

Judgment No. 1997-2

Ms. “B”, Applicant v. International Monetary Fund, Respondent

(December 23, 1997)

Introduction

1. On December 22 and 23, 1997, the Administrative Tribunal of the International Monetary Fund, composed of Judge Stephen M. Schwebel, President, and Judges Georges Abi-Saab and Nisuke Ando, Associate Judges, met to adjudge the case brought against the International Monetary Fund by Ms. “B.”¹, a staff member of the Fund.

2. On September 20, 1995, Applicant, who occupied a position graded A6, was appointed to a position internally advertised at Grade A7, but because, in the view of the Fund, she did not meet the requisite conditions for promotion to the advertised position at that time, she served at her then salary for approximately one year pursuant to a policy of the Fund referred to as “underfilling”. At the end of the period she was promoted to Grade A7. Applicant’s complaints are that the policy of “underfilling” had no basis in fact or in law, that she was entitled to immediate promotion to the grade advertised for the position she assumed, that the requirements for the promotion were unlawful, and that the decision postponing her promotion and increase of salary was in error, arbitrary and capricious, and in violation of law.

3. The relief sought in the Application is that

“ . . . salary and all associated benefits be administered retroactive from September 20, 1995, the effective date of my promotion to Grade A7, including the standard promotion increment of five-percent of such salary.”

Additionally, she requests

¹In order to protect the privacy of the persons referred to in the text of the Tribunal’s judgments, these persons shall be designated by acronyms; the departments and divisions of the Fund shall be referred to by numerals. However, the application of these procedures shall not prejudice the comprehensibility of the Tribunal’s judgments.

“full reimbursement of attorney and counselor fees for services rendered, in addition to other associated costs that I have incurred, or shall incur to resolve this grievance. These costs have not yet been determined at this time.”

In her Reply, Applicant asked, furthermore, that the Fund

“ . . . award Applicant the promotion to the Grade A8, effective September 20, 1997, consistent with the time-in-grade requirement in Staff Bulletin 89/28, Annex (2 years at A7) and the Job Standards Manual for the position, to include the standard five percent (5%) salary increase and all other associated benefits;

Third, award Applicant *Compensatory Damages*, in the amount of three hundred percent (300%) of Applicant’s gross salary, predicated on the Grade A8 salary level;

Fourth, to award Applicant *Exemplary or punitive damages* in the amount of \$200,000 (Two hundred thousand dollars);

Fifth, compensate Applicant for all costs incurred for her legal representation to resolve this matter.”

4. The Fund maintains that its decision to require Applicant to “underfill” the A7 position was based on a legitimate policy antedating her appointment and that the decision was entirely proper, as none of the applicable rules would have permitted an immediate promotion. That is because she did not as of September 1995 meet the advertised qualifications for the position. The Fund, accordingly, urged the Tribunal to reject Ms. “B”’s claim entirely and award no relief.

The procedure

5. The Application was filed on July 3, 1997. After having been amended to incorporate necessary additions, it was transmitted to the Fund on August 1, 1997. Pursuant to para. 6 of Rule VII of the Tribunal’s Rules of Procedure, the Application is considered filed on July 3, 1997. The Fund filed its Answer on September 15, 1997. A Reply and a Rejoinder were filed on October 17 and November 19, 1997 respectively.

6. Oral argument, which neither party had requested, was not held. The Tribunal had the benefit of the record of the proceedings in the Grievance Committee, including a transcript of oral hearings at which the Applicant, senior officials of the Fund, and witnesses, were heard.

The facts

7. Applicant became employed with the Fund effective February 7, 1983. In 1986 she began working in Division 1 of Department I. She joined Section 2 of that Division in 1993,

and in August 1994 was promoted to a position at Grade A6. In August 1995, while continuing to occupy that position, Applicant applied for a position advertised as Vacancy No. IV95-80, Grade A7/A8, also within Section 2.

8. A selection panel rated Applicant, whose performance had earned a "1" (outstanding) rating on her 1994 Annual Performance Report (APR), as "the best overall candidate among those interviewed in terms of relevant experience and skills necessary for the position" and unanimously selected her to fill the vacancy.

9. A difference of opinion soon arose between the selecting division, i.e., Division 1, and the Staff Development Division (SDD) of the Administration Department as to the grade at which Applicant's new appointment would be made. Applicant's supervisors testified that they believed that she was qualified for immediate promotion to A7. Indeed, they believed that they had drafted the vacancy announcement in such a manner as would permit Applicant to be found to meet fully the qualifications of the position at A7. The Senior Personnel Manager (SPM) for Department I, concurring in the view that Applicant should be appointed at A7, submitted a Request for Personnel Action requesting "Promotion -- appointment to new position -- filling of vacancy" to promote Applicant from Grade A6 to Grade A7.

10. The Staff Development Division, in reviewing Applicant's background against the qualifications for the position, concluded that she had not satisfied the minimum time-in-grade or the education requirements for the position as described in the vacancy announcement. Those qualifications included for Grade A7 a combination of education and specialized training equivalent to a university degree in the field in which she would be working --human resources management-- or in a related field, supplemented by a minimum of three years of progressively responsible experience in the particular field at Grade A6, or equivalent. A seasoned level of competence and technical expertise, including an in-depth knowledge of precedents in the particular field, was required at this grade level. For Grade A8, in addition to the training and experience for the A7 position, a minimum of two years of progressively responsible work experience in the relevant area at Grade A7 or equivalent was required.

11. At issue was the interpretation of both the education and the experience requirements. The supervisors testified before the Grievance Committee that they believed that Applicant's university degree, which was in foreign languages, satisfied the requirement stated in the vacancy announcement of being equivalent to a university degree in the relevant field. As for the experience requirement, they believed that some of Applicant's time at Grade A5 should be counted as equivalent to time at A6, given the duration of the time she had spent at A5 and the nature of her responsibilities at that grade.

