappropriate and professionally irresponsible. Sexual harassment is a matter of institutional integrity and must be investigated whether the harasser is subject to discipline or not." (Letter from Applicant's counsel to HRD Director, April 2, 2008.) Applicant thereafter initiated a Grievance relating to

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[14] In fact, the Applicant's supervisor, it appears from the record, retired the following day. (Ethics Officer's Report of Investigation, p. 5.)

[15] As a result of an oversubscription of volunteers, the Fund later determined that it would not need to implement a program of mandatory separations to achieve the downsizing. *See generally Mr. C. Faulkner-MacDonagh, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2010-2 (February 9, 2010); *Mr. A. Billmeier, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2010-3 (February 9, 2010).

the MAR rating and Mr. "X"'s alleged harassment. (Memorandum from Applicant to HRD Director, "Response to your Memo of May 19, 2008 and Initiation of a Grievance Under GAO 31," June 16, 2008.) According to Respondent, the Grievance Committee dismissed the Grievance as untimely, and Applicant did not pursue that complaint before the Administrative Tribunal.

Ms "Y"'s complaint of misconduct against Applicant and "preliminary inquiry" by Ethics Officer

34. Throughout the period of his intimate relationship with Applicant, and for an extended period of years before it and continuing thereafter, Mr. "X" additionally maintained another extramarital relationship with another Fund staff member Ms. "Y". In summer 2008, Ms. "Y" brought a complaint to the Fund's Ethics Officer, alleging that Applicant had subjected her to harassment. This allegation by Ms. "Y" triggered a "preliminary inquiry" by the Ethics Officer, leading to the Human Resources Director's decision notified to Applicant on August 26, 2008 to place her on administrative leave pending investigation of misconduct, the decision now contested before the Administrative Tribunal.

Complaint of Ms. "Y"

35. According to the Ethics Officer's later Report of Investigation (November 17, 2008), Ms. "Y" first contacted the Ethics Officer on June 9, 2008. Their initial meeting took place approximately one month later on July 8. In the interim, Ms. "Y" submitted what she regarded as documentary evidence of alleged misconduct by Applicant. Her written complaint to the Ethics Officer describes how Applicant allegedly pursued her "vicious harassment":

> "She sent me . . . the most disgusting message accompanied by very vulgar pictures she had taken in his house. . . . How could someone be so malicious, so full of hate and anger. I had done nothing to her, she on the contrary has tried to damage a [multi-year] relationship. . . .
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> . . . . Her obscene letters, language, and photographs are not wanted. She has no right to write this kind of message trying to destroy our peace and harmony. What is her goal? Break us apart? Harass us more. "

36. Ms. "Y" also provided the Ethics Officer with several email messages sent by Applicant to Ms. "Y"'s IMF email address. Three of the messages dated from June and July of 2007 and another from May 2008. The Ethics Officer reported that it was "after Ms. ["Y"] received this latest email from [Applicant] (May 2008) that she became sufficiently concerned to contact the Ethics Office and present her allegations of harassment." (Ethics Officer's Report of Investigation, p. 7.)

37. It is not disputed that sometime in early 2008 Applicant sent a package to Ms. "Y"'s home address via the U.S. postal service, which included a letter and a photograph of herself. According to the Ethics Officer's Report of Investigation, Ms. "Y" found these items "obscene

and extremely upsetting." The Ethics Officer also reported that Mr. "X" had advised Ms. "Y" "not to overreact" to the package. (Ethics Officer's Report of Investigation, p. 7.)

38. In addition, Ms. "Y" submitted several "erotic fantasies" allegedly written by Applicant and some fifteen "pornographic" photographs of Applicant. (Ethics Officer's Report of Investigation, pp. 5-6.) The Ethics Officer noted in her Report of Investigation that Ms. "Y" explained that she had received these materials "in part directly from [Applicant] and in part from Mr. ["X"], after she had insisted that he produce all of the writings and photographs which [Applicant] had previously given to him during their affair." (*Id.*, note 8.) The Ethics Officer recorded that Ms. "Y" was "unclear" in her interview as to whether Applicant had sent the materials to Mr. "X"'s IMF email address, to a personal email address, or had provided them to him in hard copy. (*Id.*, p. 6.)

39. On July 8, 2008, the Ethics Officer interviewed Ms. "Y" and later recounted in her Report of Investigation that Ms. "Y"

> "expressed deep revulsion over the nature of the materials which she had received from [Applicant]. . . . Her distress was visible and palpable during her interview. She spoke of feeling frightened, disgusted, and embarrassed by [Applicant's] behavior.
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> . . . .
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> She expressed concerns for her own personal safety and has changed her daily work routines in order to avoid confronting [Applicant]."

(Ethics Officer's Report of Investigation, pp. 7, 17.)

40. Applicant, for her part, maintains that the source of the materials at issue was Mr. "X", who downloaded and printed them from a personal email account that he and Applicant had shared. According to Applicant, in mid-2008, in retaliation for Applicant's having revealed their liaison to Ms. "Y", Mr. "X" gave the materials to Ms. "Y" who in turn produced them to the Fund's Ethics Officer. In Applicant's view, the Ethics Officer misinterpreted them as pornographic materials transmitted by Applicant to harass Ms. "Y".

41. Applicant additionally asserts that she and Ms. "Y" maintained a friendly relationship until 2008. She states that she sent only two "non-consensual" communications to Ms. "Y", including a letter and photograph mailed to Ms. "Y"'s home. Applicant explains the "non-consensual" communications as follows: "Applicant sent a letter and a picture only to inform Ms. ["Y"] of Mr. ["X"]'s deceit, and a fable to indirectly ask Ms. ["Y"] to stop harassing her through the use of Applicant's office manager." Applicant asserts that her actions were insufficient to constitute a pattern of harassment, although she has not brought a legal challenge to the finding of misconduct against her.

Initiation of "preliminary inquiry"

42. According to her Memorandum for Files, the Ethics Officer met on July 9, 2008, the day following her interview of Ms. "Y", with the HRD Director and the HRD Director's Special Assistant, communicating to them what she characterized as an "overview of the scatological, blasphemous, and pornographic messages which [Applicant] allegedly sent to [Ms. "Y"] using the Fund's email system." Additionally, she indicated that Ms. "Y" and the Senior Administrative Assistant had expressed concerns for their safety vis-à-vis Applicant. The Ethics Officer outlined as "next steps" to work with Ms. "Y" to ensure her physical safety and security at the workplace and to seek the approval of the Deputy Managing Director to conduct an email search. That approval was granted on the same date, authorizing the Ethics Officer to review email exchanges among Applicant, Mr. "X", and Ms. "Y" for the period May 2007 to date.[16] In her July 10, 2008 Memorandum for Files, the Ethics Officer noted: "On the basis of that search I will more than likely commence a preliminary inquiry bringing [Applicant] into this office for interview and confrontation." (Ethics Officer's Memorandum for Files, July 10, 2008.)

43. The Ethics Officer later recorded that based upon Ms. "Y"'s written complaint, documentary materials, and interview, she contacted the HRD Director "to advise her that I would commence a Preliminary Inquiry into these allegations." (Ethics Officer's Report of Investigation, November 17, 2008, p. 8.)

Additional witness interviews

44. In the course of her preliminary inquiry, the Ethics Officer interviewed three other individuals: a Senior Administrative Assistant (in early August 2008), the Department Director (on August 6), and Mr. "X" (by telephone on August 6 and 8).

45. According to the Ethics Officer's Report of Investigation of November 17, 2008, the Senior Administrative Assistant reported that she had observed "angry outbursts" by Applicant in the workplace; she stated that she "felt threatened" and "feared [Applicant] could bring a knife to the office." The Department Director reportedly observed that Applicant's "office behavior was not always appropriate." (Ethics Officer's Report of Investigation, pp. 8-9.)

46. According to her Report of Investigation, the Ethics Officer's telephonic interviews of Mr. "X" confirmed that he had received a "threatening" voice message from Applicant on his home voicemail in early 2008. In addition, he reportedly stated that Applicant had been "nasty" to Ms. "Y" and that the situation was "now becoming more troubling." Mr. "X" ". . . recalled receiving photographs, email messages, and erotic stories written by [Applicant] at the office (in hard copy) and also sent to him from [Applicant]'s private email to his private email account." The Ethics Officer additionally reported that "Mr. ["X"] expressed no fear for his own safety or that of Ms. ["Y"], based on [Applicant]'s actions and statements." (Ethics Officer's Report of Investigation, pp. 9-10.)

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[16] *See* Memorandum from Deputy Managing Director to Ethics Officer, cc HRD Director, July 9, 2008. The authorization was granted in accordance with "E-mail and the Internet—Updated Guidelines for Appropriate Use" (August 10, 2001).

External risk assessment

47. The Ethics Officer additionally consulted with the Fund's security services. Together they decided to seek the opinion of an external risk assessment firm, which developed an analysis based upon (a) telephone conversations and email exchanges with a Fund security officer, the Ethics Officer, and the Ethics Officer's Administrative Assistant, (b) review of materials provided by the same persons, and (c) "meetings with senior staff." (External risk assessment report, August 4, 2008, p. 1.) On August 4, 2008, the external risk assessment firm transmitted its written report to the Fund security officer, who forwarded it to the Ethics Officer. (Grievance Committee hearing, 5-5-09, Tr. 57.)

48. The external risk assessment drew the following somewhat contradictory conclusions. Using "one method for measuring whether a person has decided or is in the process of deciding to use violence," the risk assessment reported, "[a]t this time, favorably, none of the JACA [Justification, Alternatives, Consequences, Ability] elements are present." Using another, computer-assisted, assessment tool, the risk assessment report concluded that ". . . we believe this situation is most similar to those that included worsening behavior and escalations, some including highly intrusive or even harmful actions." (External risk assessment report, August 4, 2008, p. 3.) (Emphasis in original.)

49. The report additionally recommended to the Fund:

> "If you decide to proceed with the termination process regarding [Applicant], we recommend that she be placed on administrative leave until the process is complete. Based on the information we reviewed, we believe [Applicant] will react adversely to news that you are proceeding with steps to terminate her employment. We recommend removing her from the workplace to minimize contact with IMF employees."

(External risk assessment report, August 4, 2008, p. 5.) In the words of the Ethics Officer's later Report of Investigation, the external risk assessment firm "encouraged the Fund to take precautions to remove [Applicant] from the workplace and to continue its internal investigation." (Ethics Officer's Report of Investigation, November 17, 2008, p. 8.)

Decision to place Applicant on administrative leave with pay pending investigation of misconduct

50. In late August 2008, the Ethics Officer reported the results of her "preliminary inquiry" orally to the HRD Director. It is not disputed that the HRD Director was not provided with any written reports at the briefing in late August, in which the Ethics Officer and the security officer summarized the findings to date, including witness interviews and the external risk assessment.

51. The HRD Director testified in the Grievance proceedings about the decision to place Applicant on paid administrative leave pending investigation of misconduct:

> "The issue was that the staff member to whom the materials were sent was feeling very much threatened and—and aggrieved by—by

> the receipt of the materials, and expressed great concern about her safety. So we—I had to balance the issue of the rights of both staff members and the concerns of both staff members in making a decision.
>
> . . . .
>
> And the opinion that was given to me by . . . the IMF security people was that it would be prudent to put [Applicant] on administrative leave pending the outcome of the investigation. And so, therefore, I took the decision to follow that advice, based on my own judgment that it would be a prudent thing to do, as well."

(Grievance Committee hearing, 5-12-09, Tr. 10-11.)

52. The HRD Director further testified:

> "[T]he matter was severe in the sense that the materials passed back and forth were of such a nature—or the materials passed to the other staff member, rather, were of such a nature . . . as to be considered offensive. They're highly offensive, but also somewhat threatening. And the allegations against her were severe. . . . For . . . the other staff member . . . I wanted to make sure that she had the time . . . to give her the time to review and . . . do whatever she needed to do in order to defend herself."

(*Id.*, Tr. 15-16.) The HRD Director stated that she ". . . spoke to neither staff member. I relied completely on the report from the [E]thics [O]fficer, and from the—the meetings that I had with the [E]thics [O]fficer on this, as well as with the security people." (*Id.*, Tr. 14.) She additionally testified that her "consultations with the [Fund] security people" constituted the "main advice that I followed in terms of making a decision in this case . . . .[I]t was their judgment that this would be the prudent thing to do. And I agreed with that judgment." (*Id.*, Tr. 28.)

Events of August 26, 2008

53. On August 26, 2008, the Ethics Officer met with Applicant to notify her that she was commencing a formal investigation into alleged misconduct and that Applicant was being placed on administrative leave with pay. In addition, according to the Ethics Officer, she interviewed Applicant about the allegations of misconduct. At the conclusion of the meeting, Applicant was met by a Fund security officer who escorted her to her office to retrieve her belongings and then off the Fund premises.

Notices to Applicant of initiation of formal investigation into alleged misconduct and of administrative leave

54. At the meeting of August 26, 2008, the Ethics Officer provided Applicant with two memoranda. The first, issued by the Ethics Officer, was titled "Notice of Investigation into Allegations of Inappropriate Conduct by a Fund Staff Member":

> "This is to provide you with notice under the Terms of Reference for the Ethics Officer, GAO 33, and the Procedural Guidelines for Conducting Inquiries Related to Allegations of Misconduct that the Fund's Ethics Officer has received allegations against you concerning inappropriate behavior and conduct unbecoming a Fund staff member. These allegations will be examined during the Ethics Officer's investigation into this matter.
>
> The purpose of this investigation is to determine whether there is credible, material, and probative evidence that indicates that you have engaged in misconduct. Part of this determination is understanding the nature of the available evidence and your responses, as the Respondent, against a backdrop of the Fund's rules and policies. If there is a preponderance of the evidence indicating that you have violated Fund rules and/or policies, a determination to that effect will be submitted to the Director, HRD, for her review and action. If a preponderance of the evidence does not so indicate, then you will be so advised."

As to the substance of the allegations, the notice informed Applicant:

> "The Ethics Office has received reports that you have harassed, threatened, and acted offensively towards one or more current or former staff members. This Office has received allegations that you have sent offensive, derogatory, and pornographic materials to one or more current or former staff members. It is alleged that you have transmitted these materials by using the Fund's resources, such as its email system.
>
> Some examples of these inappropriate activities are attached. Be advised that during the course of this investigation, other materials and actions evidencing misconduct on your part may be discovered."

The notice further advised: "You may choose to retain counsel or another individual—other than a member of LEG [the Fund's Legal Department] or HRD—to assist you in responding to this notice." The Ethics Officer's Memorandum additionally explained upcoming steps as follows:

> "At our initial meeting, we will discuss the allegations, the internal procedures for handling complaints of unethical behavior and misconduct, and the time table going forward. You can anticipate being interviewed by the Fund's Ethics Officer on one or more occasions. You will be given the opportunity to respond fully to these allegations—both orally and in writing. You will be asked to provide documentary evidence and may identify other individuals whom you believe have relevant knowledge about the facts of this matter."

(Memorandum from Ethics Officer to Applicant, "Notice of Investigation into Allegations of Inappropriate Conduct by a Fund Staff Member," August 26, 2008.) Later on August 26, the HRD Director confirmed to the Ethics Officer, via an email message: "As we discussed previously, please proceed with a full investigation of the allegations raised against [Applicant], as outlined in your memorandum to [Applicant] dated August 26, 2008."

55. The second memorandum provided by the Ethics Officer to Applicant at their August 26 meeting had been issued by the HRD Director and was titled "Administrative Leave With Pay Pending Investigation of Misconduct":

> "As you are aware, I have asked the Fund's Ethics Officer . . . to conduct an investigation into allegations of misconduct on your part. [The Ethics Officer] is providing you today with a separate memorandum outlining the nature of the allegations against you, and describing the opportunities that you will have to respond to those allegations, both orally and in writing. The details of the procedures to be followed are also laid out in GAO No. 33 ('Conduct of Staff Members').
>
> In light of the severity of this matter and the importance of your full participation and cooperation in the process that lies ahead, I am placing you on administrative leave with pay, pursuant to Section 9.01 of GAO No. 13, with immediate effect. Thus, you will not be required to report to work until a decision has been reached in this disciplinary case, but your salary and associated benefits will continue during this period, as provided in GAO No. 13, Section 9.03. Your Director has been informed of my decision concerning administrative leave with pay."

(Memorandum from HRD Director to Applicant, "Administrative Leave With Pay Pending Investigation of Misconduct," August 26, 2008.) It is this decision of the HRD Director, notified to Applicant on August 26, 2008, that Ms. "EE" challenges before the Administrative Tribunal.

Ethics Officer's interview of Applicant

56. In her Report of Investigation of November 17, 2008, the Ethics Officer recounted her interview of Applicant of August 26. Applicant reportedly "reviewed the detailed allegations and immediately began to speak about her relationships with Ms. ["Y"] and Mr. ["X"]." She denied "stalking" Ms. "Y" and provided justifications for sending some of the communications at issue. The Ethics Officer commented that "[t]hroughout this interview, [Applicant] showed neither remorse nor embarrassment for her actions or statements. . . . She believes that she is the victim and that the IMF has failed to protect her from the actions of her supervisor." (Ethics Officer's Report of Investigation, pp. 11- 13.)

57. Applicant's account of the interview of August 26 differs. Applicant testified that the Ethics Officer "did not even want to listen to my side." (Grievance Committee hearing, 5-5-09, Tr. 77, 95.) According to Applicant's pleadings, ". . . most of her rebuttals were quickly muffled

by [the Ethics Officer]. Applicant felt uncomfortable and could barely express herself when interviewed by the Ethics Officer who was bluntly unreceptive to Applicant's side of the story."

58. It is not disputed that the meeting of August 26, 2008 constituted the only interview that the Ethics Officer undertook of Applicant in connection with the misconduct proceedings at issue in this case. The Ethics Officer recorded that "[a]t the conclusion of her interview, [Applicant] was given three weeks to present anything in writing or any additional defenses that she wishes the Fund to consider." (Ethics Officer's Report of Investigation, p. 13.)

Removal from Fund premises

59. On the morning of August 26, 2008, the Ethics Officer communicated to Fund security personnel that Applicant would be placed on administrative leave with pay pending investigation of misconduct: "Her badge will be returned to security. She may have visitor privileges to enter Fund premises, provided that she has an escort. . . . Please seize her work computer today, after she has left our premises and secure it appropriately." (Email from Ethics Officer to security officers, August 26, 2008.) Accordingly, at the conclusion of her meeting with the Ethics Officer, Applicant was met by a Fund security officer, who testified that he followed the Fund's "standard procedure" for placing a staff member on administrative leave. (Grievance Committee hearing, 5-5-09, Tr. 34-35.)

60. The officer testified that Applicant did not avail herself of the opportunity that he offered to walk at a "discreet distance" but rather walked "right with [him]" to her office where they collected her belongings, he took her key and badge, and then walked with her to a nearby Metro station. "She could not have been more courteous and polite," observed the officer. (Grievance Committee hearing, 5-5-09, Tr. 40-41.) Applicant testified that the security officer "has been very, very nice." (*Id.*, Tr. 46.) At the same time, Applicant noted that other staff members observed the escort and concluded that she was being placed on administrative leave, which "went like a fire in the prairie" among her co-workers. (*Id.*, Tr. 42.)

Subsequent misconduct proceedings

61. Following the events of August 26, the Ethics Officer continued her "formal investigation" of misconduct against Applicant. The search of the hard drive of Applicant's IMF computer revealed "no photographs of a personal nature." However, from the statements of Mr. "X", the Ethics Officer concluded that Applicant ". . . gave the 15 photographs of herself to Mr. ["X"], during the workday and at the Fund work place." (Ethics Officer's Report of Investigation, pp. 10-11.)

62. The Ethics Officer additionally reported on the search of email correspondence among Applicant, Ms. "Y" and Mr. "X". She noted that many of Applicant's emails to Mr. "X" included "either complaints about other staff members or provocative/suggestive messages of a personal nature." The email search reportedly confirmed that the "objectionable email messages (detailed above) from [Applicant] to Ms. ["Y"] were sent from her Fund email account to Ms. ["Y"]'s Fund email account." No other "objectionable" messages are identified in the Report. (Ethics Officer's Report of Investigation, pp. 10-11.)

63. On September 18, 2008, Applicant submitted a two-page statement titled "Explanations on my e-mails to Ms. ["Y"]," plus attachments. Apparently, this was the only written submission made by Applicant to the Ethics Officer in the course of her investigation.

64. On November 17, 2008, the Ethics Officer issued her Report of Investigation, finding *inter alia*:

> ". . . [Applicant] deliberately sent offensive, derogatory, sacrilegious and pornographic materials to Ms. ["Y"] and to Mr. ["X"]. . . . She transmitted some portion of these materials by using the Fund's resources and facilities, including its email system. [Applicant] made threatening and insulting comments, both written and oral, to Ms. ["Y"] and others; some of these materials were sent to Ms. ["Y"]'s home address and some to her Fund email account. [Applicant] engaged in behavior directed at Ms. ["Y"] that unreasonably interfered with her work and that created an intimidating, hostile, or offensive work environment."

(Ethics Officer's Report of Investigation, p. 2.)

65. Applying a "preponderance of the evidence" standard of proof, the Ethics Officer summarized her conclusions as follows:

> "Based on all of the evidence, I conclude that [Applicant] harassed Ms. ["Y"]. [Applicant]'s behavior was offensive and threatening. It is not appropriate under any standards for a co-worker to attempt to interfere with another co-worker's private life and peace of mind. [Applicant] misused Fund resources (e.g., its email system) by sending offensive, derogatory, obscene, and blasphemous messages to Ms. ["Y"]. The impact of [Applicant]'s actions on Ms. ["Y"] has been profoundly distressing and disturbing. [Applicant]'s conduct reflects adversely on the Fund, as her employer, and if known would certainly damage the reputation of the Fund.
>
> The Fund should not hesitate to take appropriate disciplinary action."

(Ethics Officer's Report of Investigation, p. 19.)

66. On December 15, 2008, approximately one month following submission of the Ethics Officer's Report of Investigation and on the basis thereof, the Acting Director of Human Resources issued a formal "charge" of misconduct against Applicant, pursuant to GAO No. 33, Section 10.02, stating that he had found "sufficient evidence to charge [Applicant] with serious misconduct." The charge memorandum attached the Ethics Officer's Report of Investigation and invited Applicant's response. The substance of the charge was set out as follows:

> "[T]hat you engaged in inappropriate and harassing behavior toward another Fund employee, Ms. ["Y"], which unreasonably interfered with Ms. ["Y"]'s working environment and created an intimidating, hostile and offensive atmosphere. In particular:
>
> - You sent a series of offensive and unwelcome e-mail messages to Ms. ["Y"], using your Fund e-mail account; and
>
> - You also sent offensive and unwelcome communications to Ms. ["Y"] at her home, including delivery of an obscene package, which contributed to the sense of intimidation and hostility in Ms. ["Y"]'s working environment."[17]

The memorandum advised Applicant that she would have until January 12, 2009 to provide in writing any additional comments before a decision would be taken on the misconduct charge. (Memorandum from Acting Director of Human Resources to Applicant, "Charge of Misconduct," December 15, 2008.)

67. On January 12, 2009, Applicant submitted extensive written Responses to the Ethics Officer's Report of Investigation. The Responses reviewed in detail the allegations made against her and cited what she regarded as false accusations and discrepancies in the Ethics Officer's findings. (Applicant's Responses to Ethics Officer's Report of Investigation, January 12, 2009.) The record additionally indicates that Applicant met with the Acting HRD Director in early February to discuss the pending misconduct charge. (*See* Memorandum from Acting Director of Human Resources to Applicant, "Decision on Misconduct Charges," February 10, 2009.)

68. On February 10, 2009, the Acting Director of Human Resources rendered his Decision, concluding that Applicant had committed "serious misconduct" in that "communications with Ms. ["Y"], including both e-mails from your Fund account and a package mailed to Ms. ["Y"]'s home, created an intimidating, hostile and offensive working atmosphere for Ms. ["Y"]." In determining the penalty, the Acting HRD Director noted:

> "Given the severity of the misconduct found in this case, which unreasonably interfered with the working environment of another staff member, you could have been subject to termination of employment under GAO No. 33. However, in considering the appropriate disciplinary action in your case, I have taken into account several mitigating factors, including the fact that this is your first instance of misconduct, and your explanation of the

[17] The charge cited, but did not quote, Sections 7.01(i) and (viii) of GAO No. 33, which provide that conduct for which disciplinary measures may be imposed shall include: "(i) unlawful acts or other professional or personal actions or behavior that are contrary to or inconsistent with the standards of conduct prescribed in the Rules and Regulations of the Fund or that may reflect adversely on the integrity or reputation of the Fund"; and "(viii) harassment of staff members or other employees of the Fund."

> difficult circumstances that led you to act in a way that you consider, in retrospect, to be out of character for you. I have also taken careful note of your statements in our meeting that indicated that you understand the severity of the misconduct, and that you will not repeat it under any circumstances. For these reasons, I have decided to impose lesser, though still serious, sanctions as permitted under GAO No. 33, Section 8.01, rather than termination of employment."

As a result, Applicant received the following disciplinary sanctions: (1) written reprimand, to remain in her confidential personnel record for three years; (2) ineligibility for a salary increase in 2009; and (3) "strict instructions not to contact Ms. ["Y"], send her any communications, or otherwise interfere with her working atmosphere in any way," with the admonition that "[a]ny departure from this instruction will be grounds for dismissal, as will any future incident in which you are found to have committed misconduct involving harassment of another Fund employee." Finally, the Decision of February 10, 2009 notified Applicant that "[a]s the disciplinary process is now concluded, your administrative leave is also concluded and you are hereby returned to active status." (Memorandum from Acting Director of Human Resources to Applicant, "Decision on Misconduct Charges," February 10, 2009.) Applicant accordingly resumed her work at the Fund.

The Channels of Administrative Review

69. On November 25, 2008, while the misconduct proceedings were still ongoing and before she had been "charged" with misconduct pursuant to the procedures set out in Section 10 of GAO No. 33, Ms. "EE" filed a Grievance with the Fund's Grievance Committee challenging the administrative leave decision of August 26, 2008. Applicant's Statement of Grievance, as quoted during the Grievance Committee's Pre-Hearing Conference, asserted: "The Fund unjustly put me on administrative leave, rescinded my Fund ID without a cause, and induced harm and prejudice by escorting me off the premises." (Grievance Committee Pre-Hearing Conference, 4-1-09, Tr. 12.) In its Recommendation and Report to Fund Management, the Grievance Committee articulated the issue as "[w]hether the Fund followed the proper procedures in connection with its decision to place the Grievant on administrative leave in the fall of 2008 pending an investigation into the allegations of misconduct made against her." (Grievance Committee's Recommendation and Report (September 2, 2009), p. 3.)

70. The Committee considered the Grievance in the usual manner, on the basis of oral hearings and the briefs of the parties. On September 2, 2009, the Grievance Committee issued its Recommendation and Report, concluding that the decision challenged by Ms. "EE" represented a legitimate exercise of discretionary authority. The Committee accordingly recommended that the Grievance be denied. (Grievance Committee's Recommendation and Report (September 2, 2009), pp. 15-16.) By letter of September 16, 2009, the Deputy Managing Director notified Applicant that Fund Management had accepted the Grievance Committee's recommendation.

71. On November 30, 2009, Ms. "EE" filed her Application with the Administrative Tribunal.

Summary of Parties' Principal Contentions

Applicant's principal contentions

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

1. The Fund's decision to place Applicant on administrative leave with pay was tainted by its reliance on false accusations and its failure to afford the Applicant an opportunity of presenting her version of events.

2. Applicant was not interviewed about the allegations before the day she was placed on administrative leave, in contravention of applicable regulations and due process.

3. It was "counter-intuitive" for the Fund to order an administrative leave pending investigation when it had performed most of its review, and its complete external risk assessment, before placing Applicant on administrative leave. The six-month duration of the leave was excessive.

4. Ms. "Y" and other Fund staff members conspired to make false accusations against Applicant.

5. The Ethics Officer was part of the conspiracy "due to her unethical report and carefully handpicked e-mails used to blur the truth and bring a case against Applicant." The process of the Ethics Officer's investigation was biased and negligent, in contravention of the Ethics Officer's Terms of Reference. The Ethics Officer also retaliated against Applicant for her counsel's communication to the Fund alleging abuse of power in the disposition of Applicant's earlier misconduct allegations against Mr. "X".

6. The Human Resources Director's decision to place Applicant on administrative leave with pay pending investigation of misconduct was improperly influenced by animus and bias on the part of the Ethics Officer.

7. The external risk assessment, completed on August 4, 2008, concluded that there was no evidence that Applicant could be violent.

8. Applicant seeks as relief:

> $350,000 as compensation for "six long month[s] of mental and physical pains inflicted upon her while on Administrative Leave . . . by a discriminatory and poor preliminary, called later [a] final investigation, conducted by the Ethics Officer, which triggered her administrative leave, and the humiliation of being escorted off the premises without obtaining countervailing evidence from her,

> and ignoring [the external risk assessment firm]'s, even Mr. ["X"]'s statements, that there was no evidence that Applicant could represent a danger."

Respondent's principal contentions

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

1. The Fund's decision to place Applicant on administrative leave with pay pending investigation of misconduct was a proper exercise of discretionary authority, carried out consistently with all applicable procedures.

2. Under the Fund's rules, the Human Resources Director has broad discretion to place a staff member on administrative leave with pay during an investigation into alleged misconduct. The record demonstrates that the decision was amply justified in the case of Applicant.

3. The Fund had not completed its misconduct investigation when it took the decision to place Applicant on administrative leave with pay pending investigation of misconduct. The leave was neither unnecessary nor of excessive duration in view of the steps remaining in the misconduct proceedings following the contested decision.

4. The challenged decision of the Human Resources Director reflected her own judgment as to the appropriate course of action. Applicant has presented no evidence of bias, animus or other improper motivation on the part of the Human Resources Director.

5. Applicant's claims regarding alleged bias or animus on the part of the Ethics Officer are misplaced. Allegations relating to the conduct of the Ethics Officer's investigation are not germane to the Application.

6. Applicant was informed of the allegations against her at the time of the administrative leave decision, and she was given opportunities to respond to the allegations, both orally and in writing, during the leave period.

7. There was no failure of due process in taking the contested decision to place Applicant on administrative leave with pay pending investigation of misconduct.

8. Applicant was escorted from the building in accordance with standard Fund procedures in such cases.

9. The challenged decision has brought no residual harm to Applicant.

Relevant Provisions of the Fund's Internal Law

74. For ease of reference, the provisions of the Fund's internal law relevant to the consideration of the issues of the case are set out below. In a subsequent section of this Judgment, the Tribunal will consider the proper construction of these provisions.[18]

GAO No. 33 (Conduct of Staff Members) (May 1, 1989), Section 10

75. In 1989, the Fund adopted GAO No. 33 (Conduct of Staff Members) (May 1, 1989), which provides at Section 10 the following procedural steps in respect of misconduct proceedings:

> *"Section 10. Procedures*
>
> 10.01 *Responsible Official*. For purposes of this Section, the term 'responsible official' means the Director of Administration, Head of department or other Fund official to whom authority has been delegated pursuant to Section 10.07 below.
>
> 10.02 *Charge*. If, after such preliminary investigation as he deems necessary in the circumstances, the responsible official determines that there are material grounds for charging a staff member with misconduct, he shall inform the staff member in writing of the substance of the charge.
>
> 10.03 *Response of Staff Member.* The staff member shall be given adequate opportunity to respond to the charge against him. In any personal appearance, the staff member shall have the right to be accompanied by another employee of the Fund, who may make submissions on his behalf. If the staff member so requests, the responsible official may permit the staff member to be accompanied by a person who is not an employee of the Fund.
>
> 10.04 *Inquiry*. If the staff member denies the charge, the responsible official shall conduct an inquiry into the matter, in order to determine whether or not the staff member has committed misconduct substantially as charged.
>
> 10.05 *Decision*. If, on the basis of the staff member's response and the information obtained as the result of any inquiry

[18] *See infra* Consideration of the Issues of the Case: Was the decision to place Applicant on paid administrative leave pending investigation of misconduct affected by procedural error?

referred to in Section 10.04, above, the responsible official concludes that the charge of misconduct is valid, he shall notify the staff member in writing of his conclusions, and the reasons thereof, and of the disciplinary measure(s) to be imposed. If he concludes that the charge should be dismissed or that no disciplinary action should be taken he shall also notify the staff member of this conclusion in writing.

10.06 *Confidentiality*. In any particular case in which procedures specified in Sections 10.02 to 10.05 above are applied, the responsible official shall provide information regarding the case only to those staff members who have a need to be informed. Staff members shall treat such information in a confidential manner.

10.07 *Delegation of Authority*. In any particular case, the Director of Administration or Head of department, as applicable, may conduct the procedures outlined in Sections 10.02 to 10.05 above personally, or may delegate the authority to conduct any or all of such procedures to another Fund official, graded at B1 or above, whose rank is at least one grade higher than that of the staff member charged with misconduct, provided that the authority of the Director of Administration to impose the disciplinary measures listed in Section 8.01 (iii) to (viii) above may be delegated only to a Deputy Director of the Administration Department.

10.08 *Interim Measures*. Pending the completion of an inquiry and a decision on the matter:

(i) the staff member may be relieved of specific duty by the Head of Department; or

(ii) the staff member may be placed on administrative leave by the Director of Administration in accordance with GAO No. 13 (Leave Policies), provided that in respect of staff members subject to Rule N-12 such measure shall be imposed by the Managing Director.

10.09 *Disciplinary Measures During Period of Review* Disciplinary measures concerning which an administrative review has been requested shall remain in force during the period in which the review is conducted, provided that in a specific case the Director of Administration may decide otherwise, unless the measures were imposed by the Managing Director."

GAO No. 13, Rev. 6 (Leave Policies) (September 29, 2006), Section 9.01

76. GAO No. 33, Section 10.08, refers to GAO No. 13, Section 9.01, which in its current iteration (Revision 6)[19] provides as follows:

> "9.01 *Administrative Leave With Pay Pending Investigation of Misconduct.* When a staff member is alleged to have engaged in conduct for which any of the disciplinary measures referred to in GAO No. 33 (Conduct of Staff Members) might be imposed, he may be placed on administrative leave with pay while the matter is under investigation, in accordance with the provisions of GAO No. 33. Any such period shall not extend beyond the date on which the staff member is notified of the decision in the matter.
>
> 9.01.1 If the Director, Human Resources, determines that there are no grounds for misconduct, a staff member on administrative leave with pay pending investigation of misconduct will be returned to active status."

During the period of administrative leave with pay, a staff member is entitled to all benefits to which he is otherwise entitled, and such period is to be considered as contributory service for purposes of the Staff Retirement Plan. (GAO No. 13, Section 9.05.) In respect of a staff member, such as Applicant, whose grade level is below that of a division chief, the authority to place the staff member on administrative leave rests with the Director of Human Resources. (GAO No. 13, Section 9.10.1.)[20]

Ethics Officer's Terms of Reference

77. The Fund's Ethics Office was established in 2000. The Ethics Officer's Terms of Reference describe the Ethics Officer's role as follows:

> "1. A position of Ethics Officer will be established to provide the services of an impartial person to inquire into alleged violations

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[19] The text of Section 9.01 of the current Revision 6 (September 29, 2006) is identical to that of Section 9.01 of Revision 5 (June 15, 1989), which was promulgated shortly after GAO No. 33 (May 1, 1989). Section 9.01.1 was added with the issuance of Revision 6.

[20] GAO No. 13, Section 9.10.1 provides:

> "9.10.1 The decision to place a staff member who is subject to Rule N-12 on administrative leave with pay under Section 9.01 above shall be taken by the Managing Director. For all other staff members, the decision shall be taken by the Director, Human Resources, after consultation with the staff member's department director."

(This language is substantially the same as that found at Section 9.07.1 of the earlier Revision 5.)

> of the Fund's rules and regulations and Code of Conduct. The principal aim is to provide assistance in resolving such matters in a manner that contributes to the good governance of the Fund and helps to maintain its reputation for probity, integrity, and impartiality. The Ethics Officer shall accordingly conduct inquiries; provide, on request, advice to management, the Director of the Human Resources Department (HRD), and others, on the application of ethics rules; and, participate in training programs aimed at increasing awareness on ethics issues."

78. The Ethics Officer's responsibilities in respect of the investigation of alleged misconduct are elaborated in Paragraphs 6 – 10 of the Terms of Reference:

> **"Investigation of misconduct**
>
> 6. At the direction of the Managing Director or the Director of HRD, or at his or her own initiative subject to prior approval by the Oversight Committee, the Ethics Officer will conduct investigations based on allegations and complaints of misconduct brought to his or her attention by other parties.
>
> 7. The Oversight Committee has three functions. First, it approves the commencement of an investigation at the initiative of the Ethics Officer if, in its judgment, there is sufficient cause to go forward with the matter. Second, the Committee will retain the discretion to exercise ongoing oversight of any investigation conducted by the Ethics Officer, e.g., involving particularly complex or significant allegations of misconduct. Third, it rules in the event that a staff member appeals a request by the Ethics Officer for access to confidential and/or personal information in the context of any investigation by the Ethics Officer. The Oversight Committee shall be composed of three senior officials of the Fund, appointed by the Managing Director, with the Director of HRD as Chairperson ex officio. The terms of the two senior officials other than the Director of HRD will be for five years and may not be renewable, except that one of the initial appointees will be appointed for a nonrenewable term of 2½ years. A member of the Oversight Committee who faces a conflict of interest in a particular case should recuse himself/herself from that case. The members of the Oversight Committee shall treat all matters brought to their attention by the Ethics Officer on a strictly confidential basis.
>
> 8. When inquiring into allegations of misconduct, the Ethics Officer shall have the right of direct access to all staff members, contractual employees, and vendor personnel. All have a duty to cooperate with the Ethics Officer and to make available all

pertinent information related to their service with the Fund. Departments and offices are also expected to cooperate. However, the Ombudsperson may decline to respond to the Ethics Officer by reason of his or her duty to preserve confidentiality. In the event of a dispute regarding access to information or records (other than information or records of the Ombudsperson), including confidentiality concerns, the matter will be referred to the Oversight Committee for resolution. The Committee shall determine whether the information requested is relevant to employment with the Fund, including the standard of behavior required by the Code of Conduct. The rules on access to e-mail and electronic and telephone records shall apply to the Ethics Officer.

9. The Ethics Officer shall coordinate the activities of his or her office with those of (i) the Office of Internal Audit and Inspection on matters involving financial impropriety or the misuse of Fund assets or property; (ii) the Security Office on matters involving the physical safety of Fund staff or possible damage to Fund premises or property; and (iii) law enforcement authorities on matters involving the possible violation of criminal laws.

10. Based on the reports of the Ethics Officer, the Director of HRD or, in the case of B-level staff, the Managing Director will determine any disciplinary actions to be taken in individual cases of misconduct in accordance with GAO 33."

Procedural Guidelines for Conducting Inquiries Related to Allegations of Misconduct (February 9, 2000)

79. The Ethics Officer's role in investigating suspected misconduct is further elaborated in the Procedural Guidelines for Conducting Inquiries Related to Allegations of Misconduct (February 9, 2000) ("Procedural Guidelines"), which provide in their entirety as follows:

"1. The purpose of these guidelines is to describe the process that would be followed in conducting inquiries related to allegations of misconduct. Inquiries by the Ethics Officer will be based on fundamental fairness in procedural terms, including with respect to providing those against whom allegations are made notice of investigations and an opportunity to be heard, efforts to ensure balance and thoroughness, appropriate confidentiality, and freedom from reprisal.

Initiation of inquiries

2. Inquiries related to allegations of misconduct may be initiated at the direction of the Managing Director or the Director of the

Human Resources Department (HRD) or, upon the complaint of other parties, at the initiative of the Ethics Officer, subject to approval by the Oversight Committee. Allegations or complaints of misconduct should be submitted in the form of written and signed memoranda, describing the concern pertaining to possible misconduct, to the Director of HRD or the Ethics Officer. The Ethics Officer will not act on anonymous allegations except when they relate to circumstances involving risks to the physical safety or health of the person accused or others.

3. Staff should be reassured that those who bring complaints or provide information in good faith regarding possible misconduct are guaranteed full protection from reprisal. It should be understood, however, that malicious and unsubstantiated charges of misconduct would constitute intimidation under the Fund's policy on harassment, thus providing a basis for potential disciplinary action.

Preliminary inquiry

4. The Ethics Officer will conduct a preliminary inquiry into allegations of misconduct by a party other than the Director of HRD or the Managing Director, following the procedures set forth in paragraphs 5 through 8 below. The Ethics Officer may also conduct a preliminary inquiry into allegations of misconduct on the request of the Director of HRD or the Managing Director; however, such preliminary inquiry will not be subject to review and approval by the Oversight Committee.

5. In reviewing allegations or complaints of misconduct, the Ethics Officer will schedule a confidential meeting with the person who filed the complaint (complainant) to review the written memorandum bringing forth charges, to confirm understandings about the key facts and issues involved, clarify the expectations of the complainant, and determine whether an inquiry is warranted.

6. The Ethics Officer also will review any evidence supporting the allegation or complaint and will interview possible witnesses or others who may be in a position to provide information pertaining to the charge of misconduct. In this connection, the Ethics Officer will interview the person against whom an allegation of misconduct has been made (the respondent).

Conclusion of preliminary inquiry

7. Based on the findings of such a preliminary inquiry, the Ethics Officer will submit to the Oversight Committee a brief report, containing the relevant facts presented by the complainant; additional information or evidence—including access to electronic mail and/or telephone records and possible witnesses—needed to assess the case; and recommendations concerning the appropriate scope of any further investigation—including the extent of coordination with other offices, such as the Office of Internal Audit and Inspection, the Security Office, or law enforcement authorities—that might be warranted.

8. Based on the recommendations of the Ethics Officer, the Oversight Committee will determine whether a formal investigation is warranted, the appropriate parameters of such an investigation, and which offices should be involved in conducting it. Alternatively, if a formal investigation does not appear to be warranted, the Committee could refer the matter to the Director of HRD for follow-up.

Formal investigation

9. A formal investigation commences upon referral of a matter to the Ethics Officer by the Managing Director or the Director of HRD, or by the Oversight Committee as described in paragraph 8. Once the formal investigation has commenced and at such time as the available evidence points to misconduct on the part of a particular staff member, the Ethics Officer shall, before interviewing that staff member, inform him or her that an investigation has begun, the reasons for the investigation, and the major elements of the case.

10. The respondent will be given reasonable opportunity to respond in writing in order to explain his or her position with respect to the charges and/or evidence presented by the complainant and to present his or her own evidence, including the names of witnesses who might corroborate the respondent's statements.

11. The Ethics Officer will formally review evidence pertaining to the case, including the evidence presented by the complainant and the respondent. He or she also will interview witnesses or others who may be able to offer information or evidence related to the investigation. All interviews shall be conducted discreetly. In

contacts with individuals, the Ethics Officer will explain the extent to which, in his or her judgment, it may prove necessary to divulge information provided by them to others.