12. A senior official of the Staff Development Division, Ms. "Z.", testified, however, that the phrase "or equivalent" in the experience prong of the qualifications would not permit time at A5 to count as time at A6. Rather, the "or equivalent" would refer to employment outside the Fund or during Fund service on a contractual basis. Ms. "Z." equally communicated to the SPM of Department I the SDD's view that Applicant's undergraduate

and graduate degrees in foreign languages did not fulfill the educational requirement of the posted vacancy, and that, furthermore, since she had completed only one year of the three year requirement for progressively responsible experience at Grade A6, Applicant should “underfill” the position for one year:

“Under the recent amendments to the time-in-grade policy, instead of serving the normal 3 years of minimum time-in-grade [Ms. “B.”] will be required to ‘underfill’ the position at Grade A6 for approximately 12 months. During this time, [she] will gain experience in the full range of responsibilities attached to this position. It is expected that, during the November 1996 cycle, [the Department] can propose [her] for promotion to Grade A7, provided that fully satisfactory performance is maintained during the period of ‘underfilling’.”

Accordingly, she served at the A6 grade from September 20, 1995 until November 1, 1996, at which date she was promoted to Grade A7.

13. In her Annual Performance Report for 1995, Ms. “B.”’s performance was given the rating of “1”(outstanding), and she was given a 5.9 percent merit increase (raising her salary to \$38,550).

14. On August 19, 1996, Applicant requested the Director of Administration to review the decision requiring her to “underfill” her position at Grade A6 from September 20, 1995 through November 1, 1996 “allegedly to meet her time-in-grade requirement,” claiming that the decision was arbitrary and capricious and that the rules had been disparately applied. The Director of Administration replied that Applicant did not meet either the education or experience requirements of the advertised position, emphasizing that the determination in Applicant’s case was consistent with the “Amendment to Time-in Grade Policy in Cases of Promotions to Higher Level Positions Through the Vacancy Process,” a policy laid down in a Memorandum from John P. Kennedy, Chief, Compensation Policy Division (CPD), and Peter D. Swain, Chief, Staff Development Division (SDD), of the Administrative Department, and addressed to the Senior Personnel Managers of all departments, dated September 7, 1995, a copy of which she attached to the letter. It was that policy, noted the Director of Administration, that allowed Applicant to receive her promotion in November 1996 rather than being required to wait until August 1997, as would have been required under prior rules that enforced the usual time-in-grade requirements when promotions (including those consequent to filling an announced vacancy) were made within the same job ladder. Additionally, the Director justified the decision of the Staff Development Division to override the Applicant’s departmental recommendation as to the grade of appointment, pointing out that the “Kennedy-Swain Memorandum” permitted “underfilling” when either the selecting department or the Staff Development Division concludes that the candidate does not currently fully meet the stated requirements. Applicant stated that receipt of the letter and attachment was the first notice she had of that Memorandum.

15. Applicant filed a Grievance on September 25, 1996 contesting the “underfilling” of her position at Grade A6. Following hearings held on December 11, 16, and 17, 1996, the Grievance Committee on March 19, 1997 issued to the Managing Director its Recommendation and Report denying the Grievance. Thereupon, the Managing Director informed Applicant of his acceptance of the recommendation.

Summary of parties’ principal contentions

Applicant’s contentions

16. In denying Applicant’s appeal, the Director of Administration impermissibly relied on the “Kennedy-Swain Memorandum”, which does not meet the criteria of a regulatory decision. Mr. Kennedy and Mr. Swain exceeded their authority by promulgating the Memorandum because their action exceeded the functions prescribed in their job standards. They had not been cloaked by the Managing Director or Deputy Managing Director with authority to set any form of policy for the Fund. Significant changes in administrative policy must be promulgated by either the Managing Director or the Deputy Managing Director. Significant personnel policy changes may be promulgated by the Director of Administration after consultation with the Managing Director and the Deputy Managing Director. General Administrative Order No. 1, Rev.1 does not delegate the Managing Director’s or Deputy Managing Director’s role of making authoritative statements of administrative policy to the Director of Administration or his subordinates. Former Director of Administration Graeme Rea, who retired from the Fund before the Memorandum was issued, may have given it verbal approval, but the issuance of the Memorandum had not received the approval of the present Director.

17. By the practice of underfilling, the Administrative Department was conducting illegal activity before and after the date of the Kennedy-Swain Memorandum in violation of Staff Bulletin No. 89/28.²For the exceptions to the foregoing, see paragraph 65 of this Judgment. The Fund does not now, or ever had in the past, a policy on underfilling. Any and all “underfillings” take place outside of, and not in conformity with, existing Fund policies on

²The relevant passages of Staff Bulletin No. 89/28 provide:

“Other factors relevant to promotions

The time-in-grade requirements are only one of several components of the Fund’s career progression and promotion policies. Before an individual’s promotion within a given job ladder can be considered at all, it must be established that a position with the requisite functions and responsibilities is open at the higher grade level, either because a vacancy has arisen in a position already classified at that level, or because material growth in the content of the individual’s own job justifies a reclassification of that job at a higher grade. In some job ladders there may be a good deal of scope for advancement from one grade to another, while in others the job ladder itself is limited to only one or a very small number of grades. Assuming an opening exists, the individual who is a candidate for promotion must have met the relevant time-in-grade requirement. He must also be assessed as having the capacity to perform effectively at the higher grade and, for certain senior-level grades, the potential to move in due course beyond that grade.”

promotions and time-in-grade requirements. The practice was used to deny some promotions and accommodate others.

18. The Memorandum was addressed only to Senior Personnel Managers, with copies to Administrative Officers and the Staff Association Committee. It was the intent of the authors to cover-up illegal acts. Applicant herself learned of the existence of the Memorandum only after initiating her request for review of her promotion. Additionally, the Memorandum bears no effective date. For all these reasons, it did not constitute a valid regulatory decision.