12. In carrying out investigations, the Ethics Officer shall have the right to direct access to staff members, contractual employees, and vendor personnel. All are expected to cooperate with the Ethics Officer and to make available all pertinent information. However, the Ombudsperson may decline to cooperate by reason of his or her duty to preserve confidentiality. In the event of a dispute regarding access to information or records (other than information or records of the Ombudsperson), including confidentiality concerns, the matter would be referred to the Oversight Committee for resolution. The Ethics Officer may decide, at his or her discretion, whether to agree to a request by a staff member, contractual employee, or vendor personnel to be accompanied by an attorney or other person in interviews by the Ethics Officer.

13. Upon completion of his or her investigation, the Ethics Officer will prepare a written report to the Director of HRD or, in the case of B-level staff, the Managing Director containing the following:

- summary of the allegation and nature of the charges;
- a description of the evidence that the alleged misconduct did, or did not, occur;
- opinion—in cases involving harassment—about whether a reasonable person would define the behavior in question as offensive and the extent to which that behavior might interfere with work or create an intimidating, hostile, or offensive work environment; and
- conclusions about whether there was misconduct or whether evidence was insufficient to make a finding.

Resolution

14. Based on the findings of the Ethics Officer, the Director of HRD—or the Managing Director, in the case of B-level staff—decides, in accordance with General Administrative Order No. 33, on the disciplinary action, if any, to be taken.

15. In cases where there is insufficient evidence to make a finding of misconduct, the Ethics Officer's report on the investigation

> would be referred to only if future allegations of misconduct, involving the complainant or the respondent, arose, or if the case became the subject of a Grievance Committee proceeding."

Consideration of the Issues of the Case

80. The case of Ms. "EE" is the first in which the Administrative Tribunal has been called upon to consider what substantive and procedural prerequisites the Fund is required to meet before placing a staff member on paid administrative leave pending investigation of misconduct and whether such requirements were fulfilled in the case of Applicant.

The contested decision

81. It is essential to clarify at the outset that the decision contested by Ms. "EE" is that taken by the Director of Human Resources and notified to Applicant on August 26, 2008 to place her on administrative leave with pay pending investigation of misconduct. Applicant does not challenge in this proceeding, or in any other, the ultimate finding of misconduct rendered on February 10, 2009.[21] Applicant nonetheless devotes considerable attention in her pleadings before the Tribunal to seeking to refute what she regards as Ms. "Y"'s "false illusion of harassment." This is a matter which goes to the finding of misconduct against her rather than to the decision to place her on administrative leave. The gravamen of the instant complaint of the Applicant is the challenge to the administrative leave decision.

82. Applicant nonetheless asserts that among the injuries she suffered was the denial of a salary increase for one year, and having a "damaging" written reprimand recorded on her personnel files for three years. Applicant thereby conflates the disciplinary sanctions imposed at the conclusion of the misconduct proceedings with harm she alleges she experienced as a result of the administrative leave decision itself. The Tribunal observes that the administrative leave decision did not lead inexorably to the misconduct finding, and Applicant does not contest the adequacy of the opportunity she was afforded during the pendency of the leave to rebut or explain elements of the accusations made against her. Moreover, she does not request as relief the rescission of either the decision concluding that she committed misconduct or the resultant disciplinary sanctions. Accordingly, the Tribunal does not address the merits of the decision reached at the conclusion of the disciplinary proceedings against the Applicant.

83. The Tribunal additionally observes that Ms. "EE" has framed her Application before the Administrative Tribunal as a challenge to the Grievance Committee's findings and conclusions. This Tribunal has affirmed on multiple occasions that it does not sit as an appellate body to

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[21] Applicant filed her Grievance contesting the decision to place her on paid administrative leave pending investigation of misconduct on November 25, 2008, during the pendency of the misconduct proceedings. Accordingly, at the time that she initiated her challenge to the administrative leave decision, there was no final misconduct decision to challenge. Respondent in its Response to the Tribunal's Second Request for Additional Information, p. 2, confirms that Applicant has not challenged through the Fund's formal system for the resolution of disputes the February 10, 2009 decision finding that she committed misconduct and imposing disciplinary sanctions.

review the decision-making process of the Grievance Committee. *See generally Mr. A. Billmeier, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2010-3 (February 9, 2010), para. 72 and cases cited therein. While the Grievance Committee's role is advisory to Fund Management, the Tribunal serves as an independent judicial forum. The Tribunal arrives at its own findings of fact and conclusions of law, drawing upon the record of the case, including elements assembled through the administrative review process. *See Ms. "J", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-1 (September 30, 2003), paras. 95-96.

The standard of review

84. Respondent has raised the issue of what standard of review the Tribunal shall apply to Applicant's challenge to the decision to place her on paid administrative leave pending investigation of misconduct, maintaining that such decision is subject to review under the standard applicable to challenges to individual decisions taken in the exercise of managerial discretion. That standard, as articulated in the Report of the Executive Board recommending adoption of the Tribunal's Statute and applied on numerous occasions by this Tribunal, is set out as follows:

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

Commentary on the Statute, p. 19.

85. This Tribunal also has recognized that '"in disciplinary matters,'" international administrative tribunals have held that '". . . review is not limited to determining whether there has been an abuse of discretion but encompasses a fuller examination of the issues and circumstances.'" *Ms. "BB", Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2007-4 (May 23, 2007), para. 124, quoting *D v. International Finance Corporation*, WBAT Decision No. 304 (2003), para. 23. The IMFAT has referred to jurisprudence of the United Nations Administrative Tribunal, indicating that although the "imposition of disciplinary sanctions involves the exercise of discretionary authority, this authority is distinctively quasi-judicial in nature." *Ms. "BB,"* para. 124, citing *Kiwanuka v. Secretary General of the United Nations*, UNAT Judgment No. 941 (1999).[22] In the context of a fuller examination of its own jurisprudence relating to standards of review, the IMFAT has held that in reviewing "quasi-judicial" decision-making processes its scrutiny may be heightened. *Ms. "J",* paras. 110, 121 (review of disability retirement decision), cited in *Ms. "BB"*, para. 123. In a case in which it was called upon to consider a challenge to a misconduct decision, the

[22] *See generally* Ranjan (C. F.) Amerasinghe, "Discretion in Disciplinary Cases," *in* Problems of International Administrative Law: On the Occasion of the Twentieth Anniversary of the World Bank Administrative Tribunal, 37-41 (Nassib G. Ziadé ed., 2008).

IMFAT followed the lead of other international administrative tribunals in examining '"(i) the existence of the facts; (ii) whether they legally amount to misconduct; (iii) whether the sanction imposed is provided for in the law of the [organization]; (iv) whether the sanction is not significantly disproportionate to the offence; and (v) whether the requirements of due process were observed."' *See Ms. "BB"*, paras. 124-125, quoting *D*, para. 23.

86. In the instant case, however, as noted above, Applicant does not challenge the finding of misconduct or the resultant disciplinary sanctions. Applicant does question whether the requirements of due process were met in taking the decision to place her on paid administrative leave within the context of misconduct proceedings. Additionally, by asserting that the contested decision was taken in reliance upon "false accusations," Applicant challenges the evidentiary basis for the administrative leave decision.

87. Respondent has drawn the Tribunal's attention to decisions of the World Bank Administrative Tribunal (WBAT) holding that a "decision to place a staff member on administrative leave [whether taken under the provision of the Bank's rules relating to misconduct proceedings or under another provision of its staff rules] is always a matter of managerial discretion." *AE v. International Bank for Reconstruction and Development*, WBAT Decision No. 392 (2009), para. 24; *AF v. International Bank for Reconstruction and Development*, WBAT Decision No. 393 (2009), para. 26. The WBAT has expressly distinguished the "more limited review" applied to such decisions from the "broader review power" it exercises in considering challenges to the imposition of disciplinary sanctions. *AE*, para. 24; *AF*, para. 26.

88. It is notable that, while emphasizing that the decision to place a staff member on administrative leave with pay in the context of misconduct proceedings is a discretionary one, the WBAT has proceeded to "analyze[ ] . . . the factual record that was in the Bank's hands before it placed the Applicant on administrative leave" to determine whether there was a "sufficient basis" to place the staff member on administrative leave and initiate a full investigation of possible misconduct. *AF*, paras. 30, 35. Accordingly, the "more limited review" invoked by the WBAT in *AE* and *AF* did not prevent it from scrutinizing closely the sufficiency of the facts, along with the fairness of procedures, attendant to the Bank's decisions to proceed with full investigations of alleged misconduct in those cases.

89. The WBAT's nuanced approach to review of administrative leave decisions under an abuse of discretion standard is consistent with the IMFAT's observation that ". . . the standard articulated in the Commentary for review of individual decisions involving managerial discretion comprehends a number of different factors. . . . Hence, its operation in a particular case may emphasize one factor over others or it may involve multiple factors . . . . " *Ms. "J"*, para. 107. "The degree of deference—or depth of scrutiny—may vary according to the nature of the decision under review, the grounds upon which it is contested, and the authority or expertise that has been vested in the original decision maker." *Id.,* para. 99.[23] Accordingly, the abuse of

[23] For example, "[w]hen an applicant's claim implicates a fundamental human right, the Tribunal has held that '[t]he very nature of this grave complaint requires a greater degree of scrutiny over the Fund's exercise of its discretion.'" *Mr. M. D'Aoust (No. 3), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2008-1

(continued)

discretion standard is a flexible one that this Tribunal has tailored in a manner appropriate to the nature of the case presented.

90. The question arises of what considerations shall properly influence the depth of the Tribunal's scrutiny in respect of a decision to place a staff member on paid administrative leave pending investigation of misconduct. Mindful that "[t]he standard of review is designed to set limits on the improper exercise of power and represents a legal presumption about where the risk of an erroneous judgment should lie," *Ms. "J"*, para. 99, the Tribunal considers that administrative leave with pay pending investigation of misconduct is not a punitive measure but rather is designed to preserve the status quo while facts and liabilities are sorted out through the running of a quasi-judicial process that incorporates investigation, charge, response, and decision. At the stage of investigation—when the administrative leave decision was taken in the instant case—wider latitude may be permitted to the decision-making authorities in view of the staff member's later opportunities to correct potential error in the fact-finding process. At the same time, the Tribunal recognizes that ". . . even a professionalized inquiry designed to be discreet and confidential may have adverse consequences for an accused staff member, both personal in terms of time and stress, as well as reputational and in working relationships with staff colleagues." Robert A. Gorman, "Due Process in Misconduct Cases," p. 7 (unpublished paper presented at World Bank Administrative Tribunal/American Society of International Law Joint Colloquium on International Administrative Tribunals and The Rule of Law, March 27, 2007). *See Galang v. Asian Development Bank*, AsDBAT Decision No. 55 (2002), para. 46 ("Although suspension was an interim measure, its impact on the reputation of the Applicant should not have been ignored"; quashing decision suspending staff member at half-pay pending investigation of misconduct, where decision was taken with "undue haste").

91. Taking account of (a) the interest of the Fund's Management in ensuring a broad opportunity to assess a situation of possible misconduct and potential future harm before the facts can be fully known, and (b) the interest in the dignity and morale of the accused staff member confronted with unilateral removal from the workplace and with effective suspension from work even while maintaining full pay and benefits, the Tribunal will consider whether the Fund abused its discretion in taking the decision to place Applicant on paid administrative leave pending investigation of alleged misconduct. Consistent with the governing law, did the Fund have an adequate basis in law and fact for taking the contested decision? Was the decision improperly motivated? Was the decision carried out consistently with fair and reasonable procedures? In particular, was the Fund required to have interviewed Applicant about the accusations against her before taking the decision to place her on administrative leave? Did the manner of removing Applicant from the Fund's premises, or the length of the administrative leave, violate fair and reasonable procedures in the circumstances of her case?

(January 7, 2008), para. 65, quoting *Ms. "M" and Dr. "M", Applicants v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2006-6 (November 29, 2006), para. 117.

What substantive and procedural prerequisites must the Fund meet in taking a decision to place a staff member on paid administrative leave pending investigation of alleged misconduct, and were these requirements met in the case of Applicant?

92. Central to the dispute before the Tribunal is the question of what substantive and procedural requirements the Fund must meet in taking a decision to place a staff member on paid administrative leave pending investigation of alleged misconduct. The Fund maintains that the governing regulations grant the Human Resources Director authority to place a staff member on administrative leave with pay "on the sole grounds that an inquiry into alleged misconduct by that staff member is ongoing." In the view of the Fund, as set out in its pleadings before the Tribunal:

> "The rules also do not require any specific justification for the decision, beyond the fact that an inquiry is ongoing. In the circumstances of the present case, therefore, it is clear that the Director of HRD acted within her discretion, as a matter of law, when she decided to place [Applicant] on administrative leave after having authorized a full investigation into misconduct allegations against her on August 26, 2008."

93. Plainly, however, the question of whether Applicant was the subject of an investigation of misconduct at the time she was placed on administrative leave is only the beginning and not the end of the inquiry. If, as the Fund suggests, the fact that a misconduct investigation is ongoing against a staff member is sufficient to justify an administrative leave decision under GAO No. 13, Section 9.01 and GAO No. 33, Section 10.08, then the exercise of discretion to be examined by the Tribunal was the judgment to pursue such investigation.

94. In the case of Ms. "EE", the HRD Director's decision to place the staff member on administrative leave appears to have been taken in tandem with her decision to authorize the Ethics Officer to proceed from a "preliminary inquiry" to a "formal investigation" of misconduct under the Fund's Procedural Guidelines for Conducting Inquiries Related to Allegations of Misconduct. The content and context of the Fund's communications to Ms. "EE" underscore that these two decisions went hand-in-hand; it was at the same August 26 meeting that the Ethics Officer presented Applicant with both a "Notice of Investigation into Allegations of Inappropriate Conduct by a Fund Staff Member" and a memorandum from the HRD Director advising that she was being placed on "Administrative Leave With Pay Pending Investigation of Misconduct" with "immediate effect." The essence of Applicant's complaint is that the Ethics Officer's "preliminary inquiry," which formed the predicate for the contested administrative leave decision, was flawed so as to call into question that subsequent decision. Applicant furthermore contends that the HRD Director failed to exercise independent judgment to rectify those alleged flaws.

95. Respondent, for its part, maintains that "allegations regarding the conduct of the Ethics Officer's investigation" are not "germane" to the Application. In the view of the Tribunal, however, while elements of the Ethics Officer's "formal investigation," which was carried out after the administrative leave decision was taken, may have only limited relevance to the present Application, the conduct of the Ethics Officer's "preliminary inquiry" is of central importance to

the dispute before the Tribunal, as it laid the foundation for the contested decision of the HRD Director to impose administrative leave.

96. In assessing whether the Fund met the substantive prerequisites for taking a decision to place a staff member on paid administrative leave pending investigation of alleged misconduct, the Tribunal first will consider whether the Fund had an adequate evidentiary basis to pursue a formal misconduct investigation against Ms. "EE". Thereafter, it will address the question of whether factors additional to the existence of an ongoing misconduct investigation are necessary to sustain a decision to place a staff member on paid administrative leave, and, if so, whether the Fund met such requirement in the case of Applicant.

Did the Fund have an adequate evidentiary basis to place Applicant on paid administrative leave pending investigation for misconduct?

97. Asserting that the Human Resources Director may take a decision under GAO No. 33, Section 10.08, and GAO No. 13, Section 9.01, solely on the basis that there is a misconduct investigation ongoing against the staff member, Respondent suggests that no evidentiary threshold need be met in taking such decision. The same view was elaborated by the Fund's representative during the Grievance Committee proceedings: "There is no evidentiary standard for the decision to place her on administrative leave. It's not a punishment. . . . Administrative leave by its very nature is defined in the GAO as an interim measure. . . . [I]t is not true under our rules that you have to have reached some level of evidentiary proof before that." (Grievance Committee hearing, 5-5-09, Tr. 109-110.)

98. Applicant, for her part, suggests that the contested decision lacked an adequate evidentiary basis because (a) it stemmed from "false accusations" brought by Ms. "Y", and (b) it was taken in the absence of Applicant's "potential countervailing evidence," i.e., before the Fund had sought Applicant's account of the facts at issue. (The latter assertion raises an issue of possible procedural irregularity as well as an issue of evidentiary sufficiency and will be taken up separately below.[24])

99. Accordingly, the following questions arise. First, was the Fund required to meet an evidentiary threshold in taking the administrative leave decision? Second, how does the nature of the accusations against Applicant, arising in the context of an interpersonal dispute, affect the consideration of the evidence in proceeding with a misconduct investigation? Third, how shall the Tribunal treat Applicant's contention that the misconduct investigation was improperly grounded upon "false accusations"? Fourth, did the Fund have sufficient prima facie evidence to place Applicant on administrative leave while proceeding with a full investigation into alleged misconduct?

[24] *See infra* Consideration of the Issues of the Case: Did the Fund contravene its own regulations, and fair and reasonable procedures, in failing to interview Applicant about the accusations against her until after it had taken the decision to place her on paid administrative leave pending investigation of misconduct?

Was the Fund required to meet an evidentiary threshold in taking the administrative leave decision?

100. That the Fund's rules do not appear to prescribe an evidentiary standard for pursuing an investigation into alleged misconduct—and, accordingly, for taking a decision to place a staff member on paid administrative leave pending such investigation—does not mean that fair and reasonable procedures do not require that such an evidentiary threshold be met. As this Tribunal has recognized, the Fund's internal law "'includes both formal, or written, sources . . . and unwritten sources.'" *Ms. "M" and Dr. "M", Applicants v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2006-6 (November 29, 2006), para. 123, quoting Commentary on the Statute, pp. 17-18. Among the "unwritten sources of law within the internal law of the Fund" are "certain general principles of international administrative law, such as the right to be heard (the doctrine of *audi alteram partem*) [which] are so widely accepted and well-established in different legal systems that they are regarded as generally applicable to all decisions taken by international organizations, including the Fund." Commentary on the Statute, p. 18. *See generally Ms. "M" and Dr. "M"*, paras. 123-133 (applying universally accepted principles of human rights as constraint on Fund's discretionary authority). As one commentator has observed with regard to misconduct cases, "[o]ther than the [international organization] itself, the content of procedural due process is defined by the Tribunal." Gorman, *supra*, p. 3 (referring to World Bank Administrative Tribunal, while noting that most international organizations have such an adjudicative body "with a comparable role in misconduct cases").

101. A staff member may not be unilaterally placed on administrative leave in the context of misconduct proceedings—even while maintaining full pay and benefits—on the basis of whim, rumor, or the like: "The initiation of investigations, preliminary or otherwise, on the basis of rumors and allegations by questionable sources, clearly does not comport with the basic elements of due process." *Koudogbo v. International Bank for Reconstruction and Development*, WBAT Decision No. 246 (2001), para. 43. *See also Galang*, para. 47 (distinguishing "*prima facie* evidence of misconduct warranting investigation" from "mere suspicion"). The discretion to place a staff member on administrative leave in the context of misconduct proceedings ". . . is of course not unlimited; it is not a license to be arbitrary or to act abusively." *AF*, para. 33.

102. At the same time, because administrative leave functions as an "interim measure," the organization clearly is "not required to have conclusive evidence of misconduct" before invoking it. *AF*, para. 33; *see also AE*, para. 28. The question of whether there is prima facie evidence to support a decision to place a staff member on administrative leave pursuant to GAO No. 13, Section 9.01, is necessarily distinct from the question of whether the evidence is sufficient to sustain a finding of misconduct. In the words of Respondent, "the purpose of these provisions is to make administrative leave available as an 'interim measure' before it is known whether the allegations will be proven or not."

103. Accordingly, as the World Bank Administrative Tribunal observed in *G v. International Bank for Reconstruction and Development*, WBAT Decision No. 340 (2005), para. 73, ". . . that the conclusion may ultimately be favorable to the person under investigation plainly does not mean that the inquiry should not have been conducted at all." In that case, the WBAT concluded that "on the face of it[,] the circumstances were troubling, and required investigation," *G*, para. 66 (dismissing applicant's challenge to administrative leave decision where staff member was

vindicated with respect to the most serious allegations and no disciplinary sanctions had been imposed). In contrast, where misconduct allegations are "based on insufficient information and a negligent failure to verify essential data," the WBAT has concluded that "due process was compromised" and has awarded compensation. *N v. International Bank for Reconstruction and Development*, WBAT Decision No. 362 (2007), para. 27. *See also BB v. International Bank for Reconstruction and Development*, WBAT Decision No. 426 (2009).

104. The problem of what quantum of evidence may be required to launch a preliminary inquiry—as distinguished from a formal investigation—in the absence of a written standard, has been explored by the World Bank Administrative Tribunal as follows:

> "The first matter to be considered is whether there must be a defined evidentiary basis for initiating a preliminary inquiry. It is difficult to articulate a positive standard. Neither Staff Rule 8.01, paragraph 4.02, nor INT's Standards and Procedures for Inquiries and Investigations define any threshold in this regard; it appears to be a matter of discretion. A meaningful negative answer, on the other hand, was given by the Tribunal in *Koudogbo*, Decision No. 246 [2001], at para. 43, to the effect that a preliminary inquiry cannot be launched on the basis of rumors or allegations from questionable sources. An inquiry may be disruptive. It should not be triggered merely because there have been isolated, anonymous, indirect, word-of-mouth tips. Such indications may be very valuable in law enforcement everywhere, but they must be considered critically. The line to be drawn may be difficult to define in the abstract, but the need to do so does not arise in this case. The facts upon which the preliminary investigation was launched were objective."

G , para. 78, quoted in *AF*, para. 42. Furthermore, in the view of the WBAT, the evidentiary threshold that the organization must cross to proceed from a preliminary inquiry to a formal investigation is not steep:

> "In reviewing the Applicant's claims in the context of its precedents and the applicable rules, the Tribunal notes that the threshold that INT must cross during the preliminary inquiry in order to justify the initiation of a formal investigation is low. All that it needs to find is that the allegation is sufficiently credible to merit a formal investigation."