19. The assignment of her grade, the Applicant contended, should have been considered on the basis of Staff Bulletin No. 89/28, which would have permitted immediate promotion under the exceptions provided therein, which include: "An incumbent with a combination of superior performance and the assessed potential to advance rapidly through several higher grades may, on an exceptional basis, be considered for promotion to the next higher grade at a more rapid rate than indicated by the minimum time-in-grade requirements." Applicant's Annual Performance Reports for 1994 and 1995 evidenced her superior performance. Time-in-grade is irrelevant for this purpose.

20. Ms. "Z." improperly overruled the recommendations of Applicant's immediate supervisors and her SPM that she be immediately promoted to A7. It was the SPM who had responsibility and accountability for all personnel activities within his Department, as SPMs in all departments are expected to take personnel decisions on the Department's behalf for all Grade A staff.

21. The job qualification requirements for Vacancy No. IV95-80 were not consistent with the prevailing Job Standards for that position, which mention completion of a university degree program but do not require a degree in a specific field. It is those Job Standards that are controlling. Moreover, Applicant was fully qualified for promotion to Grade A7 at the time of her selection and appointment to the vacancy in September 1995 because she, in any event, met the advertised educational and experience qualifications for the position at that grade.

22. Finally, the Applicant contended that the decision to require underfilling did not benefit Applicant; it was arbitrary, capricious and in contravention of the Fund's policies and law.

The Respondent's principal arguments

23. At the time of Ms. "B"'s appointment, the practice of underfilling constituted a bona fide unwritten source of law, which had been consistently applied until it was codified in the Kennedy-Swain Memorandum, and has been applied thereafter.

24. The strict application of Staff Bulletin No. 89/28 would have required Applicant to serve a minimum of three years at Grade A6 before she would have been eligible for promotion to Grade A7. Applicant's interpretation of that Bulletin as authorizing supervisors

to decide that a staff member be promoted without regard to the time-in-grade requirement (which is a minimum requirement) is without foundation, as otherwise the exceptions provided in the Bulletin would be superfluous. Supervisors may exercise a discretion only after the minimum requirement has been satisfied. Capacity to perform effectively at the higher grade is a requirement that applies in addition to, not in place of, the time-in-grade requirement. None of the exceptions provided in the Bulletin could have been applied in the case of Ms. "B."

25. The Kennedy-Swain Memorandum was an authorized and valid document. Ms. "B." benefitted from the policy set forth in the Memorandum.

26. The requirements in the vacancy announcement were valid and appropriate. Departments have a discretion to set higher qualifications than those stated in the Job Standards Manual, which describes the nature and level of work and desirable qualifications only in general terms. It was envisaged that Departments would make reasonable additions to those minimum requirements.

27. Reasonable determinations of additional requirements should not be disturbed by a judicial body where there is, as here, a rational relationship between the requirements and the position. Strengthening the professional qualifications of personnel in Department I, as by requiring training in human resources management, is an important objective that is being pursued in order to meet the specific demands expressed in a survey of the staff as a whole.

28. The Senior Personnel Manager has a limited authority in that he does not determine the grade at which an applicant for a position would be appointed. At most, his decision is the proposal of the department he serves; he makes recommendations to the appropriate division of the Administration Department which exercises central approval authority with respect to grade and salary for the Fund as a whole.

29. The Fund accordingly concluded that the Applicant is not entitled to the relief requested.

Consideration of the issues of the case

30. The Tribunal will now proceed to consider the principal issues posed by the conflicting views of the Applicant and the Respondent.

Staff Bulletin No. 89/28 and the Kennedy-Swain Memorandum

31. Applicant challenges the decision to require her to underfill the position on legal grounds that include the following: (a) the Kennedy-Swain Memorandum that formed the basis for the decision was without legal validity; (b) therefore, the only governing rule is the basic policy laid down in Staff Bulletin No. 89/28; (c) under the exceptions provided in that Bulletin, she would have received an immediate promotion if the supervisors involved had

exercised their authority to press for the promotion; and (d) the vacancy notice included unlawful requirements, which she, however, satisfied.

32. In order to determine whether the decision to postpone Ms. “B”’s promotion was legally justified, the Tribunal will first examine whether the Kennedy-Swain Memorandum embodied a lawful prescription on which the decision could justifiably be based.

33. Staff Bulletin 89/28 prescribes rules concerning promotions within the same job ladder as well as into alternative ladders. Applicant’s promotion fell into the former category. Promotions in that category are subject to minimum time-in-grade requirements:

“Other factors relevant to promotions

....Before an individual’s promotion within a given job ladder can be considered at all, it must be established that a position with the requisite functions and responsibilities is open at the higher grade level, either because a vacancy has arisen in a position already classified at that level, or because material growth in the content of the individual’s own job justifies a reclassification of that job at a higher grade. In some job ladders there may be a good deal of scope for advancement from one grade to another, while in others the job ladder itself is limited to only one or a very small number of grades. Assuming an opening exists, the individual who is a candidate for promotion must have met the relevant time-in-grade requirement.” (Staff Bulletin No. 89/28, p. 4.)

For a promotion from Grade A6 to A7, the time-in-grade requirement is three years in Grade A6. (Annex to Staff Bulletin 89/28.) Applicant had served in a Grade 6 position for little more than one year at the time she applied for a promotion to Grade 7. To admit the position of the Applicant’s superior officers that time spent in Grade A5 could be counted in lieu of time spent in Grade A6 would deprive time-in-grade requirements of their essential rationale. Consequently, the Tribunal concludes that the Applicant did not meet the time-in-grade requirement under Staff Bulletin 89/28.

34. A change in policy was undertaken when it was discovered that the rule set out in Staff Bulletin 89/28 led to inequities in promotions within the same ladder as compared with promotions across job ladders. On September 7, 1995, Messrs. Kennedy and Swain, the Chiefs of the two Divisions of the Administration Department with responsibility for policies concerning promotions, issued a Memorandum entitled “Amendment to Time-in-Grade Policy in Cases of Promotions to Higher Level Positions Through the Vacancy Process”. That Memorandum liberalized the time-in-grade restriction of Staff Bulletin 89/28. Its stated purpose was to offer a “simplification of the time-in-grade rules covering promotions when staff are selected for higher grade positions through the Career Opportunities (vacancy list) process.” The Memorandum provides a “uniform approach” to the application of time-in-grade rules in all cases of vacancy list promotions, regardless of whether the staff member moves within or between job ladders. Under the Memorandum, a candidate may be promoted

without meeting all the requirements for the promotion, including time-in-grade, but underfilling must take place for about one year when the experience or education required is lacking.

35. The new policy is stated to be as follows:

“Revised Policy

The principle governing the timing of the selected staff member’s promotion to the higher grade will be whether he or she meets the specific experience and educational qualifications for the position as set forth in the Job Standards and/or the advertisement for the position.

If the Staff Development Division and the selecting department agree that the successful candidate fully meets the education and experience criteria and the specified requirements for the position, the appointment will be made at the grade at which the position is classified and advertised.....

On the other hand, if the Staff Development Division or selecting department concludes that the candidate does not currently fully meet the stated requirements, but nevertheless can soon be expected to meet such requirements and to perform successfully in the position with additional training and/or on-the-job experience, the candidate will initially be appointed one grade below the lowest grade indicated for the position. When positions are ‘underfilled’ in this fashion, promotion to the lowest grade at which the position is actually classified will occur after approximately one year on May 1 or November 1, provided that the incumbent has successfully carried out the duties and responsibilities of the position, as established by the Job Standards and/or advertisement for the position.” (Kennedy-Swain Memorandum, pp. 1-2.)

36. Applicant attributes great significance to her distinction between a “policy” (“an authoritatively imposed rule”) and “practice” (“spawns from repeated or customary action, lacking the authority of an imposed rule”). From that distinction, she concludes that the Kennedy-Swain Memorandum lacks legitimacy because it embodies a practice rather than a policy.

37. The sources of the internal law of the Fund which are discussed in the published Commentary on the Statute contained in the Report of the Executive Board to the Board of Governors on the Establishment of an Administrative Tribunal include unwritten sources of law. The second sentence of Article III of the Tribunal’s Statute provides that:

“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 Commentary explains that:

“There are two unwritten sources of law within the internal law of the Fund. First, the administrative practice of the organization may, in certain circumstances, give rise to legal rights and obligations. Second, certain general principles of international administrative law, such as the right to be heard (the doctrine of *audi alteram partem*) 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.” (p. 18)

The statement on practice refers to the de Merode case, in which the WBAT held that the World Bank had a legal obligation, arising out of a consistent and established practice, to carry out periodic salary reviews. (de Merode, WBAT Reports, Dec. No. 1 (1981), at p. 56.)

38. The law-creating effect that administrative practice may have is emphasized also by the ILOAT in its Judgment No. 323:

“Many of the obligations put upon the Organization by the Regulations are in general terms, leaving the Organization free to choose its own method of discharging them. The method chosen may be announced in an administrative circular or similar document or it may become established by practice. Once it is settled, it becomes, until it is altered, part of the obligation.” (In re Connolly-Battisti (No. 5) (1977) p. 10.)

39. In its Judgment in re D’Aoust (Mr. Michel D’Aoust v. International Monetary Fund, Judgment No. 1996-1), the Tribunal set forth the following essential conditions for a valid regulatory decision: a decision, taken by an authorized organ of the Fund, laid down in a published official document of the Fund, with a determinable effective date, of which the staff has been given reasonable notice. The Tribunal will consider whether the Memorandum at issue satisfied these conditions.

The issue of authority

40. The Applicant contends that the Kennedy-Swain Memorandum, on which the challenged decision is based, is an invalid document because the Division Chiefs were without authority to make policy for the Fund on personnel matters. She argues that:

“First the Kennedy-Swain memorandum was clearly designed and intended to cover-up prior transgressions and exceptions, or illegal acts, perpetrated by the Staff Development Division in violation of the controlling bona fide internal Fund law and policy, i.e., Staff Bulletin 89/28.

Second, the Kennedy-Swain memorandum was designed by Messrs Kennedy and Swain to empower Mr. Swain and the Staff Development Division to, inter alia, decide independently, arbitrarily, and capriciously, the rationale by which the Staff Development Division could either favor or deny a staff member's promotion. In essence, Messrs. Kennedy and Swain empowered the Staff Development Division with a **veto power over all of the Fund's recruitment/advertising departments**, which was neither envisioned by Staff Bulletin 89/28 or by the Fund's management.

Applicant previously pointed out that neither Mr. Kennedy nor Mr. Swain had been authorized to set out Fund policy; that their respective Job Standards authorize them, inter alia, to **only** '[Initiate] and [participate] in drafting Fund policy and procedures in relevant areas and [oversee] implementation of policies [but only] when approved by management.'

41. The Respondent maintains that the change of policy laid down in the Memorandum was authorized and that the Memorandum constituted a legitimate personnel measure. It recalled that at the time the Bulletin was issued its provisions foresaw that adaptations to the policy it laid down would need to be made. Respondent argues that Applicant "overlooks the obvious fact that", under the functional division of responsibilities prescribed by management, as confirmed in the Fund's handbook "FY 1996 Activities and Organization", issued in 1996 to the staff under the signature of the First Deputy Managing Director, ". . . ADM has both the responsibility and authority to develop, implement, and administer personnel policies . . ." In issuing the contested Memorandum, the Division Chiefs were acting within the scope of their responsibilities to deal with a perceived inequity and oversight in the existing policy that was embodied in Bulletin No. 89/28 ; the actions taken by them were within their normal line of duty and had the endorsement of the Director of Administration.