BB, para. 73. Accordingly, the WBAT has asked whether during the preliminary inquiry the Bank's investigators had established "*prima facie* evidence or credible information" to support a formal investigation. *BB*, para. 75-76 (concluding *inter alia* that Bank's investigator's selection of witnesses manifested questionable judgment).

Accusations of misconduct arising in the context of an interpersonal dispute

105. International administrative jurisprudence suggests that additional scrutiny may be required in assessing the adequacy of the evidence in proceeding with a misconduct investigation where the allegations rest upon accusations of "interpersonal misconduct" brought by one staff member against another: "It must . . . be understood that a complaint by a staff member of what may be called 'inter-personal' misconduct cannot automatically trigger proceedings of the kind prescribed in Staff Rule 8.01. The victim's complaint is merely the starting point for consideration by the Bank of whether or not it will commence disciplinary proceedings." *Sjamsubahri v. International Bank for Reconstruction and Development*, WBAT Decision No. 145 (1995), para. 9.

106. The WBAT has cautioned:

> "[T]he Bank must, in a necessarily preliminary way, decide whether there is sufficient substance to the complaint in terms both of evidence and gravity to warrant taking the matter further. Were this not so, it would be open to any staff member, by making accusations of no matter how flimsy a character, to compel the opening of a formal investigation by the Bank which it is easy to imagine could cause significant harm to a possibly innocent fellow staff member. . . .
>
> Consequently, when one staff member complains against another, the Bank must make an initial assessment of the complaint looked at as a whole. In the present case there is no evidence that the complaints made about the Applicant by the complainant were subjected to this necessary preliminary scrutiny . . . . The Bank thus appears simply to have accepted the complaints made by the complainant as a proper basis for starting a full-scale disciplinary investigation without considering whether there was sufficient prima facie evidence and, if there were, whether the seriousness of the matter alleged were likely to justify the extended degree of examination that then followed."

Sjamsubahri, paras. 9-10.

107. More generally, the WBAT has recognized the significance of the identity and potential motives of complaining witnesses when reviewing decisions to proceed with investigations of alleged misconduct. *See BB*, para. 77 ("[T]he Tribunal finds that [the Bank's investigatory unit] should not have given substantial weight to the testimony of the three legal assistants. . . . The great bulk of their testimony consisted of complaints against a hiring policy that they perceived as unfair to them; they were naturally motivated against the Applicant . . . ").

108. The above considerations are pertinent to the case brought by Ms. "EE". Applicant asserts that the Ethics Officer "used the witnesses' unsubstantiated allegations as *de facto*

evidence" and "took all the allegations at face value without investigating any further, and when investigating them did so 'sloppily'. . . ."

109. It is recalled that the evidence of Applicant's alleged misconduct was comprised principally of the complaining staff member's own expression (both oral and written) of distress, along with documentary evidence of messages and materials allegedly transmitted to her by Ms. "EE". The Ethics Officer reported that her interview of Ms. "Y" revealed:

> ". . . deep revulsion over the nature of the materials which she had received from [Applicant]. . . . Her distress was visible and palpable during her interview. She spoke of feeling frightened, disgusted, and embarrassed by [Applicant's] behavior.
>
> . . . .
>
> She expressed concerns for her own personal safety and has changed her daily work routines in order to avoid confronting [Applicant]."

(Ethics Officer's Report of Investigation, pp. 7, 17.) Ms. "Y"'s written complaint to the Ethics Officer consisted of a highly personal account in which she focused upon the tensions between herself and Applicant in the context of their respective relationships with the (by then) former staff member Mr. "X":

> "I had done nothing to her, she on the contrary has tried to damage a [multi-year] relationship. . . .
>
> . . . . She has no right to write this kind of message trying to destroy our peace and harmony. What is her goal? Break us apart? Harass us more."

110. Applicant maintains that it should have been evident from the relationships among herself and the witnesses against her that the complainant's motives might be suspect and that the Fund's decision-makers failed to take such possibility into account. In confronting the HRD Director during the Grievance Committee proceedings, Applicant asserted: "I think that you should have been suspicious that Mr. ["X"] was the harasser. Ms. ["Y"] was the girlfriend of the harasser. Just the competence of the people, you should have been suspicious about it." (Grievance Committee hearing, 5-12-09, Tr. 25.)

111. The WBAT has also recognized that, in deciding whether to proceed with a misconduct inquiry in circumstances where the complaint might have arisen from personal animus, investigators ought to take notice of a lapse in time between the alleged misconduct and the bringing of the complaint. In such cases, a lapse in time may suggest that the complaint is motivated by malice rather than by a genuine desire to have a complaint of misconduct investigated:

> "During that period he had shown no discontent with the Applicant, even though some of the matters, including one of the

> principal episodes occurred more than a year before the complaint was made. Indeed, the complainant had on more than one occasion spoken in approving and appreciative terms of the manner in which the Applicant had worked with him and given him help. Nor does the Bank appear to attribute any significance to facts such as the following: that the complaints made against the Applicant were evidently closely connected with the complainant's dissatisfaction at not having been promoted; and that the principal episodes to which the complaints made in July 1992 related occurred as long before as April, May, August and November 1991 and January and February 1992."

Sjamsubahri, para. 11.

112. In the instant case, Applicant notes that Ms. "Y" did not approach the Ethics Officer until a year after her receipt in June and July 2007 of the first three of the purportedly offensive email messages. Applicant asserts that she and Ms. "Y" had maintained a friendly relationship until 2008, that the 2007 emails had been "well-received" by Ms. "Y" at the time, but that they were "reinterpreted" a year later as "harassment" following revelation to Ms. "Y" of Applicant's relationship with Mr. "X". The Ethics Officer's account, by contrast, emphasizes that it was after Ms. "Y" received the email of May 2008 that she became "sufficiently concerned" to contact the Ethics Officer and present her allegations of harassment. (Ethics Officer's Report of Investigation, p. 7.)

113. It is recalled that the two communications that Applicant herself characterizes as "non-consensual," i.e., not welcome by Ms. "Y", were made in 2008; Ms. "Y" first contacted the Ethics Officer in early June of that year and met with her a month later to elaborate her complaint. Accordingly, in the view of the Tribunal, any lapse in time between the conduct that Ms. "Y" initially may have found troubling and her complaint to the Ethics Officer does not provide cause to question the evidentiary basis for the administrative leave decision.

Applicant's contention that the misconduct investigation was improperly based upon "false accusations"

114. Applicant maintains that the proceedings against her were tainted from the start as being based upon "false accusations" brought by Ms. "Y", that the Ethics Officer acted with complicity in these accusations by negligently examining them, and that she improperly influenced the Human Resources Director who failed to exercise independent judgment in taking the contested decision to place Applicant on administrative leave pending the outcome of the misconduct proceedings. (The claims of bias and the respective roles of the Ethics Officer and the HRD Director are considered below.)[25]

[25] *See infra* Consideration of the Issues of the Case: Was the administrative leave decision improperly motivated by animus, bias, or retaliation against Applicant?

115. Applicant accordingly devotes much attention in her Tribunal pleadings and their numerous attachments to seeking to refute the evidentiary basis for the administrative leave decision. According to Applicant's account, it was Mr. "X" and not herself who supplied Ms. "Y" with many of the allegedly objectionable materials that may have led to the decision to place Applicant on administrative leave. In respect of other communications that Applicant acknowledges having made to Ms. "Y", she asserts either that Ms. "Y" did not find them objectionable at the time or that Applicant had good reasons for sending them, and that, in any event, such activity did not constitute "harassment." (*See* Grievance Committee hearing, 5-5-09, Tr. 10-17; Applicant's Responses to Ethics Officer's Report of Investigation, January 12, 2009.)

116. Applicant's assertion that accusations giving rise to the misconduct investigation were "false" is substantially negated by the Fund's ultimate finding that Ms. "EE" had committed "serious misconduct" in that her "communications with Ms. ["Y"], including both e-mails from [Applicant]'s Fund account and a package mailed to Ms. ["Y"]'s home, created an intimidating, hostile and offensive working atmosphere for Ms. ["Y"]." (Memorandum from Acting Director of Human Resources to Applicant, "Decision on Misconduct Charges," February 10, 2009.) That decision was taken after Applicant was formally "charged" with misconduct and the Fund had the benefit of her extensive written Responses, as well as a meeting between her and the Acting HRD Director, both in early 2009.

117. The Tribunal concludes that Applicant's assertion that the administrative leave decision lacked an adequate evidentiary basis as being based upon "false accusations" is largely undermined by the fact that she has not brought a legal challenge to the ultimate finding of misconduct against her. The record of the case suggests that, at the time Applicant was placed on administrative leave, she may well have been suspected of engaging in misconduct more extensive than that for which ultimately she was held to be responsible. That fact, however, if it is true, does not of itself invalidate the decision to place her on paid administrative leave while proceeding with a formal investigation into alleged misconduct. As Respondent rightly points out, a staff member may be completely exonerated as the result of a full investigation of misconduct, but such finding does not necessarily impugn the decision to proceed with such investigation and to place the individual on administrative leave with pay under GAO No. 13, Section 9.01 while so proceeding.

Did the Fund have prima facie evidence to pursue a misconduct investigation against Applicant, and, accordingly, to support its decision to place her on administrative leave pursuant to GAO No. 13, Section 9.01?

118. The WBAT has indicated that the threshold of evidence required for moving from a preliminary inquiry to a formal investigation of misconduct is not steep. "The outcome of a preliminary inquiry is a determination whether further investigation is warranted, not whether an investigation is substantiated." *BB*, para. 76. The question arises whether, in the case of Ms. "EE", the complaints against her were "sufficiently credible" as to represent "prima facie evidence" warranting a further investigation. *See BB*, paras. 73-76. Did the Fund, in the case of Applicant, fulfill its responsibility to decide "in a necessarily preliminary way . . . whether there [was] sufficient substance to the complaint in terms both of evidence and gravity to warrant taking the matter further"? *See Sjamsubahri*, para. 9.

119. Reviewing the record in the instant case, at the conclusion of the "preliminary inquiry" phase of the proceedings against Ms. "EE", i.e., at the juncture when the Fund took the decision to place Applicant on administrative leave pursuant to GAO No. 13, Section 9.01, it had the following evidence suggesting that Applicant may have engaged in conduct in breach of the Fund's standards: (1) a written complaint and interview of Ms. "Y", in which she asserted that she had received offensive materials from Applicant and expressed concerns for her safety, which she maintained had affected her movements at the workplace; (2) documentary materials, allegedly transmitted from Applicant to Ms. "Y", that on their face appeared objectionable; and (3) interviews of three additional staff members, at least one of whom, the Senior Administrative Assistant, provided some corroboration of Ms. "Y"'s concerns for her safety.

120. As Applicant has not challenged the misconduct finding of February 2009, the Tribunal has not been called upon to decide whether the Fund properly concluded that the evidence brought against Ms. "EE", considered in the light of her rebuttals, was sufficient to sustain that ultimate finding. *See generally Mr. "DD", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-8 (November 16, 2007), paras. 60-90 and cases cited therein (interpreting Fund's internal law prohibiting harassment). Rather, it must decide whether there was a prima facie case against Applicant sufficient to support the Fund's decision to place her on paid administrative leave, a decision that was apparently taken together with the decision to proceed with a full investigation of misconduct against her.

121. Where interpersonal conflict exists, it will ordinarily be helpful for the Fund to give a person against whom a complaint has been lodged an opportunity to be heard prior to placing that person on administrative leave (a conclusion the Tribunal reaches below). The value of granting a hearing in such circumstances is that at times an entirely different complexion may be placed on the issues under investigation. Often, of course, a sharp dispute of fact will arise which will establish the need for further investigation. Be that as it may, the Tribunal concludes, in the light of the record of the case set out above, that the Fund did have an adequate evidentiary basis to place Applicant on paid administrative leave pending its further investigation into possible misconduct.

Was prima facie evidence of misconduct sufficient ground to invoke the administrative leave provision of GAO No. 13, Section 9.01?

122. Having concluded that the Fund had sufficient prima facie evidence to support an ongoing investigation into alleged misconduct by Ms. "EE", the Tribunal turns to the question of whether such investigation was legally sufficient to justify the administrative leave decision in the circumstances of Applicant's case or whether further justification was required.

123. Respondent, while maintaining the position that the governing internal law does not "require any specific justification for the [administrative leave] decision, beyond the fact that an inquiry is ongoing," nonetheless adds that the "Fund's decision was not only proper as a matter of law; it was also carefully considered and amply justified by the circumstances that had been brought to the attention of the Director of HRD by the Ethics Officer and by the Fund's security personnel." The Fund cites concerns that Applicant's continued presence in the workplace may have posed a security risk to other staff.

124. The Tribunal observes that, by its terms, GAO No. 13, Section 9.01, provides that the staff member ". . . *may* be placed on administrative leave with pay while the matter is under investigation. . . ." (Emphasis supplied.) This language suggests that the decision to place a staff member on administrative leave during a misconduct investigation does not follow automatically from the pursuit of such investigation but rather requires an exercise of discretion that takes account of additional (unspecified) factors. Likewise, the HRD Director in her Grievance Committee testimony observed that she had reviewed that rule and that it ". . . indicated to me that I had basically to make a judgment as to whether or not administrative leave was appropriate in this case." (Grievance Committee hearing, 5-12-09, Tr. 23-24.)

125. The view that the decision to place a staff member on paid administrative leave pending investigation of misconduct requires an exercise of discretion additional to that required in proceeding with the misconduct investigation itself also finds support in international administrative jurisprudence. In a case arising from allegations of financial misconduct, the World Bank Administrative Tribunal held "patently unconvincing" such justifications for an administrative leave as "afford[ing] the Applicant more time to devote to his defense" and "avoid[ing] the work disruptions that would likely come from future interviews of the Applicant." Had the Bank's rationale for the administrative leave decision rested solely on those reasons, the WBAT held, "the Tribunal would find it to have been an abuse of discretion." The WBAT nonetheless sustained the administrative leave decision on the separate ground that it was "in the interests of the IFC, to remove from a position of financial responsibility a person being charged with serious financial wrongdoing." That reason, concluded the WBAT, was "asserted in good faith and carries sufficient weight as to render the decision on administrative leave within the range of reasonable discretion." *D*, paras. 68-69. *See also AF*, paras. 34-36 (upholding administrative leave "to prevent further unauthorized release of confidential information," citing Bank's "legitimate business interest" in protecting such information). Accordingly, the jurisprudence suggests, and this Tribunal affirms, that administrative leave is to be regarded as an injunctive measure taken to prevent possible future harm.

126. In the instant case of Ms. "EE", it is recalled that in informing Applicant that she was being placed on administrative leave, the Fund cited only the "severity of this matter and the importance of your full participation and cooperation in the process that lies ahead." (Memorandum from HRD Director to Applicant, "Administrative Leave With Pay Pending Investigation of Misconduct," August 26, 2008.) The HRD Director similarly testified that she ". . . wanted to make sure that [Applicant] had the time . . . [to] do whatever she needed to do in order to defend herself." (Grievance Committee hearing, 5-12-09, Tr. 16.) Nonetheless, the principal motivating factor for the administrative leave decision, as expressed by the HRD Director in her Grievance Committee testimony, appears to have been a concern for staff safety. That matter is considered below.

Did the Fund have a reasonable basis to conclude that Applicant's presence in the workplace during the pendency of the misconduct proceedings posed a risk of future harm?

127. The HRD Director testified in the Grievance Committee proceedings that "the staff member to whom the materials were sent was feeling very much threatened and—and aggrieved

by—by the receipt of the materials, and expressed great concern about her safety. . . ." (Grievance Committee hearing, 5-12-09, Tr. 11.) According to the HRD Director:

> "[T]he opinion was given to me by . . . the IMF security people was that it would be prudent to put [Applicant] on administrative leave pending the outcome of the investigation. And so, therefore, I took the decision to follow that advice, based on my own judgment that it would be a prudent thing to do, as well."

(*Id.*)

128. The HRD Director emphasized: "[M]y decision was based on consultations with the security people. That was the main advice that I followed in terms of making a decision in this case. . . . [I]t was their judgment that this would be the prudent thing to do. And I agreed with that judgment." (*Id.*, Tr. 28.) Additionally, the HRD Director testified that a decision to place a staff member on administrative leave with pay pending a misconduct investigation would not have required that there be a serious threat of violence: "[A] lesser concern would be the concern that we would have in the sense that not knowing how people would react, we would just take the prudent course of action." (*Id.*, Tr. 22-23.)

129. Applicant disputes the Fund's basis for placing her on administrative leave on the ground of concern for workplace safety. In Applicant's view, the safety hazard claim was "concocted" by Ms. "Y" and the Senior Administrative Assistant and "orchestrated" by the Ethics Officer. "[I]f the Fund had seriously believed that Applicant could be a potential danger," asserts Applicant, "it would have taken immediate measures to protect" the relevant staff members in July 2008.

130. The Fund, for its part, maintains that the administrative leave decision was motivated by "justifiable concern about the integrity of the workplace and the security of Fund staff members." "[T]he Fund's decision was taken after careful consideration of the concerns for safety and security arising out of Applicant's alleged misconduct—as expressed not only by [Ms. "Y"] but also by the Fund's in-house and external security experts . . . ."

131. It is recalled that the report of the external risk assessment recommended to the Fund:

> "If you decide to proceed with the termination process regarding [Applicant], we recommend that she be placed on administrative leave until the process is complete. Based on the information we reviewed, we believe [Applicant] will react adversely to news that you are proceeding with steps to terminate her employment. We recommend removing her from the workplace to minimize contact with IMF employees."

(External risk assessment report, August 4, 2008, p. 5.) In the words of the Ethics Officer's later Report of Investigation, the external risk assessment firm "encouraged the Fund to take precautions to remove [Applicant] from the workplace and to continue its internal investigation." (Ethics Officer's Report of Investigation, p. 8.)

132. The external risk assessment had drawn two, somewhat inconsistent, conclusions. Using "one method for measuring whether a person has decided or is in the process of deciding to use violence," the risk assessment reported, "[a]t this time, favorably, none of the JACA [Justification, Alternatives, Consequences, Ability] elements are present." Using another, computer-assisted, assessment tool, the risk assessment report concluded that ". . . we believe this situation is most similar to those that included worsening behavior and escalations, some including highly intrusive or even harmful actions." (External risk assessment report, August 4, 2008, p. 3.) (Emphasis in original.)

133. While Applicant maintains that the conclusions of the risk assessment were largely favorable to her, she seeks to impugn the report on the ground that it reflected "only one side of the story": "Although the risk assessment did not find any evidence of threat, it could only be faulty from the start as it was based mainly on [the Ethics Officer]'s defamatory report and choice of poor evidence, paranoia, and hearsay with no evidence and countervailing evidence." In particular, Applicant alleges bias in the risk assessment in referring to elements of her personal and family history that are cited in the report as "stressors" in Applicant's life. Accordingly, while faulting the risk assessment itself, Applicant asserts that its essential conclusion was that she did not pose a safety hazard to the Fund workplace.

134. It is not disputed that Applicant was not interviewed in connection with the external risk assessment. Additionally, that risk assessment was made without the benefit of the Ethics Officer's telephone interviews of Mr. "X" on August 6 and 8, which took place following the Ethics Officer's receipt of the report from the external risk assessment firm but before her briefing to the HRD Director in late August that resulted in the decision to place Applicant on administrative leave. In her Report of Investigation of November, the Ethics Officer reported that in those interviews of early August "Mr. ["X"] expressed no fear for his own safety or that of Ms. ["Y"], based on [Applicant]'s actions and statements." (Ethics Officer's Report of Investigation, p. 10.)

135. Accordingly, the following questions arise. Did the Fund have a reasonable basis to conclude that Applicant's presence in the workplace during the pendency of the misconduct proceedings posed a risk of future harm warranting administrative leave? Was the concern for staff safety a reason "asserted in good faith and carr[ying] sufficient weight as to render the decision on administrative leave within the range of reasonable discretion"? *D*, para. 69.

136. The Tribunal observes that the decision to remove Applicant from the workplace at the beginning of the "formal investigation" of misconduct was reasonably related to the nature of the misconduct alleged. The complaining witness expressed fears for her own safety, which found corroboration in the interview of another staff member. An external risk assessment concluded *inter alia* that the situation was one "most similar to those that included worsening behavior and escalations, some including highly intrusive or even harmful actions."

137. That the Fund did not gauge Applicant's presence in the workplace to present an "immediate threat" to safety does not undermine the rationale of safety concerns to support the administrative leave decision pursuant to GAO No. 13, Section 9.01 (*Administrative Leave With Pay Pending Investigation of Misconduct*). That provision may be distinguished from the separate Section 9.08 (*Administrative Leave Without Pay for Special and Unusual*

Circumstances), which governs situations where, in the view of the Director of Human Resources, ". . . the continuing presence of a staff member at work may not be in the interest of the Fund, *may pose an immediate threat to the Fund*, or is pending an investigation of misconduct by a staff member involving financial impropriety." (Emphasis supplied.) This provision was not invoked by the Fund either in placing Applicant on administrative leave or in its representations before the Tribunal. That the decision contested in this case was expressly taken under Section 9.01 is underscored by the fact that the leave was to expire at the conclusion of the misconduct proceedings (*see* Memorandum from HRD Director to Applicant, "Administrative Leave With Pay Pending Investigation of Misconduct," August 26, 2008), and, indeed, Applicant was returned to active status as a result of the ultimate decision on misconduct (*see* Memorandum from Acting Director of Human Resources to Applicant, "Decision on Misconduct Charges," February 10, 2009).

138. The Tribunal recognizes that concerns for safety in the workplace are inherently difficult to assess. At the same time, the possible consequences of mistaken assessment are sufficiently grave that a broad range of discretion must prevail. The Tribunal is not in a position to second-guess the Fund's assessment in the light of the information it had before it. Applicant is correct in stating that the information to which the external risk assessment firm had access was limited to that provided by the Fund. The Tribunal holds below[26] that the decision to place Applicant on administrative leave was marred by procedural irregularity by the failure of the HRD Director to afford Applicant the opportunity to provide her version of the events at issue before taking that decision.