42. The major responsibilities of the Compensation Policy Division, whose Chief is Mr. J. Kennedy, as set forth in the Handbook referred to in the preceding paragraph, include:

"To maintain job descriptions, job grading standards, and a job titling system; to maintain a grade structure that provides for reasonably equitable relationships among positions across job ladders; to determine and recommend the assignment of each position to the appropriate grade; and to conduct job audits as required."

The major activities of that Division encompass the task:

"To contribute to the development of policies to provide a program of staff benefits that supports the recruitment and retention objectives of the organization and takes into account the general competitive level of benefits in comparator organizations as well as the special requirements of an international organization." (Handbook pp. 15 and 16.)

The responsibilities of the Staff Development Division, whose Chief is Mr. Swain, encompass:

“1. Career Development. To formulate policies and procedures and oversight for career development programs and services, which include performance evaluations, long-term career assessments, promotions, staff mobility, separations and outplacement, salary reviews and merit increases.

. . .

1. Policy planning and review: The division will continue its involvement in the development of personnel policy in a number of areas. . .”

43. Applicant’s argument that the Chiefs of these Divisions lack authority to change policy is based also on the view that their Job Standards do not provide them with that authority. She refers to the following excerpts from the Standards:

“**Job Standards for Division Chief, (ADM) Compensation Policy**, dated December 2, 1991. These are excerpts from Mr. Kennedy’s job standards, which state, inter alia:

‘Under the direction of the Director, (ADM), supervises the overall management of the policies and programs related to compensation policy, job grading matters, personnel records, and the computerized personnel information system.

. . . Manages the smooth and timely functioning of all division activities.

Initiates and participates in drafting Fund policy and procedures in relevant areas and oversees implementation of policies when approved by management . . .

Maintains, develops, and recommends changes in the compensation system and salary administration guidelines. . .

.”

“**Job Standards for Division Chief, (ADM) Staff Development**, dated December 2, 1991. These are excerpts from Mr. Swain’s job standards, which state, inter alia:

‘Under the direction of the Director, (ADM), supervises the overall management of the policies and programs related to staff development including . . . promotion policies . . .

Manages the smooth and timely functioning of all division activities. . .
Initiates and participates in drafting Fund policy and procedures in relevant areas and oversees implementation of policies when approved by Management.”

44. The Tribunal notes that the Chiefs of the Compensation and Staff Development Divisions testified before the Grievance Committee that the change in the policy prescribed by Staff Bulletin 89/28 had been discussed with, and approved by, the former Director of Administration, Mr. Rea, prior to his departure from the Fund. Applicant’s argument that Mr. Rea’s approval could not have survived his departure is disputed by the Fund. The Fund maintains that the change in policy codified a long-standing practice and that policies approved by one Director of Administration do not lapse on his or her succession by another.

45. The Tribunal finds that the official functions of the divisions and of their chiefs confer upon them sufficient authority to codify a pre-existing practice and issue the contested policy memorandum. A consideration, though not a determinative consideration, in so concluding is that the Kennedy-Swain Memorandum liberalized existing restraints on promotions, i.e., it removed an unintended and inequitable result of Bulletin No. 89/28, namely, that staff promotions within the same job ladder were subject to time-in-grade requirements that did not apply in the same way when staff were promoted into a different job ladder.

Was the Memorandum an appropriate form for implementing a personnel policy of the Fund?

46. One of the propositions advanced by Applicant is that the Memorandum “was issued contrary to existing bona fide Fund policy documents which require that significant administrative policy changes be promulgated by either the Managing Director or the Deputy Managing Director, while significant personnel policy changes, after consultation with the Managing Director and the Deputy Managing Director, may be promulgated by the Director of Administration. Such documents, just as their respective job standards, do not delegate policy making authority” to either of the division chiefs. She relied on the “letter and spirit of existing Fund policy statements”, i.e., General Administrative Order No. 1 and Staff Bulletin No. 89/28 as granting the Director of Administration “only the responsibility for maintaining” the series of General Administrative Orders and making recommendations to management “for necessary revision”. She maintains that they do not delegate the Managing Director’s or Deputy Managing Director’s authority to the Director of Administration or his subordinates. She also refers to D’Aoust in which the contested practice was held not to constitute a regulatory decision on the ground that it was “distilled in no rule, General Administrative Order, handbook or handout, statement on conditions of employment, contract or other published official paper of the Fund”. (para.35.)

47. Article II, Section 2.b. of the Tribunal’s Statute provides in part:

“For purposes of this Statute:

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. .
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b. the expression ‘regulatory decision’ shall mean any rule concerning the terms and conditions of staff employment, including the General Administrative Orders and the Staff Retirement Plan, but excluding any resolutions adopted by the Board of Governors of the Fund;”.

Under this definition “any rule concerning the terms and conditions of employment” may be a regulatory decision. Such rules may, but need not, be in any one of the forms specifically mentioned in the provision, provided they meet other applicable criteria.

48. In its Judgment No. 117 (José Luis Pando v. Director General of the Inter-American Institute for Cooperation on Agriculture (1992)), the OASAT, while rejecting the complainant’s appeal for failure to exhaust administrative remedies, enunciated the following principle regarding the form in which administrative actions may be clothed, recalling a previous decision that had held:

“Administrative actions generally must be in writing or documented and must fulfill certain formal requirements necessary to ensure an effective, efficient, sure, and fair management. In this regard, it is necessary to bear in mind that the internal administrative acts of the Organization of American States (circulars, instructions, requisitions, etc.) are binding upon those issuing them and those for whom they are intended. In this sense, the will of the Organization’s bodies is put in writing in documents that are the statutory source for all legal purposes. Those documents come in various forms, but they must satisfy certain minimum requirements in order for them to be valid and effective, for example, signature, date, clarity, notice, etc. As long as those documents are not declared null or invalid, they constitute full proof in terms of what they order, call for, provide for, create, oblige, authorize, amend, etc. However, to invalidate or destroy them, i.e., to modify or nullify the administration’s intent as expressed therein, evidence by experts, testimony, or other appropriate proof can be brought to bear against them (Kouyoumdjian v. Secretary General of the OAS, OASAT Judgment No. 94 [1986]).”

49. The Tribunal concludes that the Memorandum was a lawful form for the issuance of a personnel policy. It was a written statement of an adjustment in personnel policy, based on a pattern of practice, clearly related to its antecedents, which sets forth the policy change to be made, and which was circulated to senior personnel officers of every Fund Department, to their administrative officers, and to the Staff Association.

The issue of retroactivity

50. Applicant asserts that the Memorandum was retroactively applied to her and adversely affected her interests. She argues that she:

“ . . . applied for the personnel assistant position in question on August 9, 1995, while the Kennedy-Swain memorandum was dated September 7, 1995, and presumably was written on that date. Therefore, if the Kennedy-Swain memorandum was not effective until September 7, 1995, Applicant is not affected by the memorandum. If Respondent alleges, for example, that the Kennedy-Swain memorandum was effective retroactively, then the burden of proof shifts from Applicant to Respondent to make a showing of where in that memorandum the effective date is explicitly stated to cover the Fund’s staff members. In the absence thereof, as an obligating and binding document the Kennedy-Swain memorandum becomes impotent and void, thereby precluding Respondent from legally claiming that the memorandum covers Applicant.”

51. The Respondent addresses this point by pointing out that “by the date of Applicant’s promotion, underfilling had become a fairly standard practice in situations similar to hers,” and supports this proposition by furnishing a Table captioned “Staff who have underfilled before the Amendment to the TIG [Time-in grade] Policy was issued”.

52. In any event, in the absence of a specific provision setting the effective date of the Memorandum, the date of the Memorandum itself denotes the date on which it became effective. That date, September 7, 1995, antedated the Fund’s decision regarding Applicant’s promotion (September 20, 1995). There is no legal justification for regarding the date on which she applied for promotion as controlling.

The issue of limited circulation

53. The contested Memorandum was distributed to the Senior Personnel Manager of each Department, to the Administrative Officer of each Department and to the Staff Association. Applicant impugns the Memorandum for its limited circulation:

“In addition, there is no reason to believe that the intended audience for the ‘Kennedy-Swain’ memorandum was beyond the addressees: ‘Senior Personnel managers and copies to : ‘Administrative Officers and the Staff Association Committee.’ Therefore, based on what is known and not conjecture, it was not the intent of the authors to make known the existence of the ‘Kennedy-Swain’ memorandum to the staff members Fund-wide. In fact, I was not made aware of the existence of this memorandum by either my senior personnel manager or my administrative officer. I learned of its existence only after I initiated my request for review of my promotion to the director of administration on August 19, 1996.”

54. In the same vein, she argues on the basis of the principles enunciated in D’Aoust:

“As the Tribunal observed about the practice in “D’Aoust,” at the time the practice of underfilling, a prominent element of the Kennedy-Swain memorandum, was applied to Applicant, underfilling was generally an unpublished practice known to, and employed by, a small number of officials of the Administration Department of the Fund. In both cases the Administration Department is consistent in its methodology of applying so-called practices in lieu of bona fide, management approved policies. Contrary to Respondent’s representation that underfilling ‘had become a fairly standard practice in situations similar to the Applicant’s,’ in fact, the term of ‘underfilling’ was used as a mechanism by which the Staff Development Division of the Administration Department-- based on capricious and arbitrary decisions-- could accommodate the promotion of some chosen staff members and deny the promotion of others.”

55. Respondent counters that the limited distribution of the Memorandum does not affect its validity:

“The Applicant also contends that the Kennedy/Swain memorandum was invalid because it was addressed to SPM’s, Administrative Officers and the Staff Association Committee. In response to this allegation, Mr. Swain pointed out, as the rationale for this distribution, that part of the function of SPM’s is to act as the promulgators of policies and practices within their departments, and it was expected that they would convey this information to the limited number of staff affected by the liberalization of the requirements. . . . It was also expected that these changes would be incorporated in a broader review of promotion policies that was underway at the time.

In any event, the extent to which the memorandum may have been distributed is simply beside the point, as the memorandum is in every way favorable to the Applicant and other similarly-situated staff. Lack of widespread publication would be material only if staff are adversely affected, for example, if they rely on incomplete information to their detriment. In this case, even if the underfilling policy was unknown to the Applicant, both the vacancy announcement, as well as the more general time-in-grade requirements, made clear that she would have to serve at Grade A6 for three years before promotion to Grade A7.³

³ “The Applicant also attacks the Kennedy-Swain memorandum because it does not bear an effective date. Since the memorandum merely memorialized a practice that had been in effect for some time, whether it bears an effective date or not is immaterial.”

In summary, the underfilling policy reflected in the Kennedy-Swain memorandum resulted from an authorized and valid exercise on the part of officials responsible for career development at the Fund, which was entirely for the benefit of staff members and was properly applied to the promotion of the Applicant.”

56. In D’Aoust, the Tribunal faulted a practice applied to Mr. D’Aoust for being “distilled in no rule, General Administrative Order, handbook or handout, statement on conditions of employment, contract or other published official paper of the Fund” (para 35). That conclusion was based on two considerations: the structure of the Statute and general principles of international administrative law. Notice, which was at issue in D’Aoust, besides being an element of due process required by ample judicial authority, is also an element of the system of the Statute because it is a pre-condition for the determination of the effective date. The effective date, in turn, is an element of importance when the legality of a regulatory decision is challenged directly. These issues are considered in the following passage from the Judgment:

“37. It may be added that notice by which rights and obligations are clearly conveyed is a requirement not only of due process. Such notice is an element of the structure of the Statute of the Administrative Tribunal of the Fund, and, as a general proposition, it is held to be required by ample judicial authority.