139. Conclusive evidence of a threat to safety is not, and should not be, required in order to take the preventive action of placing a staff member on paid administrative leave pending investigation of misconduct, in circumstances such as those presented by the case of Ms. "EE". The Fund had a reasonable basis, supported by witness interviews and an external threat assessment, to conclude that Applicant's continued presence at work during the pendency of the misconduct proceedings posed a risk of future harm related to the misconduct alleged. As this Tribunal has recognized, Fund staff have a "fundamental right to enjoy physical security." *Mr. "R" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2004-1 (December 10, 2004), para. 52 (concluding in circumstances of the case that equal treatment in calculation of housing allowance for overseas Office Director required reimbursement of residential security costs indirectly, as well as directly, incurred). *See also Bares v. Asian Development Bank*, AsDBAT Decision No. 5 (1995), paras. 21-27 (organization has duty to exercise reasonable care relating to safety, health and security of its staff).

140. The text of GAO No. 13, Section 9.01 indicates that placing a staff member on paid administrative leave pending investigation for misconduct requires an exercise of judgment separate from and additional to the decision that there is prima facie evidence to pursue an investigation of possible misconduct. In the instant case, the HRD Director weighed information

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[26] *See infra* Consideration of the Issues of the Case: Did the Fund contravene its own regulations, and fair and reasonable procedures, in failing to interview Applicant about the accusations against her until after it had taken the decision to place her on paid administrative leave pending investigation of misconduct?

presented by the Fund's Ethics Officer and security personnel. In the end, she decided that safety considerations should govern. The Tribunal does not take exception to this conclusion.

141. Accordingly, the Tribunal concludes that the administrative leave decision should be sustained on the grounds that the Fund had, at the time of that decision, prima facie evidence warranting an ongoing investigation into alleged misconduct by Applicant and a tenable basis to decide that her continued presence in the workplace during the pendency of the misconduct proceedings posed a risk of future harm.

> Was the decision to place Applicant on paid administrative leave pending investigation of misconduct affected by procedural error?

142. Having concluded that the Fund met the substantive prerequisites for placing Applicant on paid administrative leave pending investigation for misconduct, the Tribunal now turns to the question of whether in taking that decision the Fund committed procedural error. In particular, was the Fund required to have interviewed Applicant about the accusations against her before invoking the administrative leave provision of GAO No. 13, Section 9.01?

> > Did the Fund contravene its own regulations, and fair and reasonable procedures, in failing to interview Applicant about the accusations against her until after it had taken the decision to place her on paid administrative leave pending investigation of misconduct?

143. Applicant contends that the Fund violated her right to due process, and the Fund's regulations, by placing her on administrative leave with pay without first seeking her own account of the events at issue. In Applicant's words, the administrative leave decision was taken in "complete disregard of Applicant's potential countervailing evidence." Referring to the sequence of procedural steps set out in the Fund's internal law, Applicant asserts that she was "not informed of any charge before she was put on administrative leave," as the Fund "quickly bypassed GAO 33, Section 10.02 [Charge] and 10.04 [Inquiry] and the [P]rocedural [G]uidelines to have her put under GAO 33, Section 10.08 *Interim Measures* . . . ." Applicant's due process claim accordingly raises the two closely related questions of whether the Fund was to have interviewed Applicant about the allegations before taking the administrative leave decision and at what stage in the misconduct proceedings the "interim measure" of administrative leave may be invoked.

144. Respondent, for its part, maintains that "[t]he steps taken to inform Applicant of the allegations against her and elicit her response, at the time the full investigation commenced and she was placed on administrative leave, were entirely consistent with the relevant provisions of GAO No. 33, as well as the Fund's Procedural Guidelines for Conducting Inquiries Related to Allegations of Misconduct. . . ."

145. Accordingly, the Tribunal must consider whether the Fund contravened its own regulations, and fair and reasonable procedures, in failing to interview Applicant about the accusations against her until after it had taken the decision to place her on paid administrative leave pending investigation of misconduct. The Tribunal will consider this question, first, in light of the obligations of the Ethics Officer, as prescribed in the Procedural Guidelines, and, second,

in view of the responsibilities of the HRD Director under GAO Nos. 13 and 33 and general principles of international administrative law.

146. The Tribunal observes at the outset that a difficulty confronted in this case in carrying out its "function . . . , as a judicial body, to determine whether a decision transgressed the applicable law of the Fund"[27] is that the Fund's written law governing the sequence of procedures to be followed in matters of suspected misconduct is found not in one but rather in several, sometimes conflicting, staff regulations, namely, GAO Nos. 13 and 33, on the one hand, and the Procedural Guidelines for Conducting Inquiries Related to Allegations of Misconduct and the Ethics Officer's Terms of Reference, on the other. It is noted that Applicant and Respondent each invoke both the Procedural Guidelines and the GAOs in support of their respective positions. Each of these regulatory frameworks will be examined in turn. The question of the inconsistencies between them and how those inconsistencies shall be resolved in the light of general principles of international administrative law will be considered below.

147. It is recalled that the misconduct proceedings undertaken against Ms. "EE" unfolded in the following sequence.

148. In the first phase of the proceedings, the Ethics Officer, in consultation with the HRD Director, initiated a "preliminary inquiry" based upon accusations brought by Ms. "Y". In the course of the "preliminary inquiry," the Ethics Officer also interviewed three other individuals. The Ethics Officer reviewed documentary evidence, including email correspondence among Applicant, Ms. "Y", and Mr. "X", as authorized under applicable Fund rules. Additionally, in conjunction with the Fund's security services, she commissioned a risk assessment by an external firm to consider to what extent Applicant's continued presence in the workplace might pose a threat to staff safety, and the firm reported its findings to the Fund. The "preliminary inquiry" phase took place in July and August 2008, culminating in the HRD Director's decisions, notified to Applicant on August 26 to place her on paid administrative leave and to have the Ethics Officer proceed with a full investigation into alleged misconduct.

149. The second phase of the misconduct proceedings comprised the Ethics Officer's "formal investigation" (also called the "full investigation" by Respondent in its pleadings). According to the Fund's Rejoinder, this stage of the proceedings began with the Ethics Officer's meeting with Applicant of August 26, and included the Ethics Officer's review of the contents of Applicant's computer hard drive, additional witness interviews, Applicant's written submission of September 18, 2008, and review of documentary evidence earlier obtained. (The Fund's Response to the Tribunal's Second Request for Additional Information reveals, however, that all of the witness interviews identified in the Ethics Officer's Report of Investigation were completed in the first week of August, i.e., during the "preliminary inquiry" stage.) The Ethics Officer's "formal investigation" concluded with the submission of her Report of Investigation to the Human Resources Director in November 2008.

[27] Commentary on the Statute, p. 13

150. The third (and final) phase of the misconduct proceedings reflected procedural steps prescribed by GAO No. 33, Section 10. These included the "Charge" (Section 10.02) of misconduct issued by the Acting HRD Director in December 2008, Applicant's "Response" (Section 10.03) submitted in January 2009, and the final "Decision" (Section 10.05) on the merits of the misconduct charge rendered in February 2009.

> Pursuant to the Procedural Guidelines, was the Ethics Officer required to have interviewed Applicant in connection with the accusations against her before concluding the "preliminary inquiry"?

151. As noted above, to Applicant's complaint that the Fund "quickly bypassed GAO 33, Section 10.02 [Charge] and 10.04 [Inquiry] and the [P]rocedural [G]uidelines to have her put under GAO 33, Section 10.08 *Interim Measures* . . . ," Respondent offers the following answer: "The steps taken to inform Applicant of the allegations against her and elicit her response, at the time the full investigation commenced and she was placed on administrative leave, were entirely consistent with the relevant provisions of GAO No. 33, as well as the Fund's Procedural Guidelines for Conducting Inquiries Related to Allegations of Misconduct. . . ."

152. Furthermore, the Fund expressly cites paragraphs 9-10 of the Procedural Guidelines, which provide:

> "**Formal investigation**
>
> 9. A formal investigation commences upon referral of a matter to the Ethics Officer by the Managing Director or the Director of HRD, or by the Oversight Committee as described in paragraph 8. Once the formal investigation has commenced and at such time as the available evidence points to misconduct on the part of a particular staff member, the Ethics Officer shall, before interviewing that staff member, inform him or her that an investigation has begun, the reasons for the investigation, and the major elements of the case.
>
> 10. The respondent will be given reasonable opportunity to respond in writing in order to explain his or her position with respect to the charges and/or evidence presented by the complainant and to present his or her own evidence, including the names of witnesses who might corroborate the respondent's statements."

153. The Tribunal observes that the cited provisions govern "[o]nce the formal investigation has commenced." Significantly, Respondent omits any discussion of the Procedural Guidelines' requirements relating to the "preliminary inquiry" stage, i.e., the stage that directly preceded the decision to place Applicant on paid administrative leave pending investigation of misconduct.

154. Those provisions of the Procedural Guidelines that govern the "preliminary inquiry" are set out at paragraphs 4-6. Paragraph 6 provides:

> "**Preliminary inquiry**
>
> . . . .
>
> 6. The Ethics Officer also will review any evidence supporting the allegation or complaint and will interview possible witnesses or others who may be in a position to provide information pertaining to the charge of misconduct. *In this connection, the Ethics Officer will interview the person against whom an allegation of misconduct has been made (the respondent).*"

(Emphasis supplied.)

155. It is not disputed that Applicant was not interviewed about accusations that had been made against her by Ms. "Y" or informed that a preliminary inquiry was underway until she was notified on August 26 that a formal misconduct investigation had begun and that she was being placed on paid administrative leave for the duration of the misconduct proceedings.

156. Respondent's pleadings confirm that the Fund regarded the Ethics Officer's interview of Applicant on August 26 not as the last step in the preliminary inquiry but rather as the first step in the formal investigation: "[T]he full investigation that followed included . . . the August 26, 2008 interview with Applicant . . . ." "[T]he Director of HRD acted within her discretion, as a matter of law, when she decided to place [Applicant] on administrative leave *after having authorized a full investigation into misconduct allegations against her* on August 26, 2008." (Emphasis supplied.)

157. Respondent's position that no interview of Applicant was required during the "preliminary inquiry" stage of the proceedings was underscored in the course of the Grievance Committee proceedings, in which its representative stated:

> "There is no procedural requirement for her to be brought into the loop and make a statement during the preliminary inquiry. . . .
>
> . . . .
>
> [A]s a matter of the legal structure of the Fund, there is no procedural requirement to consult with the staff member concerning the decision to place on administrative leave. . . .
>
> . . . .
>
> [T]he preliminary inquiry phase is not considered to be the appropriate time to have the substantive interview with the respondent. The appropriate time is as part of the full investigation when that person has been made thoroughly aware of the nature of

> the allegations against them so that when they are in that situation they can respond fully.
>
> . . . And it was considered more orderly and, in fact, more fair to [Applicant] to do it with all the protections and procedural due process associated with the full investigation."

(Grievance Committee hearing, 5-5-09, Tr. 101, 104-106.)

158. The text of paragraph 6 of the Procedural Guidelines provides that the Ethics Officer "will" interview the person against whom an allegation of misconduct has been made. Accordingly, it would appear that such interview is not discretionary but rather is a mandatory element when the Ethics Officer undertakes a "preliminary inquiry" under the Procedural Guidelines. That it is the usual practice to do so is also confirmed by the synopsis of procedures published in the Ethics Officer's Annual Report for 2005-6 and circulated to the staff of the Fund:

> "The initial phase, called the Preliminary Inquiry, is designed to determine whether there is any evidence that could support the charging party's allegations, by reviewing the claims, the nature of the available evidence, *and the initial response of the respondent* against a backdrop of the Fund's rules and policies."

(2005-6 Annual Report of the Ethics Officer, p. 25.) (Emphasis supplied.) Applicant points out that the contemporaneous record of the case also reflects such an understanding of the regulations on the part of the Ethics Officer, who stated in her Memorandum for Files of July 10, 2008: "On the basis of that [email] search I will more than likely commence a preliminary inquiry bringing [Applicant] into this office for interview and confrontation." (Ethics Officer's Memorandum for Files, July 10, 2008.)

159. The record, however, confirms that by the time the Ethics Officer sat down with Applicant on August 26 to discuss the matter of Ms. "Y"'s accusations against her, the decision to place Applicant on administrative leave, while proceeding with a full investigation into misconduct, was a fait accompli. In citing paragraphs 9-10 of the Procedural Guidelines, Respondent emphasizes the later opportunities that Applicant was afforded to respond to the allegations against her. These later opportunities necessarily came too late for Applicant to have avoided the decision she contests.

> Was the HRD Director required to have interviewed Applicant in connection with the accusations against her before taking the decision to place her on paid administrative leave pending investigation of misconduct?

160. The Tribunal has concluded that the Ethics Officer, in failing to interview Applicant prior to completing the preliminary inquiry, did not comply with the terms of the Procedural Guidelines. A further question arises. Was the HRD Director required, before deciding to place Applicant on paid administrative leave, to afford Applicant the opportunity to present her version of the events at issue? Might GAO Nos. 13 and 33 provide an answer?

161. While emphasizing the requirements of the Procedural Guidelines, which expressly govern the responsibilities of the Ethics Officer, Respondent acknowledges in its pleadings that the contested administrative leave decision was taken by the Human Resources Director under the authority of GAO Nos. 13 and 33: "The challenged decision in this case was within the authority of the Director of the Human Resources Department ('HRD') under GAO No. 33 ('Conduct of Staff Members'), Section 10.08, which provides that '[p]ending the completion of an inquiry and a decision on the matter . . . the staff member may be placed on administrative leave by the Director of [HRD] in accordance with GAO No. 13 (Leave Policies)'." "[The HRD Director] properly exercised her discretion to make use of the 'interim measures' provided in GAO No. 33 to temporarily remove Applicant from the workplace, but with full pay and benefits."

162. The HRD Director, in her written notice to Applicant of the administrative leave decision, cited the authority of the GAOs, stating that she was "placing [Applicant] on administrative leave with pay, pursuant to Section 9.01 of GAO No. 13," and that the "details of the procedures to be followed are also laid out in GAO No. 33 ('Conduct of Staff Members')." (The Ethics Officer's notice of investigation, by contrast, cited the Ethics Officer's Terms of Reference, GAO No. 33, and the Procedural Guidelines.)[28] Accordingly, it is not disputed that it was the HRD Director who was vested with the authority, and did take, the contested decision pursuant to GAO No. 33, Section 10.08, and GAO No. 13, Section 9.01.

163. It is recalled that the relevant regulatory provisions state as follows:

- GAO No. 33 (Conduct of Staff Members) (May 1, 1989), Section 10.08:

> "10.08 *Interim Measures*. Pending the completion of an inquiry and a decision on the matter:
>
> (i) the staff member may be relieved of specific duty by the Head of Department; or
>
> (ii) the staff member may be placed on administrative leave by the Director of Administration in accordance with GAO No. 13 (Leave Policies), provided that in respect of staff members subject to Rule N-12 such measure shall be imposed by the Managing Director."

- GAO No. 13, Rev. 6 (Leave Policies) (September 29, 2006), Section 9.01:

> "9.01 *Administrative Leave With Pay Pending Investigation of Misconduct.* When a staff member is alleged to have engaged in conduct for which any of the disciplinary measures referred to in

[28] For the full texts of the relevant memoranda, *see supra* The Factual Background of the Case: Events of August 26, 2008.

> GAO No. 33 (Conduct of Staff Members) might be imposed, he may be placed on administrative leave with pay while the matter is under investigation, in accordance with the provisions of GAO No. 33. Any such period shall not extend beyond the date on which the staff member is notified of the decision in the matter.
>
> . . . .
>
> 9.10.1 The decision to place a staff member who is subject to Rule N-12 on administrative leave with pay under Section 9.01 above shall be taken by the Managing Director. For all other staff members, the decision shall be taken by the Director, Human Resources, after consultation with the staff member's department director."

Inconsistencies among the governing rules

164. While asserting that the "steps taken to inform Applicant of the allegations against her and elicit her response . . . were entirely consistent with the relevant provisions of GAO No. 33," Respondent does not explain precisely how these provisions are to be read consistently with the proceedings that unfolded in the case of Ms. "EE". It is recalled that Applicant contends not only that the administrative leave decision was taken in "complete disregard of Applicant's potential countervailing evidence," i.e., without interviewing her first, but also that she was "not informed of any charge before she was put on administrative leave" and that the Fund "bypassed GAO 33, Section 10.02 [Charge] and 10.04 [Inquiry] . . . to have her put under GAO 33, Section 10.08 *Interim Measures* . . . ." Accordingly, Applicant contends that the "interim measure" of administrative leave was not taken at the appropriate stage of the misconduct proceedings.

165. Applicant correctly points out that, according to the sequence of proceedings set out in GAO No. 33, Section 10, the "charge" precedes the "inquiry," and "interim measures" may be taken "[p]ending the completion of an inquiry and a decision on the matter." (Section 10.08.) In the case of Applicant, the interim measure of administrative leave was taken more than three months *before* she was formally charged with misconduct.

166. Examining GAO No. 13, Section 9.01, the Tribunal observes that the language of that provision appears broader than indicated by Section 10.08 of GAO No. 33. GAO No. 13, Section 9.01, provides that administrative leave with pay may be imposed "[w]hen a staff member is alleged to have engaged in conduct for which any of the disciplinary measures referred to in GAO No. 33 (Conduct of Staff Members) might be imposed . . . ." At the same time, however, the provisions of GAO No. 33 would appear to govern the interpretation of GAO No. 13. By the terms of GAO No. 13, Section 9.01, administrative leave with pay pursuant to that provision may be invoked "while the matter is under investigation, *in accordance with the provisions of GAO No. 33*." (Emphasis supplied.)

167. The Tribunal observes that confusion arises from a lack of coordination between the Procedural Guidelines, on the one hand, and the sequence of procedural steps set out in GAO No. 33, Section 10, on the other. The problem of when the interim measure of administrative

leave may be taken in the circumstances of the instant case arises because of the elaboration of the inquiry stage as the stage of investigation undertaken by the Ethics Officer and governed by the Procedural Guidelines, whereas authority for taking the interim measure of administrative leave is found in GAO No. 33, Section 10 and GAO No. 13, Section 9.01.

168. The Procedural Guidelines refer neither to "interim measures" nor to "administrative leave." GAO Nos. 13 and 33 do not refer to the stages of the Ethics Officer's "preliminary inquiry" and "formal investigation," as set out in the Procedural Guidelines. Moreover, the later enacted Procedural Guidelines (2000) do not explain their relationship to GAO No. 33 (1989), which also continues to govern misconduct proceedings, as illustrated by the instant case.

169. In 2001, the Fund's first Ethics Officer identified the inconsistency affecting the rules governing misconduct proceedings in the following terms: GAO No. 33, Section 10.04 (Inquiry) ". . . predate[d] the establishment of the EO [Ethics Office] and to some extent may have been overtaken by it. . . ." This is so, explained the Ethics Officer, ". . . because if the charge results from an ROI [Ethics Officer's Report of Investigation], an inquiry will already have been conducted." (Ethics Officer's First Annual Report to Fund Staff (2001), p. 7.) The Ethics Officer's observation suggests that the Procedural Guidelines effectively revised the sequence of steps set out in Section 10 of GAO No. 33, i.e., that the Ethics Officer's investigation will have been completed before a "charge" is issued. It is in this sense that the inquiry (Section 10.04) stage of GAO No. 33 "may have been overtaken by" the Ethics Officer's investigation.

170. The Tribunal itself has commented on the same inconsistency between the procedural steps prescribed in GAO No. 33 and the Ethics Officer's responsibilities under the Procedural Guidelines: "The procedural requirements set out in GAO No. 33 contemplate only one 'responsible official,' who makes an 'inquiry' into the alleged misconduct and thereafter takes a 'decision.' . . . GAO No. 33 accordingly does not incorporate the role of the Fund's Ethics Officer, an office that was not established until some ten years after the implementation of GAO No. 33." *Ms. "BB"*, para. 139. Accordingly, in the case of *Ms. "BB"*, as well as in the instant case of Ms. "EE", ". . . it may be said that . . . the HRD Director, delegated the 'inquiry' function of GAO No. 33, Section 10.04 to the Ethics Officer who produced a Report of Investigation." *Id*.

171. The Tribunal observes that an anomaly arises from the grafting of the procedures envisioned by the Procedural Guidelines onto the pre-existing procedures of GAO No. 33. The Procedural Guidelines appear to provide for delegation to the Ethics Officer not only of the function of investigating possible misconduct but also of drawing conclusions—in the first instance—as to whether misconduct occurred. The result is that the Ethics Officer, as she did in the case of Ms. "EE", pursuant to paragraph 13 of the Procedural Guidelines, makes a recommendation as to the disposition of the allegations, i.e., prepares a written report to the Director of HRD containing *inter alia* "conclusions about whether there was misconduct." In cases involving alleged "harassment," the Ethics Officer is directed to provide an "opinion . . . about whether a reasonable person would define the behavior in question as offensive and the extent to which that behavior might interfere with work or create an intimidating, hostile, or offensive work environment." (Procedural Guidelines, para. 13.) These conclusions are drawn even before the staff member is "charged" with misconduct under GAO No. 33, Section 10.02 and has the opportunity for "response" to that charge under Section 10.03. In the view of the

Tribunal, the resulting procedural sequence may introduce a measure of redundancy into the misconduct proceedings that, in some cases, may unduly prolong them. More fundamentally, it raises a question of due process, inasmuch as the Ethics Officer's "conclusions about whether there was misconduct" could have the potential for prejudicing the final outcome of the misconduct proceedings.