(i) As for the structure of the Statute, Article VI, Section 2,⁴ limits the period within which challenges may be brought to the Tribunal. The period is reckoned from the date of announcement or effectiveness if later; whether the date of effectiveness is later can be measured only in comparison with the date of announcement of the decision. That rules constituting regulatory decisions have been ‘announced’ is presumed in the commentary on Article VI, Section 2 in the Report to the Board of Governors:

‘Regulatory decisions could be challenged by adversely affected staff within three months of their announcement or effective date. It is considered useful to permit the direct review of regulatory decisions within this limited time period. As a result, the question of legality, and any related issues (such as interpretation or application) could hopefully be firmly resolved before there had been considerable reliance on, or implementation of, the contested decision.

⁴An application challenging the legality of a regulatory decision shall not be admissible if filed with the Tribunal more than three months after the announcement or effective date of the decision, whichever is later; provided that the illegality of a regulatory decision may be asserted at any time in support of an admissible application challenging the legality of an individual decision taken pursuant to such regulatory decision.”

However, the legality of a regulatory decision could be raised as an issue at any time with respect to an individual decision taken pursuant thereto, subject to the rules involving timely filing of challenges to individual decisions. Accordingly, a staff member could contest the denial of a benefit in his particular case on the grounds that the regulation on which the denial was based was illegal, without regard to the date on which the regulation was enacted, subject to the provisions of Article XX.”

57. In the Application, Ms. “B” complains of an individual decision on the ground that it is based on an unlawful regulatory decision. As explained above, in such a case, the time element loses its importance. To the extent that the criterion of notice is based on systemic reasons, it is not mandatory where those reasons do not apply.

58. In contrast to the Application, Applicant’s Reply challenges directly both the individual decision and the policy on which it is based. However, in the light of the provisions of the Tribunal’s Statute and the Fund’s Commentary on them, the time element is not dispositive in this situation either.

“In cases involving both types of grounds, the requirements of the tribunal statute regarding exhaustion of remedies and the statute of limitations should be understood as follows. The Grievance Committee would first hear the case and dispose of the issues over which it had jurisdiction (i.e., whether the decision at issue involved a correct interpretation or application of the Fund’s rules). If the Grievance Committee rejected his case, the staff member could then proceed to the tribunal. At that time, it would be open to him to raise, as grounds for review, not only the issues that were before the Grievance Committee but also, if appropriate, the legality of the underlying regulatory decision, regardless of whether more than three months had passed since the individual decision at issue had been taken. In essence, the pursuit of administrative remedies as to the issue of interpretation or application would suspend the time period for seeking review of the decision on grounds for which no administrative review is available.” (Commentary, p. 26.)

59. In view of these considerations, the Tribunal finds that, in the case at hand, notice is not required for systemic reasons. That leaves the question whether reasonable notice of the particular change in policy would nevertheless be required by general principles of law.

60. In D’Aoust, the Tribunal held that a particular practice fell short of meeting the essential criteria for a regulatory decision because it did not afford reasonable notice to the staff. In D’Aoust, the evidence showed that:

“ . . . at the time that that practice was applied to Mr. D'Aoust, it was an unpublished practice known to and employed by a small number of officials of the Administration Department of the Fund. . . .” (Para. 35.)

Several factors distinguish the present case from D'Aoust. For one, unlike the measure at issue in D'Aoust, the Kennedy-Swain Memorandum does not constitute an unpublished practice known to and employed by a small number of officials of the Administration Department of the Fund. It was published, and circulated to all SPMs, all Administrative Officers and to the Staff Association. Moreover, the Memorandum was one of the periodic adjustments that the 89/28 Staff Bulletin, which formalized the minimum time-in-grade requirements, foresaw might be warranted:

“The manner in which specific time-in-grade requirements are implemented is kept under review, and may be adjusted from time to time as warranted by organizational developments, such as changes in institutional growth rates, staff turnover and recruitment patterns. In administering and, as appropriate, revising these requirements, the Administration Department works in consultation with the Economist Committee, the Non-Economist Committee, and the Review and Senior Review Committees.” (Minimum Time-in-Grade Requirements, Staff Bulletin No. 89/28, December 21, 1989, p. 1.)

That Bulletin was circulated to all staff members, who, thus, were, or could be, aware of the fact that periodic adjustments might be made. When it became apparent that the Bulletin led to inequities, and a modification was undertaken, all departments were informed. The fact that the Memorandum codified a practice that --as evidence submitted to the Tribunal shows-- had been followed in the past and, moreover, constituted an interim measure pending broad revision of the entire salary structure of the Fund, are also factors of relevance.

61. The Tribunal in D'Aoust observed that other international tribunals have held procedural irregularities and errors irrelevant

“where the actions or omissions did not affect the decision of the complainant or his financial interests. That was the case, e.g., where the complainant was not a member of the class of persons to which an incriminated action applied or when an unlawful omission has no financial effect upon him.” (Para. 23.)

For instance, the IDBAT, in Ricardo Schwarzenberg Fonck v. IDB (Case No. 2) (1984), held that lack of information is immaterial when it could have had no influence on the legal position of the complainant. The Tribunal considered that:

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In the framework of these considerations it may be said once again that it is the duty of the Bank to supply its employees and staff members with the most ample information on working conditions or on the alteration of its internal rules and that the performance of that duty is advantageous not only to the workers but equally to the Bank, as it constitutes a guarantee of security and balance in relations between workers and employers.

5) The aforementioned conditions notwithstanding, in the present case, as was emphasized earlier, if there was an omission (albeit partial) of information due the complainant, that omission was irrelevant because, as was recognized by the two parties, at the time of the complainant's entrance in the Bank he was not participating in the Retirement Plan. Hence, the lack of information on the change in rules on retirement could have had no influence on the personal and professional decisions of the complainant.

If the complainant became aware of the change in the rule in 1978, that is, two years before he became a regular staff member and a participant in the Retirement Plan, it is evident that he was fully aware of all that had occurred when exact knowledge of the conditions of retirement became important to him."