172. In any event, while the Procedural Guidelines appear to permit (or provide for) the HRD Director's delegation to the Ethics Officer of the function of investigating possible misconduct, they do not divest the HRD Director of responsibility under GAO No. 33, Section 10.08 and GAO No. 13, Section 9.01 to take the decision on administrative leave. The question arises of what obligation the HRD Director had, in the circumstances of the instant case, to afford the accused staff member an opportunity to present her version of the events at issue before taking the administrative leave decision, particularly in light of the fact that the Ethics Officer had not provided Applicant with such opportunity, as required by the Procedural Guidelines.

173. Accordingly, a central difficulty presented by the case arises from the fact that in promulgating the Procedural Guidelines the Fund failed to clarify the relationship between those Guidelines and General Administrative Orders No. 13 and No. 33, which pre-dated them. The following questions arise. Did the Guidelines supersede or amend the GAOs, or do they coexist with them? Did the Procedural Guidelines effectively revise the sequence of steps set out in Section 10 of GAO No. 33? What is the significance of the fact that the Fund has not clarified the relationship among the governing regulations?

174. In *Galang v. Asian Development Bank*, AsDBAT Decision No. 55 (2002), the AsDBAT confronted a problem similar to that presented in the instant case of Ms. "EE", namely, the question of what procedural requirements need be met before the Bank, pursuant to its rules, could invoke the "interim measure" of "suspension pending investigation." Under the rules of the Asian Development Bank, such suspension could be made with pay, with partial pay or without pay; the applicant had been suspended with half pay. The relevant regulation provided that the "interim measure" of "suspension pending investigation" could be imposed "[i]f a charge of unsatisfactory conduct or misconduct is made against a staff member . . . ." *Id.*, para. 7. The AsDBAT considered whether the use of the word "charge" in the provision governing "interim measures" was to be interpreted the same as "charge" in the sequence of misconduct steps or whether it could be read to mean, more broadly, "suspicion" of misconduct. The applicant had not been formally "charged" with misconduct.

175. The AsDBAT examined the sequence of misconduct procedures set out in the Bank's Administrative Order, observing that the "charge" follows a preliminary inquiry; if there is sufficient evidence to warrant formal disciplinary proceedings, the staff member will be informed of the charge against him. Accordingly, concluded the AsDBAT, the "charge" contemplated by Section 9 (Formal Disciplinary Procedures) is not a mere suspicion or allegation, but an accusation supported by sufficient evidence. *Id.*, para. 37.

176. The AsDBAT concluded that, as it was the Bank which issued the regulation, ". . . it could have put the matter beyond doubt by using unambiguous language. . . . The Bank failed to do so, and Section 5.1 [Interim Measures] must be interpreted *contra proferentem*, and any ambiguity resolved in favor of the staff member." *Id.*, para. 38. Accordingly, as no formal

"charge" of misconduct had been made against the applicant, the AsDBAT held that the Bank was not entitled to suspend him from duty with half pay as an interim measure. There was "good reason" for such interpretation, held the AsDBAT, as suspension involved "serious consequences to the livelihood and reputation of a staff member." *Id.*, para. 39. Accordingly, it construed the ambiguity in the Bank's written law in favor of a formal "charge" of misconduct as a predicate to taking the "interim measure" of suspension.

The importance of clarity in the Fund's written law

177. The potentially confusing array of regulations governing misconduct proceedings was adverted to by the Ethics Officer herself in an Annual Report to the staff of the Fund:

> "The guidance and rules incumbent upon the ETO [Ethics Office] are found in three stand-alone documents: Terms of Reference for the Ethics Officer, GAO 33, and Procedural Guidelines for Conducting Inquiries Related to Allegations of Misconduct. In the personal opinion of the undersigned Ethics Officer, this process could be simplified and reduced to one document to make it easier for staff to understand the process that will be followed by the ETO for handling allegations of unethical behavior or misconduct."

(2005-06 Annual Report of the Ethics Officer, p. 26.)

178. The Tribunal has commented on a number of occasions on the importance of clarity in the Fund's regulations governing the employment relationship: "[N]otice by which rights and obligations are clearly conveyed is a requirement . . . of due process." *Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1996-1 (April 2, 1996), paras. 36-37 (". . . neither the members of the staff of the Fund nor this Tribunal can adequately react to a practice [relating to salary determination] which is at once real in its effects but so elusive in its origins, adoption, recording, articulation and transparency"). *See also Ms. "B", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1997-2 (December 23, 1997), para. 56; *Ms. "J"*, para. 89 (noting potential confusion to staff members as to administrative review requirements in view of intersecting nature of claims for medical separation, workers compensation, and disability pension); *Mr. S. Ding, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2009-1 (March 17, 2009), para. 49 ("the effect of the wording of the provisions in question is not clear on their face . . . . Rather, staff are left to draw this implausible conclusion [of inequality in number of years of eligibility for education allowances] by their own calculation").

179. In 2001, the first Ethics Officer suggested that GAO No. 33, Section 10.04 "should perhaps be reviewed by LEG [the Fund's Legal Department] with a view toward clarifying its language in light of the investigative procedures contemplated in the Ethics Officer's Terms of Reference." (Ethics Officer's First Annual Report to Fund Staff (2001), note 16.) To date, however, GAO No. 33 has not been updated to reflect any change in the stages of the Fund's

misconduct proceedings as a result of the adoption of the Procedural Guidelines. As for GAO No. 13, although it was revised in 2006, adding Section 9.01.1,[29] it continues to make no mention of the Procedural Guidelines, which had been adopted in 2000. The Fund, while having the opportunity to clarify how the sequence of procedures set out in the Procedural Guidelines might be reconciled with the administrative leave provision of GAO No. 13, declined to do so. It may therefore be concluded that GAO No. 13 continues to be understood as permitting a staff member to be ". . . placed on administrative leave with pay while the matter is under investigation, *in accordance with the provisions of GAO No. 33*." (Emphasis supplied.) Accordingly, it appears that the steps set out in Section 10 of GAO No. 33 would continue to govern the timing of an administrative leave decision.

180. While the Tribunal appreciates that the process of updating and revising the Fund's internal law is an ongoing one, it notes the importance—particularly in respect of disciplinary matters—of the Fund's written regulations providing effective and accurate notice of the governing requirements. When new staff rules are adopted, especially those denominated "Guidelines," "Policies," and the like, it is incumbent that the Fund give indication on the face of such pronouncements just how they are to fit into the existing regulatory framework. When such documents modify the meaning or application of the General Administrative Orders, the Fund should, as a matter of course, update the relevant GAOs. In no area is certainty about the requirements of the Fund's internal law more important than in the regulations that govern proceedings to investigate, determine, and sanction misconduct. Adequate notice of the applicable procedures provides essential guidance, not only to members of the staff who may be subject to their effects, but also to the officers of the Fund charged with carrying out their prescriptions.

181. The facts of the instant case raise the further issue of the importance of notice to the individual staff member facing misconduct proceedings. It is not clear from the record of the instant case to what extent—if at all—Applicant had access to the texts of the Fund's internal law while she remained on paid administrative leave awaiting the outcome of the misconduct proceedings in her case. There is evidence in the record that Applicant was barred, at least for a portion of that time, from access to the Fund's internal computer system, on which staff regulations are posted. (*See* Grievance Committee hearing, 4-1-09, Tr. 26-28; 5-5-09, Tr. 43-45; *but see* Email from Ethics Officer to security officers, August 26, 2008.) There also is no indication that Ms. "EE" was provided with the relevant Procedural Guidelines and GAOs at the time that she was informed of the initiation of the misconduct proceedings against her and placed on administrative leave.[30]

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[29] *See supra* note 19.

[30] Applicant states in her Reply that she "did not possess" a copy of the Procedural Guidelines when she submitted her Application to the Tribunal. In a footnote in its Rejoinder, Respondent asserts as to GAO No. 33 and the Procedural Guidelines: "Both of these documents were provided to the Tribunal as part of the Fund's February 12, 2010 Response to the Tribunal's Request for Additional Information. Although Applicant claims that she 'did not possess' a copy of the Procedural Guidelines before that time, the document is available to all staff on the Fund's Intranet." This statement suggests that she was not provided with the regulations at the time of the August 26 meeting with the Ethics Officer.

182. That the steps of the misconduct proceedings that were to follow the Ethics Officer's investigation may have been opaque to Applicant is acknowledged by Respondent in its Post-Hearing Reply Brief before the Grievance Committee, pp. 1-2, in which it observed that Ms. "EE"'s own Post-Hearing Brief ". . . seem[ed] to reflect a serious misunderstanding on Grievant's part of the disciplinary process that underlies her case." The Fund noted that "Grievant's arguments indicate that in her view, the decision to place her on administrative leave with pay in August 2008 was equivalent to a decision to 'terminate her' without the benefit of a full investigation, and that this earlier decision was reversed by the subsequent decision by [the Acting HRD Director] to allow her to return to work." *Id.*

183. In the view of the Tribunal, ensuring that the accused staff member is able to be fully informed of the applicable procedures is part of the process that is due to a staff member facing the uncertainty inherent in being subject to misconduct proceedings. Accordingly, when first notified that he or she is under investigation pursuant to those procedures, the staff member should be provided with the texts of the governing staff rules. Likewise, at the time when the staff member is charged with having violated a particular substantive standard, the staff member should be provided with the applicable regulation. This is especially so if, while on administrative leave, the staff member is denied access to the Fund's computer system and therefore is unable to retrieve the pertinent regulations via the Fund's intranet. *Cf. Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2001-1 (March 30, 2001), paras. 122, 128 (non-staff member applicant could not be assumed to have had access to information on dispute resolution disseminated to staff members, including on the Fund's internal website; holding that "exceptional circumstances" excused failure to exhaust channels of administrative review in timely manner; it was incumbent on the Fund to have informed the applicant of the applicable administrative review requirements). In the case of Ms. "EE", a clear understanding of the proceedings that lay ahead may have gone a long way toward diminishing some of the anxiety which, in any case, may be expected to accompany being subject to misconduct proceedings.

The principle of *audi alteram partem* and the proper construction of the procedural framework

184. The Tribunal returns now to the question of whether the HRD Director was required, prior to deciding to place Applicant on paid administrative leave, to have afforded Ms. "EE" the opportunity to present her own version of the events at issue. The Tribunal finds no clear answer in the Fund's written law. Do generally recognized principles of international administrative law require such a hearing?

185. Article III of the Tribunal's Statute provides in part: "In deciding on an application, the Tribunal shall apply the internal law of the Fund, including generally recognized principles of international administrative law concerning judicial review of administrative acts." The Report of the Executive Board, recommending the Statute's adoption, elaborates:

> "With respect to employment-related matters, the internal law of the Fund includes both formal, or written, sources (such as the Articles of Agreement, the By-Laws and Rules and Regulations, and the General Administrative Orders) and unwritten sources."

Commentary on the Statute, pp. 17-18. Among the "unwritten sources of law within the internal law of the Fund" are:

> ". . . certain general principles of international administrative law, such as the right to be heard (the doctrine of *audi alteram partem*) [which] are so widely accepted and well-established in different legal systems that they are regarded as generally applicable to all decisions taken by international organizations, including the Fund."

Commentary on the Statute, p. 18.

186. This Tribunal has invoked general principles of international administrative law both to fill in lacunae in the written law of the Fund and to buttress its requirements. In *Mr. "F"*, *Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005), the applicant contended that he had been the object of religious hostility in contravention of the Fund's Discrimination Policy. In raising a claim of religious discrimination in the workplace, Mr. "F" challenged a form of discrimination expressly addressed by the Fund's written law. The Tribunal commented that such discrimination was prohibited by the Fund's written law, "as well as by universally accepted principles of human rights." *Id.*, para. 81. In a subsequent Judgment, *Ms. "M" and Dr. "M",* para. 126, the Tribunal observed that the express provisions of the Fund's nondiscrimination law did not refer to the particular type of discrimination alleged by the Applicants in that case, namely, discrimination on the ground of birth out of wedlock. The case arose under the provision of the Staff Retirement Plan relating to giving effect to child support orders. The Tribunal noted that the omission in the written law was "readily explained by the fact that such discrimination, which is typically directed at children, does not ordinarily arise in the context of employment law." *Id*. Recognizing the pertinence of universally recognized principles of human rights to the practices of the Fund, however, the Tribunal held that the challenged provision was "fundamentally defective" because it was incompatible with "international standards of nondiscrimination." *Id.*, para. 132.

187. The significance of the principle of *audi alteram partem* as a general principle of international administrative law which is "so widely accepted and well-established in different legal systems that [it is] regarded as generally applicable to all decisions taken by international organizations, including the Fund," Commentary on the Statute, p. 18, was evident to the drafters of the Statute of the Administrative Tribunal. Moreover, the Tribunal itself has invoked the doctrine in a variety of circumstances, none of which, to date, has involved misconduct proceedings. As the WBAT has commented, "[e]ven in cases where decisions taken result from the exercise of managerial discretion . . . , the Tribunal has stressed the importance of respecting the requirements of due process." *BF v. International Bank for Reconstruction and Development*, WBAT Decision No. 430 (2010), para. 80 (referring to performance appraisal process).

188. "The IMF Administrative Tribunal consistently has applied notice and hearing as essential principles of international administrative law." *Mr. "F"*, note 18 (citing *Ms. "C"*, para. 37; *Estate of Mr. "D"*, paras. 116-128; *Mr. "P" (No. 2)*, para. 152.) *Mr. "F"*, para. 106 ("the fair and transparent procedures that govern or should govern the operations of the Fund require that a staff member whose position is abolished be given reasonable notice of that prospect. The staff

member should be in a position when such a decision first is conveyed to him to set out any reasons that he or she may have to contest the propriety or equity of the abolition decision"); *Mr. "P" (No. 2), Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2001-2 (November 20, 2001), para. 152 ("Fund's internal law favors legal decisions that are the result of adversary proceedings, in which reasonable notice and the opportunity to be heard are the essential elements"; interpreting provision of Staff Retirement Plan providing for giving effect to child support orders); *Ms. "J"*, para. 167 and *Ms. "K", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-2 (September 30, 2003) para. 104 (questioning whether procedures employed by the Administration Committee of the Staff Retirement Plan had afforded applicants for disability retirement "sufficient and timely opportunity for rebuttal").

189. Of particular pertinence to the instant case is this Tribunal's Judgment in *Ms. "C", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1997-1 (August 22, 1997). In *Ms. "C"*, the applicant contested the non-conversion of her fixed-term appointment on the basis of alleged "interpersonal deficiencies." Observing that ". . . adequate warning and notice are requirements of due process because they are a necessary prerequisite to defense and rebuttal," *Ms. "C"*, para. 37, the Tribunal concluded that ". . . most fundamentally, when Ms. "C"'s supervisor was given evidence by her co-workers of her interpersonal deficiencies, Ms. "C" should have been afforded meaningful opportunity to rebut that evidence." *Id.*, para. 42, citing *Lindsey v. Asian Development Bank*, AsDBAT Decision No. 1 (1992), para. 9. Accordingly, in *Ms. "C"*, the Tribunal held that where accusations brought by co-workers weighed in the evaluation of the applicant's work performance it was a "lapse of due process," *id.*, para. 41, that the applicant had not been afforded the opportunity to present her account of the facts at issue.

190. A fortiori such considerations govern in the context of misconduct proceedings. To "hear both sides" is a core element of due process. The Tribunal recalls that although paid administrative leave is an interim measure designed to preserve the status quo until the misconduct proceedings have run their course, placing a staff member on administrative leave, coupled with suddenly barring him from regular access to the Fund's premises is not without adverse consequences to the staff member, in particular in regard to reputational issues, anxiety, career development, relations with colleagues, and opportunity for assignments.[31] Accordingly, in respect of an administrative leave decision, it may be said that the staff member's "stake in the outcome of the decision-making process" is a considerable one; accordingly, it "deserves a high level of procedural protection." *Ms. "J"*, para. 162, *Ms. "K"*, para. 100 (disability pension decision).

191. Principles of due process are expressly incorporated in the Fund's written internal law governing investigation of alleged misconduct. The Procedural Guidelines, para. 1, emphasize that inquiries by the Ethics Officer ". . . will be based on fundamental fairness in procedural

[31] The Tribunal has recognized above the dignity interest of the accused staff member confronted with unilateral removal from the workplace even while maintaining full pay and benefits. *See supra* Consideration of the Issues of the Case: The standard of review.

terms, including with respect to providing those against whom allegations are made *notice of investigations and an opportunity to be heard*, efforts to ensure balance and thoroughness, appropriate confidentiality, and freedom from reprisal." (Emphasis supplied.) *Cf. Ms. "M" and Dr. "M"*, para. 132 (challenged provision of the Staff Retirement Plan was "incompatible with the international standards of nondiscrimination *that the Fund itself professes*" as reflected in other elements of its written law). (Emphasis supplied.)

192. This Tribunal has recognized that fair procedures promote not only the interests of the individual staff member but also those of the Organization as a whole. *See Ms. "J"*, para. 162, *Ms. "K"*, para. 100 (assuring that decisions on disability pensions taken by the Administration Committee of the Staff Retirement Plan are made in accordance with fair and reasonable procedures is "an interest shared by all Plan participants and the organization").

193. The Tribunal recognizes that the dignity interest of the staff member is not the only interest furthered by a requirement to afford a staff member under suspicion of misconduct the opportunity to present his or her version of the facts at issue, before the Human Resources Director makes a decision about administrative leave. It is recalled that prima facie evidence is required to support an ongoing misconduct investigation, which, in turn, is a prerequisite to the imposition of administrative leave. Accordingly, an interview, during the preliminary inquiry stage, of a staff member who is under suspicion of misconduct effectively provides the staff member with notice and an opportunity to respond to the suspicions (perhaps not yet fully developed) against him or her while the inquiry is still at its early stages. Permitting all relevant persons, most particularly the staff member against whom the complaint of misconduct is directed, the opportunity to be heard is designed to protect against the effect of possible bias and false accusations on the fact-finding process. This is especially so when the nature of the complaint involves alleged interpersonal misconduct such as that at issue in the case against Ms. "EE". In such circumstances, the concern for accurate fact-finding is heightened. Affording an interview to the staff member who is the object of an allegation of harassment provides an opportunity for the Fund to refine the understanding of the facts and to ferret out false accusations.

194. The World Bank Administrative Tribunal has held that a staff member who is the subject of a preliminary inquiry under the Bank's staff rules should be informed of that fact at the "earliest reasonable moment," explaining its rationale as follows:

> "[A] staff member who is the subject of a preliminary inquiry should be informed of that fact at the earliest reasonable moment, taking into account when justified the aforementioned concerns regarding tampering, collusion, and the like. Early notice—short of a formal Notification of Misconduct—can provide an opportunity to the subject to respond to the charges, to explain his suspect behavior, to inform the investigators, and so better to focus and expedite (and perhaps conclude) the preliminary inquiry."

D v. International Finance Corporation, WBAT Decision No. 304 (2003), para. 65; *N v. International Bank for Reconstruction and Development*, WBAT Decision No. 362 (2007), para. 23. *See also G*, para. 81 ("early notice may give a person suspected of wrongdoing the occasion

to exculpate himself, and so avoid the disruption and embarrassment of an in-depth investigation"); *BB,* para. 80 (". . . preliminary inquiry was additionally flawed by [the investigative unit of the Bank]'s failure to inform the Applicant of that inquiry and provide her with the opportunity to present explanations regarding her behavior").

195. Additionally, the WBAT has recognized the obligation of investigators to seek out exculpatory as well as inculpatory evidence. *N*, para. 35; *Z v. International Bank for Reconstruction and Development*, WBAT Decision No. 380 (2008), para. 27. In the circumstances of the instant case of Ms. "EE", such exculpatory evidence, if it was to be found, could reasonably be expected to have come from Applicant herself. The essence of the alleged misconduct, an accusation by another Fund staff member of harassment, heightens the obligation to interview the suspect staff member during the "preliminary inquiry" stage. Where the accusation involves one staff member's word against another's, care must be taken to avoid the consequences of a possible improper motive to use the Fund's misconduct machinery against a colleague. *See generally Sjamsubahri*, paras. 9-10. More generally, the WBAT has recognized that the early interview of a suspect staff member is "especially appropriate when the ability to gather information from other sources is not clear, sufficient or likely to result in accurate findings." *N*, para. 23.

196. For the foregoing reasons, the Tribunal concludes that in this case raising allegations of interpersonal misconduct, in which the Ethics Officer failed to interview the suspect staff member as part of her preliminary inquiry, it was incumbent on the HRD Director to provide Applicant the opportunity to present her account of the events at issue before taking the decision to place her on paid administrative leave pursuant to GAO No. 13, Section 9.01. The Fund's obligation to interview the staff member about the accusations giving rise to the misconduct investigation before taking the administrative leave decision derives from the underlying principle of *audi alteram partem*, an obligation that is given expression to a great extent by the written law of the Fund.

197. The question of whether an interview by the Ethics Officer in the course of a preliminary inquiry would necessarily obviate the need for such interview by the HRD Director is not presented by this case. Additionally, the Tribunal recognizes there may be exceptional circumstances, where there is an immediate risk of harm to the institution, in which it will not be necessary to afford a hearing prior to an administrative leave decision. Thus, the Tribunal concludes that the doctrine of *audi alteram partem*, a fundamental principle of international administrative law, should be followed before a decision to place a staff member on administrative leave is taken unless exceptional circumstances require otherwise.

198. The Tribunal concludes, in the circumstances of the case, that the Human Resources Director erred when she failed to afford Ms. "EE" an opportunity to be heard prior to placing her on administrative leave. While the Tribunal considers that this procedural error is not sufficient to overturn the contested decision, it does merit relief in the form of monetary compensation.

199. Applicant suggests that the administrative leave decision lacked an adequate evidentiary basis because it was taken in the absence of Applicant's "potential countervailing evidence." The Tribunal has concluded above that the Fund did have prima facie evidence to support an ongoing misconduct investigation. That the Fund failed to interview Applicant about the accusations

against her until after taking the decision to place her on paid administrative leave does not negate the evidentiary basis upon which the Fund grounded that decision. Accordingly, the Tribunal's conclusion that the contested decision was "carried out in violation of fair and reasonable procedures," Commentary on the Statute, p. 19, does not provide ground for the Tribunal to overturn the administrative leave decision in this case. This so because (a) the Tribunal has held that the Fund had the requisite prima facie evidence of alleged misconduct to take the administrative leave decision, and (b) Applicant has not challenged the ultimate decision finding that she committed misconduct, a decision taken following a full opportunity for Applicant's written and oral response at a later stage of the misconduct proceedings.

Was the administrative leave decision improperly motivated by animus, bias, or retaliation against Applicant?

200. The Tribunal now turns to Applicant's claim that the decision to place her on paid administrative leave pending investigation of misconduct was improperly motivated by animus, bias and retaliation. Applicant alleges that the proceedings against her were tainted from the start as being based upon "false accusations" by another staff member, that the Ethics Officer acted in "complicity" with these accusations by "negligently" examining them, and that the Ethics Officer improperly influenced the HRD Director in taking the contested decision. Applicant asserts that the Ethics Officer was biased against Applicant as a result of the complaint of sexual harassment Ms. "EE" earlier had lodged against Mr. "X" and the resulting protest that her counsel brought in respect of the disposition of that complaint.

201. Respondent, for its part, maintains that the contested decision of the HRD Director represented her own judgment as to the appropriate course of action, reflecting neither animus nor bias but rather a "careful weighing of competing concerns and an effort to proceed cautiously in the interest of the workplace as a whole."

Alleged bias of Ethics Officer

202. The Fund asserts that Applicant's claims of bias or animus on the part of the Ethics Officer are "misplaced" and that allegations relating to the conduct of the Ethics Officer's investigation are "not germane" to the Application challenging the HRD Director's decision to place Applicant on paid administrative leave. In the view of the Tribunal, however, Applicant's allegation of bias on the part of the Ethics Officer is relevant to her challenge to the contested decision; it is not disputed that the HRD Director drew upon the Ethics Officer's information and views in taking the administrative leave decision. The degree to which the Human Resources Director relied upon the Ethics Officer's advice and whether she exercised appropriate independent judgment in the matter is a separate question, to be considered below.

203. Applicant properly points out, as articulated in the Ethics Officer's Terms of Reference, that the position of Ethics Officer was established to provide the services of an "impartial" person to inquire into alleged violations of the Fund's standards for staff conduct and to resolve such matters "in a manner that contributes to the good governance of the Fund and helps to maintain its reputation for probity, integrity, and impartiality." (Ethics Officer's Terms of Reference, para. 1.) Unquestionably, the Ethics Officer's conduct in the discharge of her responsibilities must meet these high standards.

204. The issue of alleged "false accusations" has been considered above; the Tribunal has concluded that the Fund had an adequate evidentiary basis for taking the administrative leave decision.[32] Moreover, the possibility that other staff members may have harbored ill will toward Applicant does not establish improper motivation in the Fund's decision to place Applicant on administrative leave pending investigation for misconduct, in light of the accusations against her. Respondent correctly observes:

> "[T]he mere fact that the Ethics Officer presented evidence from witnesses that Applicant considered to be 'defamatory', or the fact that the Ethics Officer's findings supported a charge of misconduct, cannot in themselves be seen as evidence of bias, since such an argument would invalidate any ethics inquiry that resulted in a negative outcome for a staff member."

In the view of the Tribunal, in the light of the ultimate finding of misconduct, the accusations against Ms. "EE" were not, as she alleges, "unsubstantiated" in the sense of paragraph 3 of the Procedural Guidelines, which provides that ". . . malicious and unsubstantiated charges of misconduct would constitute intimidation under the Fund's policy on harassment, thus providing a basis for potential disciplinary action."

205. Applicant asserts that the Ethics Officer "took sides and drew many opinionated conclusions with no evidence." Applicant cites as evidence of bias alleged discrepancies in the Ethics Officer's Report of Investigation of November 2008. Although the Report was produced at a later stage of the misconduct proceedings, much of the evidence upon which it draws was collected before the administrative leave decision was taken, and, in Applicant's view, its contents are relevant to demonstrating the animus with which Applicant alleges the Ethics Officer undertook the preliminary inquiry that preceded the administrative leave decision.

206. In the view of the Tribunal, Applicant has not supported her assertion that the Ethics Officer was responsible for "false statements and malicious efforts to hide evidence to support a pattern of harassment and [a] seriously botched Report of Investigation." Applicant's specific allegations relating to the content of the Ethics Officer's written Report of Investigation of November 2008 are not before the Tribunal. Applicant submitted extensive and detailed Responses to that Report after she was charged with misconduct under GAO No. 33, Section 10.02, and these Responses were taken into account by the Acting HRD Director in taking the Decision on misconduct. In the view of the Tribunal, there is no ground to conclude, as Applicant alleges, that "there was an offence of conspiracy committed against Applicant" by Mr. "X", Ms. "Y", the Senior Administrative Assistant and the Ethics Officer.

207. Applicant contends that the Ethics Officer was biased against her as a result of Ms. "EE"'s earlier complaint of sexual harassment against Mr. "X". She alleges that the Ethics Officer had sought proof from her that she did not seek from Applicant's accusers. The Tribunal acknowledges that it is possible that the Ethics Officer, in the course of her earlier interaction

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[32] *See supra* Consideration of the Issues of the Case: Applicant's contention that the misconduct investigation was improperly based upon "false accusations."

with Applicant relating to Applicant's complaint against Mr. "X", formed opinions about the personal relationships underlying Ms. "Y"'s accusations against Applicant. Applicant has advanced no evidence, however, that any such opinions, if they were formed, improperly affected the Ethics Officer's preliminary inquiry in her case. The fact that a staff member may be the complainant in one misconduct case and the respondent in another cannot of itself disqualify the Ethics Officer from investigating both complaints. In cases in which the Ethics Officer concludes that a staff member may have demonstrated questionable conduct of his own, such conclusion does not preclude the Ethics Officer's pursuit of an investigation into whether the staff member was himself the object of conduct violating the Fund's standards. *Cf. Mr. "F"*, para. 101 ("The deportment of Mr. "F" himself was at times offensive, combative and excessive but, on the evidence in the record, not such as to excuse the behavior of which he was the victim"; upholding claim of religious intolerance and workplace harassment).

208. In connection with the investigation of Ms. "EE"'s earlier complaint against Mr. "X", the Ethics Officer's Report of Investigation states that it was an earlier HRD Director, rather than the Ethics Officer, who decided not to proceed with a full investigation of misconduct against Mr. "X", based upon his impending retirement from the Fund. (Ethics Officer's Report of Investigation, pp. 2, 4-5 and note 2.) The Ethics Officer reported that she concluded a preliminary inquiry into the matter. Whether to pursue it further was not her decision to make. That decision was taken by a former HRD Director, an individual not involved in making decisions about the case of Ms. "EE".

209. Applicant further asserts that the Ethics Officer was motivated by retaliation for the letter sent by Applicant's counsel protesting the disposition of Ms. "EE"'s complaint of sexual harassment against Mr. "X": "Applicant believes that the Ethics Officer retaliated against her by conducting a dismal report of investigation because of [her counsel's] April 2, 2008 letter to the Fund, which stated the following: '[The Ethics Officer] has abused the powers of her office in denying [Applicant] the right to a fair and transparent review of her misconduct complaint [against Mr. "X"].'"

210. The World Bank Administrative Tribunal has emphasized in the context of challenges to administrative leave decisions that a finding of improper motivation cannot be made without "clear evidence" thereof. *AF*, para. 37. *See also G*, paras. 70 -75 (failure to prove improper motivation where "there were undoubtedly objective circumstances which demanded explanation"); *BB*, paras. 120-122 (record does not support allegations of malice or bad faith on the part of the Bank's investigators, even where significant procedural errors warranted relief). Based upon the record of the case, the Tribunal cannot conclude that there is "clear evidence" or, indeed, any evidence that the decision to proceed with a misconduct investigation and place Applicant on paid administrative leave during the pendency thereof was improperly motivated by retaliation for her counsel's protest against the Fund's disposition of Applicant's earlier complaint against Mr. "X". The Tribunal has held above that the Fund met the substantive prerequisites for the contested administrative leave decision: prima facie evidence of misconduct and a tenable basis to conclude that the staff member's presence in the workplace posed a risk of future harm. Again, the fact that Applicant has not challenged the ultimate misconduct finding in her case militates against a conclusion that the contested administrative leave decision was improperly motivated.

211. In so concluding, however, the Tribunal reaffirms that "[p]rotection from reprisal is essential to the fair and effective operation of the Fund's system for the resolution of staff complaints." *Mr. "DD"*, para. 177. The Fund's Procedural Guidelines for Conducting Inquiries Related to Allegations of Misconduct states: "3. Staff should be reassured that those who bring complaints or provide information in good faith regarding possible misconduct are guaranteed full protection from reprisal." Likewise, the Fund's Policy on Harassment provides:

> "30. Anyone who feels harassed, particularly by a supervisor, is likely to fear reprisal should he or she bring the matter to the attention of those in authority. However, reprisal against anyone who files a complaint in good faith is unacceptable and in itself constitutes misconduct subject to disciplinary action.
>
> 31. A person who brings a complaint in good faith should not be subjected to retaliation, and adverse action taken against a complainant that appears to stem from the registering of a complaint will be thoroughly investigated. As part of follow-up measures to formal complaints, officials of HRD will check from time to time with complainants to ensure that no such adverse actions have been taken as a result of their filing a complaint."

Additionally, this Tribunal has made clear that "[t]he sustainability of an accusation of harassment made in good faith is not a pre-condition for a finding of reprisal in response to that accusation." *Ms. "C"*, para. 22; *Mr. "DD"*, para. 179.

212. The Tribunal cannot, on the basis of the record before it, draw the inference that the Fund's decision to place Applicant on administrative leave while pursuing an investigation of alleged misconduct against her was motivated by reprisal for Applicant's earlier complaint against Mr. "X" or by the view expressed in her counsel's letter that the Ethics Officer had acted improperly in declining to pursue that complaint. The propriety of that decision and of the communication to the Applicant relating to it is a matter upon which the Tribunal shall comment at the end of this Judgment.

> The independent role of the Human Resources Director in taking the administrative leave decision

213. GAO No. 13, Section 9.10.1,[33] makes clear that it is the Director of Human Resources who is vested with the authority to take a decision to place a staff member on administrative

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[33] GAO No. 13, Section 9.10.1 provides:

> "9.10.1 The decision to place a staff member who is subject to Rule N-12 on administrative leave with pay under Section 9.01 above shall be taken by the Managing Director. For all other staff members, the decision shall be taken by the Director, Human Resources, after consultation with the staff member's department director."

leave with pay pending investigation of misconduct. While the Tribunal concludes that Applicant has not established bias or improper motive on the part of the Ethics Officer, Applicant's claim raises the important question of the exercise of independent judgment by the Human Resources Director in taking the administrative leave decision.

214. In Applicant's view, the HRD Director's decision ". . . could only be faulty from the beginning considering the main basis for that decision stemmed from the Ethics Officer's '*bias or animus*' against Applicant." (Emphasis in original.) In the view of Applicant, "[the HRD Director] was a 'puppet' in [the Ethics Officer]'s hands . . . ," and the decision of the HRD Director was "entirely influenced" by the Ethics Officer and therefore "inevitable." The Fund responds that "[the HRD Director] made clear at the hearing that her decision to place Applicant on administrative leave reflected her own judgment as to the best course of action . . . ." Respondent maintains that the HRD Director ". . . properly and necessarily took account of preliminary information and viewpoints in arriving at her decision on administrative leave . . . ."

215. In *Galang*, para. 45, the Asian Development Bank Administrative Tribunal concluded that "[e]ven if suspension [as an interim measure pending investigation of misconduct] can be ordered on the basis of suspicion alone, at the very least the person making the order of suspension should himself entertain a reasonable suspicion, after considering all the relevant facts and taking adequate time for consideration." Particularly in a case in which a misconduct investigation arises from an interpersonal dispute, the independent exercise of judgment by the HRD Director is an essential element of procedural fairness. At the same time, the World Bank Administrative Tribunal has held that "senior managers are entitled to rely on facts as presented by internal investigating bodies," *G*, para. 76 (denying applicant's contention that Bank's Vice President for Human Resources failed to exercise independent judgment as to whether administrative leave was warranted).

216. It is recalled that the Human Resources Director testified that she "spoke to neither staff member" and "relied completely on the report from the [E]thics [O]fficer, and from the—the meetings that I had with the [E]thics [O]fficer on this, as well as with the security people." (Grievance Committee hearing, 5-12-09, Tr. 14.) She additionally testified that her "consultations with the [Fund] security people" constituted the "main advice that I followed in terms of making a decision in this case . . . . [I]t was their judgment that this would be the prudent thing to do. And I agreed with that judgment." (*Id.*, Tr. 28.)

217. It is not disputed that the HRD Director was not provided with any written reports at the briefing in late August that provided the basis for her decision to place Applicant on administrative leave with pay. At that meeting, the Ethics Officer and the security officer summarized the findings to date of the preliminary inquiry, including the interviews conducted by the Ethics Officer and the external risk assessment. At the same time, the Tribunal credits the HRD Director's Grievance Committee testimony that the governing GAOs ". . . indicated to me that I had basically to make a judgment as to whether or not administrative leave was appropriate in this case. And that's the judgment that I made, that it was appropriate in this case." (Grievance Committee hearing, 5-12-09, Tr. 24.)

218. As considered above,[34] the text of GAO No. 33, Section 9.01 indicates that placing a staff member on paid administrative leave pending investigation of misconduct requires an exercise of judgment separate from and additional to the decision to proceed with a formal investigation of misconduct. In the instant case, the record reflects that the HRD Director believed that she had to "make a judgment" under the GAOs. She weighed information provided by the Fund's Ethics Officer as to the results of her preliminary inquiry, and by IMF security personnel who supported the view that safety considerations justified placing Applicant on paid administrative leave.

219. The evidence shows that in taking the administrative leave decision the HRD Director made a judgment, weighing information and advice from multiple sources. The Tribunal has held above that this process was flawed in failing to take into account any evidence that Applicant might have brought to her attention had she been interviewed before the administrative leave decision was taken.[35]

220. While the Human Resources Director might have done more to inform herself of the relevant facts, as by reviewing the written report from the external risk assessment firm, the fact that she relied instead upon oral reports does not, in the view of the Tribunal, vitiate the administrative leave decision or give rise to an additional compensable claim. The record indicates that the HRD Director's decision was the product of deliberation and independent judgment. While the better practice would be for the Ethics Officer, security personnel, and any others briefing the HRD Director to furnish such written reports as may exist, that they did not do so in this case is not determinative.

221. In sum, Applicant has not established bias on the part of the Ethics Officer in this case. Nor has she put forward any independent ground to support a finding of improper motive on the part of the Human Resources Director, who was responsible, both in law and in fact, for taking the contested decision in the case. Accordingly, the Tribunal does not find that the administrative leave decision was improperly motivated by animus, bias or retaliation.

222. At the same time, the Tribunal observes that Applicant's claims of bias on the part of the Ethics Officer and lack of independent judgment by the HRD Director underscore the importance of fair procedures as a safeguard against the potential effects of bias in the investigative process. In this regard, the Tribunal notes the role of the Oversight Committee, as set out in the Procedural Guidelines and the Ethics Officer's Terms of Reference. Respondent asserts that, in the circumstances of the case, the Ethics Officer was not required to consult with the Oversight Committee before initiating a preliminary inquiry into the accusations lodged by Ms. "Y". In the view of the Tribunal, however, it is not entirely clear that the Ethics Officer's early consultation instead with the HRD Director was the best approach in light of the Guidelines' provision for approval by the Oversight Committee (comprised of three senior

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[34] *See supra* Consideration of the Issues of the Case: Was prima facie evidence of misconduct sufficient ground to invoke the administrative leave provision of GAO No. 13, Section 9.01?

[35] *See supra* Consideration of the Issues of the Case: Was the HRD Director required to have interviewed Applicant in connection with the accusations against her before taking the decision to place her on paid administrative leave pending investigation of misconduct?

officials of the Fund, with the HRD Director as Chairperson ex officio, *see* Ethics Officer's Terms of Reference, para. 7) where an inquiry into possible misconduct is initiated "upon the complaint of other parties" (Procedural Guidelines, para. 2). The Tribunal is particularly troubled by the Ethics Officer's comment in the Report of Investigation that "[b]ased on Ms. ["Y"]'s complaint, interview, and documentary materials, I contacted . . . then Director, HRD, *to advise her* that I would commence a Preliminary Inquiry into these allegations." (Emphasis supplied.) (Ethics Officer's Report of Investigation, p. 8.) This characterization of events by the Ethics Officer suggests that she regarded it as within her own discretion to initiate a Preliminary Inquiry. In the view of the Tribunal, invoking the procedures of the Oversight Committee in cases in which one staff member raises a complaint of interpersonal misconduct against another provides an important check against potential overreaching by the Ethics Officer.

Did the manner of removing Applicant from the Fund's premises violate fair and reasonable procedures?

223. In her request for relief, Applicant claims that she experienced "the humiliation of being escorted off the premises without obtaining countervailing evidence from her, and ignoring [the external risk assessment firm]'s, even Mr. ["X"]'s statements, that there was no evidence that Applicant could represent a danger." Accordingly, Applicant's articulation of the harm she associates with being escorted from the building by a Fund security officer, rather than being permitted to leave on her own, is closely related to two of her other complaints considered above: (1) that she was wrongly assessed to pose a threat to the safety of other Fund staff; and (2) that the decision to place her on paid administrative leave pending investigation of misconduct was taken before she had the opportunity to present her own account of the facts at issue.

224. The Fund responds that Applicant was escorted from the building in accordance with standard Fund procedures and that those procedures were "handled professionally and with sensitivity" in her case.

225. Both Applicant and the security officer testified during the Grievance Committee proceedings to Applicant's removal from the Fund's premises following her meeting with the Ethics Officer on August 26. Applicant testified: "[The security officer] has been very, very nice. I mean, he actually noticed that I was kind of distressed because I was crying on the way to the subway. So he tried to comfort me and tell me like this, Well, you know, it happens. . . . [T]he escorting was fine." (Grievance Committee hearing, 5-5-09, Tr. 46-47.) The officer, for his part, observed that Applicant did not avail herself of the opportunity that he offered to walk at a "discreet distance" but rather walked "right with [him]" to her office where they collected her belongings, he took her key and badge, and then walked with her to a nearby Metro station. "She could not have been more courteous and polite," observed the officer. (*Id.*, Tr. 40-41.)

226. At the same time, Applicant also described the public aspect of her removal from Fund premises:

> "It was all right when . . . I was escorted with [the security officer], although the two women who happened to be on the other side recognized that you were a security, so they already knew

> what was happening to me that I was put on administrative leave. And that went like a fire in the prairie, actually, when I was. Some woman actually cried to see that an institution could just come and remove the person like this in front of everybody. . . . [E]verybody was calling me, although they were not supposed to call me. But they did not know. They just wanted to know what was happening. I said, I am on administrative leave. And then they told me, yes, we recognized Mr. . . . as a security [officer]."

(*Id.*, Tr. 42-43.)

227. Applicant questions why she was "put on a lengthy 6-month Administrative Leave and escorted outside the building as a 'safety hazard,' while . . . an external risk assessment company, stated, before the Administrative Leave took place, that there was no evidence that Applicant could be violent." In Applicant's words, "[b]asically, the whole process meant that anyone could accuse somebody else of being a 'safety hazard' with no evidence and that the accused would be prevented from having an 'equal opportunity' to defend him/herself."

228. The Tribunal recalls that the external risk assessment report cautioned the Fund as to how Applicant might react to news that she was under investigation for misconduct:

> "If you decide to proceed with the termination process regarding [Applicant], we recommend that she be placed on administrative leave until the process is complete. Based on the information we reviewed, we believe [Applicant] will react adversely to news that you are proceeding with steps to terminate her employment. We recommend removing her from the workplace to minimize contact with IMF employees."

(External risk assessment report, August 4, 2008, p. 5.)

229. Moreover, the security officer testified that the Fund followed a "standard procedure" for placing a staff member on administrative leave and that he had been involved in such cases a "couple of times a year." He would await the staff member outside the Ethics Office and "escort that person to their office where they will pick up a few of their personal items, whatever they can carry, and that I would escort them out of the building. And then they turn over the key and their badge to me, also, and their remote access is what we normally do. And then I escort the person from the building." According to the security officer's testimony, the Fund had adopted this standard practice a number of years earlier, at his recommendation, because ". . . one never knows how someone is going to act when they have been told that they are under administrative leave. It is just a normal precaution." It is a "very standard practice in any large organization." (Grievance Committee hearing, 5-5-09, Tr. 34-35, 37.)

230. In *D v. International Finance Corporation*, WBAT Decision No. 304 (2003), paras. 68-69, the World Bank Administrative Tribunal sustained the decision to place the staff member on administrative leave on the ground that it was "in the interests of the IFC, to remove from a position of financial responsibility a person being charged with serious financial wrongdoing."

Nonetheless, the WBAT upheld that portion of the applicant's complaint in which he alleged that his physical removal from the premises was "seriously humiliating and damaging to his reputation," para. 66, reasoning as follows:

> "The Tribunal is, however, unconvinced . . . that the Respondent had good reason to remove the Applicant from his office at Headquarters in such an intimidating and public fashion, with a security guard posted at his door and then escorting him from the building. Any apprehension concerning destruction of evidence in the Applicant's office was minimized by the earlier perusal by the Respondent of the Applicant's e-mails, and the Respondent has in any event not explained in any detail why it might have been fearful of any tampering or destruction; nor is there any apparent reason why the Applicant could not have been induced to leave the building in a less conspicuous manner. The circumstances in which the Applicant was ushered from his office were sufficiently unsettling to other staff members working nearby that they prevailed upon the Applicant's Department Director to summon them together to provide some explanation."

Id., para. 70.

231. The Tribunal observes that in the instant case, unlike in *D*, the accusation of misconduct for which Applicant was placed under investigation, i.e., harassment of another staff member who expressed fear for her safety, was rationally related to the concerns that animate the "standard procedure" of removing a staff member from the premises under the escort of a Fund security officer. The Tribunal is not called upon to decide whether the practice is appropriate in all cases but rather whether Respondent violated fair and reasonable procedures in the circumstances presented by the case of Ms. "EE".

232. The record indicates that there was nothing abusive about the escort itself. The question arises whether the removal of Applicant from Fund premises, according to what has been described as "standard procedure" of the Fund in such cases, was carried out consistently with fair and reasonable procedures, or whether, as Applicant contends, she suffered compensable harm as a result.

233. While the Tribunal does not question the application in this case of the standard procedure adopted by the Fund, it considers that the Fund should seek ways to minimize the public embarrassment to a staff member who is being placed on administrative leave. There exists a range of ways to achieve this. For example, the staff member could be escorted at the end of the workday when few staff members are present. Consideration could also be given to disabling a staff member's security pass and instructing him or her not to report the next day. Accordingly, while the Tribunal does not find in this case that the manner of removing Applicant from Fund premises at the start of the administrative leave was carried out in contravention of fair and reasonable procedures, the Fund may wish in future cases to consider a less conspicuous fashion of barring from the Fund's premises a staff member who has been placed on administrative leave pending investigation of alleged misconduct.

Did the length of the administrative leave violate fair and reasonable procedures?

234. The Tribunal has sustained the decision to place Applicant on paid administrative leave pursuant to GAO No. 13, Section 9.01. It now turns to Applicant's contentions that (a) it was "counter-intuitive" for the Fund to order an administrative leave pending investigation when it had performed "most of its review and complete external risk assessment before Applicant was placed on Administrative Leave," and (b) the six-month duration of the leave was excessive. The Fund responds that the leave was neither unnecessary nor of excessive duration in view of the steps remaining in the misconduct proceedings following the contested decision.

Admissibility

235. Article V of the Tribunal's Statute provides that "[w]hen the Fund has established channels of administrative review for the settlement of disputes, an application may be filed with the Tribunal only after the applicant has exhausted all available channels of administrative review." Applicant filed her Grievance with the Fund's Grievance Committee on November 25, 2008, while the administrative leave was still ongoing. (The Committee's proceedings on the matter took place in 2009, following Applicant's return to active service.) Hence, at the time that Applicant initiated the administrative review process under GAO No. 31 (Grievance Committee), she could not have raised the claim that the six-month duration of the leave was unduly lengthy.

236. Accordingly, as a preliminary matter, the Tribunal must consider whether Applicant's contention that the six-month length of the administrative leave violated fair and reasonable procedures is properly before it for decision. The Tribunal notes that Respondent has answered the claim on the merits and has not raised any objection to the admissibility of Ms. "EE"'s contention that the length of the administrative leave was excessive.

237. This Tribunal has emphasized the importance of the requirement of its Statute than an Application may be filed only after exhaustion of all available channels of administrative review. 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." *Ms. V. Shinberg (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-5 (November 16, 2007), para. 87. *See, e.g., Ms. "W"*, *Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-2 (November 17, 2005), para. 118 ("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"); *Mr. "DD"*, paras. 171-174. The question accordingly arises whether Ms. "EE"'s claim that the length of the administrative leave violated fair and reasonable procedures in the circumstances of her case is (a) "closely linked" with her challenge to the decision to place her on administrative leave and (b) has been given some measure of review in the dispute resolution process. Have the twin purposes of the exhaustion of remedies requirement, i.e., to provide opportunities for the resolution of the dispute and to build an evidentiary record in the event of subsequent adjudication, *Estate of Mr. "D"*, para. 66, been fulfilled in this case?

238. The administrative leave decision of August 26, 2008, by its terms and in accordance with the governing regulation, permitted the Fund to maintain Applicant on paid administrative leave until a decision was reached on the merits of the misconduct charge. The contested decision accordingly contained within it the essential element now challenged. Although Applicant could not have known at the time that she initiated administrative review how long the misconduct proceedings would run, she was informed from the start, consistent with the terms of GAO No. 13, Section 9.01, that she was being placed on paid administrative leave ". . . until a decision has been reached in this disciplinary case. . . ." (Memorandum from HRD Director to Applicant, "Administrative Leave With Pay Pending Investigation of Misconduct," August 26, 2008.) In the view of the Tribunal, Applicant's claim that the length of the administrative leave was excessive is "closely linked" to her challenge to the administrative leave decision itself.

239. Furthermore, Ms. "EE" raised the issue of the six-month length of the administrative leave in the course of the Grievance Committee proceedings. (*See* Grievant's Post-Hearing Brief, p. 4.) The Committee in its Recommendation and Report concluded: "The Grievance Committee further rejects the Grievant's assertion that the Fund had sufficient information on August 26, 2008 to consider the veracity and accuracy of the allegations made against her and to reach a full decision on the merits. . . . The Committee is satisfied that the Fund needed this period of time [until February 2009] to review and evaluate the evidence before reaching its final decision." (Grievance Committee's Recommendation and Report (September 2, 2009), pp. 14-15.)

240. Applicant's contentions relating to the timing and duration of the administrative leave are both "closely linked" to her principal claim and have been given some measure of review prior to her Application before the Administrative Tribunal. The Tribunal accordingly concludes that Applicant's further claim is admissible.

Merits

241. Applicant claims that the misconduct investigation had been substantially concluded before the administrative leave decision was taken; accordingly, she questions the timing of that decision and the duration of the leave, which she maintains caused her unreasonable harm.

242. It is not disputed that Applicant was returned to active service as of February 10, 2009, the same date she was notified of the disposition of the misconduct proceedings. (Memorandum from Acting Director of HRD to Applicant, February 10, 2009.) The governing regulation, GAO No. 13, Section 9.01, provides that the staff member may be placed on administrative leave with pay "while the matter is under investigation" and that "[a]ny such period shall not extend beyond the date on which the staff member is notified of the decision in the matter." The Fund's rules, however, impose no time limit on the disciplinary process. Accordingly, the question for decision is whether the six-month duration of the administrative leave violated fair and reasonable procedures in the circumstances of Applicant's case.

243. While Applicant asserts that the Ethics Officer told her that the leave would last only for a few days, the written Notice from the HRD Director, provided to Applicant by the Ethics Officer at their August 26 meeting, stated: ". . . you will not be required to report to work until a decision has been reached in this disciplinary case. . . ." (Memorandum from HRD Director to

Applicant, "Administrative Leave With Pay Pending Investigation of Misconduct," August 26, 2008.)

244. Applicant contends that she was placed on administrative leave ". . . on the pretext that an investigation was necessary, when in fact no investigation ever took place," and that ". . . the administrative leave should not have lasted more than a few days, even a few hours—the time it takes to search a hard drive." The Fund responds that ". . . while Applicant insists that nothing of consequence to her case occurred during her administrative leave period, it is clear that the Fund was taking deliberate steps during that time not only to inform itself of the facts surrounding the misconduct allegations, but also to ensure that Applicant had a full opportunity to be heard, and that all sides of a very complex and delicate workplace conflict were taken into account." In the view of the Fund, the time was necessary to assess properly a complicated case involving serious allegations and to assure that due process was provided during and after the investigation.

245. The steps of the misconduct proceedings have been described above.[36] Plainly, the proceedings had not been completed at the time that Applicant was placed on administrative leave. While much of the gathering of evidence may have taken place before the administrative leave began, that evidence had to be weighed in the light of the Fund's standards and Applicant's responses to the charge.

246. The Tribunal may, however, consider whether these steps were unduly protracted in view of the nature of the case. The circumstances of the instant case of Ms. "EE" may be contrasted, for example, with those brought out in the World Bank Administrative Tribunal's Decision in *BB*, paras. 123-124, 129, in which it was held that the investigatory stage—lasting a period of years rather than months—was unduly protracted even in view of the complex nature of the case, so as to "suggest[ ] disregard for the trauma that the conduct of an investigation entails" and to warrant compensation. In the instant case, however, this Tribunal cannot say, in view of the record before it, that the duration of the Ethics Officer's investigation and the stages of the misconduct proceedings that followed was such as to give rise to a compensable claim. The Tribunal has questioned above whether inconsistencies in the regulations governing misconduct proceedings may have introduced some redundancy in those procedures.[37] While that question may invite the Fund's consideration, it does not provide a basis for relief in this case.

247. Applicant also contends that it was "counter-intuitive" for the Fund to order an administrative leave pending investigation when it allegedly had performed most of its review before taking the administrative leave decision. Applicant accordingly suggests the administrative leave decision came too late in the investigative process. Is there ground for concluding in this case that the preliminary inquiry phase of the investigatory process was unduly prolonged so that, in Applicant's words, the "preliminary investigation materialized into a final investigation"?

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[36] *See supra* The Factual Background of the Case.

[37] *See supra* Consideration of the Issues of the Case: Was the HRD Director required to have interviewed Applicant in connection with the accusations against her before taking the decision to place her on paid administrative leave pending investigation of misconduct? Inconsistencies among the governing rules.

248. The World Bank Administrative Tribunal has emphasized that the preliminary inquiry phase of a misconduct investigation should not be improperly prolonged or notice to the staff member delayed:

> "The point at which evidence of misconduct becomes 'sufficient' can obviously be elusive and uncertain in some cases, but that should not be regarded as an invitation to the Respondent to delay the closing of the preliminary inquiry, along with the notifying of the subject staff member that a disciplinary investigation is under way and the formulation of specific allegations."

D, para. 64. *See also G v. International Bank for Reconstruction and Development*, WBAT Decision No. 340 (2005), para. 81 (where "lengthy interview" of the staff member had been conducted *before* she was placed on administrative leave, the decision to place the applicant on administrative leave was not "materially affected by a tardy notification").

249. In determining the timing of the decision to move from a preliminary inquiry to a formal investigation—the juncture at which the administrative leave decision was taken in the case of Ms. "EE"—officials must balance sufficient suspicion of misconduct against such considerations as whether notice to the staff member might compromise the objective of the inquiry or, alternatively, cause unnecessary stress to the staff member if an early suspicion is found to be unwarranted. Accordingly, the question of what quantum of suspicion is required before the Fund may place a staff member on paid administrative leave pending investigation of misconduct is integrally related to the question of at what point in the proceedings the staff member must be notified that an inquiry is underway and afforded an opportunity to respond to those accusations. There is no ground to conclude in this case, however, that the Fund unduly prolonged the period preceding the administrative leave decision.

250. The Tribunal has held that taking the administrative leave decision in the circumstances of Applicant's case was within the ambit of the Fund's discretionary authority under GAO No. 13, Section 9.01. Applicant's additional claims raise the questions of whether the decision was taken too late so that the "preliminary investigation materialized into a final investigation" and whether the disciplinary proceedings that followed the decision were unduly prolonged.

251. There is no indication in the record that the Fund unduly prolonged the preliminary inquiry leading up to the administrative leave decision. Nor can the Tribunal conclude that the steps that followed were so protracted as to give rise to a compensable claim. For the foregoing reasons, the Tribunal concludes that the six-month duration of the administrative leave does not provide a basis for relief in the circumstances of the case.

Conclusions of the Tribunal

252. The Tribunal concludes as follows. The decision to place Ms. "EE" on paid administrative leave pending investigation of misconduct, pursuant to GAO No. 13, Section 9.01, is sustained on the following grounds. First, in the view of the Tribunal, the record supports the conclusion that at the time the Fund took the administrative leave decision it had prima facie evidence to support an ongoing investigation into alleged misconduct against Applicant. Second,

the decision that Applicant's continued presence in the workplace during the pendency of the misconduct proceedings posed a risk of future harm was a tenable one, supported by evidence. In making the latter determination in the interest of protecting staff safety, the Fund enjoys a wide, though not unbridled, measure of discretion. It is the conjunction of these two factors, namely, prima facie evidence of misconduct and a risk of future harm, which permits the Tribunal to sustain the invocation of GAO No. 13, Section 9.01, in the circumstances of Applicant's case.

253. At the same time, while sustaining the contested decision to place Applicant on paid administrative leave pending investigation of misconduct, the Tribunal holds that the decision was marked by procedural irregularity. In particular, the Fund's failure to seek any account from Ms. "EE" of her version of the facts relevant to the accusations against her before taking the administrative leave decision violated the Fund's written internal law and the fair procedures that must govern misconduct proceedings.

254. Additionally, the Tribunal observes that the Fund's written law governing misconduct proceedings invites the Fund's re-consideration in the light of the lack of coordination and inconsistencies found among disparate staff rules, as brought out in the course of this case.

255. The Tribunal rejects Applicant's additional contentions, namely, that the administrative leave decision was improperly motivated, and that the manner of removing her from the Fund's premises and the duration of the leave violated fair and reasonable procedures. Accordingly, Ms. "EE"'s additional claims are denied.

256. Finally, the Tribunal observes that an element of the Applicant's complaint springs from the fact that Mr. "X", a senior official of the Fund, had prolonged sexual relationships with the Applicant and Ms. "Y". That official at the same time was the direct supervisor of the Applicant. The immediate cause of a dispute between the Applicant and her supervisor was her view that she merited a more favorable rating on her Annual Performance Report, a rating that, according to Applicant, Mr. "X" refused to give and declared she would not in future attain. According to the Ethics Officer, in her telephonic interview with him, Mr. "X" acknowledged his sexual relationships with staff members of the Fund, including his subordinate, the Applicant. As far as the record indicates, Mr. "X" apparently was oblivious to any transgression of the Fund's ethical standards in so doing.

257. As far as the record before the Tribunal also reveals, the Fund launched no formal investigation into whether Mr. "X" violated the Fund's Policy on Harassment. That Policy of the Fund provides:

> "8. Intimate personal relationships between supervisors and subordinates do not, in themselves, constitute harassment. However, individuals who have such relationships should seek confidential ethics advice to prevent actual or apparent conflicts of interest. Intimate relationships between supervisors and subordinates can lead to complaints by third parties about unequal treatment or favoritism. Such a relationship could also give rise to complaints by one of the participants if the relationship ends."

In this connection, the Tribunal finds of interest—and believes that the Fund should find to be instructive—the rule that has been adopted by the IMF's sister institution, the World Bank. World Bank Staff Rule 3.01 (Standards of Professional Conduct) provides at Paragraph 4 (Supervisory Relationships):

> "4.02 A sexual relationship between a staff member and his/her direct report, or direct or indirect manager or supervisor is considered a *de facto* conflict of interest. The manager/supervisor shall be responsible for seeking a resolution of the conflict of interest, if need be in consultation with management, who will take measures to resolve the conflict of interest. Failure to promptly resolve the conflict of interest may result in a finding of misconduct."

258. In the instant case, while pursuing an affair with the Applicant, among others, Mr. "X", as her supervisor, prepared her Annual Performance Report, the terms of which she contested. There is no indication that he sought ethics advice to prevent what clearly was an actual conflict of interest. While the Ethics Officer in her Report of Investigation (November 2008) recognized that Mr. "X"'s conduct might have constituted misconduct had he been a current staff member, the record indicates that the Fund did not launch a formal investigation into Mr. "X"'s misconduct, allegedly because of the fact that, when his conduct came to light, he was on the very verge of retirement. As far as the documentation before the Tribunal indicates, some two months elapsed between the filing of the Applicant's complaint against Mr. "X" and his retirement. Moreover, that inaction apparently took no account of the possibility that, after his retirement, Mr. "X" might enjoy continued access to the premises of the Fund and benefit from contractual relations from the Fund as many retired staff members do.

259. The Tribunal feels bound to express its concern at the Fund's passivity in the face of the admitted misbehavior of Mr. "X" in carrying on an affair with a subordinate whose work performance he was charged with evaluating. The immediate events that gave rise to this case are precisely those that the Fund's Policy on Harassment seeks to prevent. It is understandable that, in the circumstances, the Applicant feels aggrieved that while she was held accountable for her conduct in relation to Ms. "Y", Mr. "X" escaped any chastisement.

260. Furthermore, the Tribunal reaffirms that the disciplinary process is not the only avenue of recourse when a staff member believes that he or she has been the object of impermissible workplace harassment. In *Mr. "F"*, paras. 100-101, 121 and Decision, paras. 2 and 3, this Tribunal squarely held that the Fund's failure to take effective measures in response to workplace harassment brought to the attention of appropriate Fund officials gives rise to a compensable claim. *See also Mr. "DD"*, para. 113 (framing "question for the Tribunal in the instant case [as] whether Applicant experienced impermissible treatment to which the Fund failed effectively to respond"); *Ms. "BB"*, paras. 67-93.

261. The record shows that Applicant was advised by the Ethics Officer: "If you continue to be dissatisfied with your APR, you may wish to consider the Fund's administrative and

grievance channels that are available to you. Given that your former manager has now[38] retired from the Fund, *it would not be productive to pursue your allegations of harassment*." (Memorandum from Ethics Officer to Applicant, "Ethics Concerns," July 30, 2007.) (Emphasis supplied.) Whether the Ethics Officer referred to her own further pursuit of a misconduct investigation against Mr. "X" under the Procedural Guidelines or, alternatively, to remedies that Ms. "EE" herself might pursue is not clear. In the view of Applicant's counsel, the purport of this communication was to advise Ms. "EE" that she had no channels of recourse for the harassment that she alleged: "In effect, [the Ethics Officer] was advising [Ms. "EE"] to drop the matter and not pursue her grievance. . . . Sexual harassment is a matter of institutional integrity and must be investigated whether the harasser is subject to discipline or not." (Letter from Applicant's counsel to HRD Director, April 2, 2008.)

262. Whether or not Mr. "X" remained subject to the Fund's misconduct procedures following his retirement, Applicant's right to pursue a timely complaint of sexual harassment through the Fund's formal process for resolution of employment disputes was not extinguished by the conclusion of Mr. "X"'s employment as a staff member of the Fund. Had Applicant raised a timely allegation of harassment through the channels of administrative review provided by GAO No. 31 (Grievance Committee), the question of "whether Applicant experienced impermissible treatment to which the Fund failed effectively to respond," *Mr. "DD"*, para. 113, would have been given legal resolution through that process. It appears from the record that Ms. "EE" did initiate a Grievance challenging her performance rating and alleging harassment by Mr. "X". That Grievance was dismissed by the Grievance Committee as untimely.

Remedies

263. Article XIV, Section 1 of the Statute of the Administrative Tribunal provides:

> "1. 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."

264. In her Application, Applicant seeks as relief $350,000, citing

> "six long month[s] of mental and physical pains inflicted upon her while on Administrative Leave . . . by a discriminatory and poor preliminary, called later [a] final investigation, conducted by the Ethics Officer, which triggered her administrative leave, and the humiliation of being escorted off the premises without obtaining countervailing evidence from her, and ignoring [the external risk assessment firm]'s and even Mr. ["X"]'s statements, that there was no evidence that Applicant could represent a danger."

[38] In fact, the Applicant's supervisor, it appears from the record, retired the following day. (Ethics Officer's Report of Investigation, p. 5.)

265. The Tribunal has held that its remedial authority encompasses relief for procedural irregularity even while sustaining the contested decision. Accordingly, "the Tribunal has authority to reject an Application challenging the legality of an individual decision while finding the Fund nevertheless to be liable in part, as by procedural irregularity in reaching an otherwise sustainable decision." *Ms. "C"*, para. 44 and Decision, para. Second (awarding compensation equivalent to six months salary for irregularities of process in non-conversion of fixed-term appointment, while denying as unfounded applicant's claim that contested decision was taken in reprisal for complaint of sexual harassment). In *Mr. "F"*, para. 121 and Decision, paras. 2 and 3, the Tribunal reaffirmed that ". . . relief may be awarded for intangible injury" and awarded compensation of $100,000 for the Fund's failures (a) to take effective measures in response to religious intolerance and workplace harassment of which the applicant was an object and (b) to give him reasonable notice of the abolition of his post.

266. In the case of Ms. "EE", the Tribunal has concluded that Applicant has prevailed not in whole but only in part on her multiple claims. While sustaining the contested decision to place Applicant on paid administrative leave pending investigation of misconduct, the Tribunal has concluded that the decision was marked by significant procedural irregularity. In particular, the Fund's failure to seek any account from Ms. "EE" of her version of the facts relevant to the accusations of misconduct before taking the administrative leave decision violated the Fund's written internal law and the fair procedures that must govern misconduct proceedings. For this breach of due process, Ms. "EE" is entitled to compensation in the amount of $45,000.

Decision

FOR THESE REASONS

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

1. The Fund's decision to place Ms. "EE" on paid administrative leave pending investigation of misconduct, pursuant to GAO No. 13, Section 9.01, is sustained.

2. Nonetheless, Ms. "EE" is entitled to compensation for the Fund's failure to seek any account from Ms. "EE" of her version of the facts relevant to the accusations against her before taking the decision to place her on paid administrative leave.

3. For that breach of due process, Ms. "EE" is awarded $45,000.

4. Ms. "EE"'s additional claims are denied.

Stephen M. Schwebel, President

Catherine M. O'Regan, Judge

Andrés Rigo Sureda, Judge

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Stephen M. Schwebel, President

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Celia Goldman, Registrar

Washington, D.C.
December 3, 2010