A fortiori, where the legal position of the complainant is affected, but in a positive way, lack of notice furnishes no ground for complaint.

62. The OASAT, in Judgment No. 118 (René Gutiérrez v. the Secretary General of the Organization of American States) (1992) dealt with the application by Mr. Gutiérrez for a post advertised within the Organization, for which he was not selected on the ground of inadequacy of educational achievements. The following passages of the Judgment are relevant:

"V. POLICY OF THE GENERAL SECRETARIAT

36. As can be seen in the testimony given by the former Director of the Department of Human Resources, Hernán Hurtado Prem, the possibility envisaged in the Introduction to the Classification Standards that a combination of studies and experience can be substituted for a university degree does not reflect the policy adopted by the Secretary General. In the public hearing held on November 6, 1992, the Complainant's attorney responded as follows to an answer given by Mr. Hurtado Prem:

Did you say that the Secretary General insisted on a university degree for professional posts at that time or is he doing so now?

To which Mr. Hurtado Prem replied:

. . . He changed this policy last year and it is now required. The combination of experience and studies in place of a university degree is no longer accepted.

VI. ERRORS OF PROCEDURE

37. From a study of the record and of the Complainant's specific charges, the Tribunal concludes that the following errors of procedure have been committed:

a. The Complainant was not informed promptly, as it is his subjective right to be, of the Secretary General's decision to accept the recommendation of the Advisory Committee on Selection and Promotion to withdraw Internal Vacancy Announcement No. IR/18/91 and order a new competition for external applicants.

This omission was subsequently rectified. However, the error committed by the Department of Human Resources is inexcusable; the final result of an administrative procedure must always be transmitted to those directly concerned, since failure to do so denies them the right to defend themselves and thus nullifies the procedure. Of course, until whatever personal notification or communication the law may require has been made, the action taken can have no legal effect of any kind to the detriment of the persons against whom it is taken."

63. The holding in Gutiérrez seems to be confined to changes that are detrimental to the claimant; it does not preclude changes that operate to the advantage of the persons concerned. In the present case, Ms."B" received her promotion before having completed the three years at Grade A6 required under Staff Bulletin 89/28.

64. On the basis of the applicable principles and precedents, and in view of the facts of this case, the Tribunal concludes that the limited measure of the circulation of the Kennedy-Swain Memorandum did not adversely affect the Applicant. However, if the facts of the case were such that the failure to inform the Applicant of the Kennedy-Swain Memorandum had adversely affected her, the Tribunal might attach different consequences to the inadequacy of notice.

The exceptions provided in Staff Bulletin No. 89/28

65. Applicant argues that, under the terms of the policy laid down in Staff Bulletin 89/28, an immediate promotion would have been allowed on the basis of the exceptions provided therein, a proposition that is contested by Respondent. The exceptions in question are:

"(3) An incumbent with a combination of superior performance and the assessed potential to advance rapidly through several higher grades

may, on an exceptional basis, be considered for promotion to the next higher grade at a more rapid rate than indicated by the minimum time-in-grade. Such exceptions, which are expected to be very few, could occur when a staff member is appointed to a supervisory position. Review or Senior Review Committee endorsement is required for such exceptions in the case of promotions to Grades A14 and above.

- (4) A newly-recruited staff member's service as a contractual employee, if doing similar work at a comparable level, will be taken fully into account in applying the time-in-grade requirements.
- (5) A newly-recruited staff member's first promotion to the next higher grade in a job ladder may be made without reference to the minimum time-in-grade requirements if the staff member is recruited for a probationary period at one grade lower than the normal entry level for the job ladder or one grade below the lowest level at which the position was advertised on the vacancy list, or if warranted by a combination of superior performance and relevant prior work experience." (pp. 2-3.)

66. Respondent recalls that at the time of her appointment to the position in question, the Applicant had served only a little over one year at Grade A6 and concludes that she was therefore not eligible for immediate promotion to Grade A7 under Staff Bulletin No. 89/28. The Fund characterizes as "unfounded" Applicant's assertion that she should have been promoted immediately to Grade A7 on the basis of the exceptions in the Staff Bulletin, because those exceptions are inapplicable in her case. She did not have the "assessed potential to advance rapidly through several higher grades", nor was she a newly recruited staff member.

67. The Applicant interprets Staff Bulletin 89/28 as permitting supervisors to set aside the time-in-grade requirements. She maintains that the Bulletin:

"... grants the 'staff member's supervisors' the authority to decide the appropriate time to propose a career progression inasmuch as they 'are in the best position to make the necessary judgments.' The paragraph does not set out any conditions to supplant the supervisors' judgement on the matter."

"... the time Applicant served at the Grade A6 position was irrelevant and immaterial, inasmuch as Applicant had demonstrated, sufficiently and to the satisfaction of her supervisors, that she was well seasoned and her supervisors recommended that she be immediately promoted to the Grade A7."

68. Respondent's understanding of the clause in question is very different, i.e., that the Bulletin prescribes minimum requirements to which supervisors are bound.

“The Applicant is construing this language as authorizing supervisors to decide that a staff member be appointed to a vacancy without regard to the time-in-grade requirements set forth in the Bulletin.

The Applicant’s interpretation is neither well-founded or logical; if it were correct, the specific exceptions enumerated in the Bulletin would be superfluous. Rather, this sentence must be read in the context of the whole paragraph, which explains why the time-in-grade requirement has been defined as a minimum, rather than average, period of time-in grade. Properly read, this sentence gives some flexibility to supervisors to propose that a staff member be promoted only after the minimum requirement has been met, without regard to any average period of time-in grade. As Mr. Kennedy explained, this provision was not intended to permit a supervisor to determine that promotion should occur before the minimum time-in-grade requirements had been met; rather, it means that ‘once the minimum threshold has been passed, . . . supervisors are in the best position to decide the timing [of a promotion] and ADM would not try to impose a control such as average time in grade that could interfere with that decision.’

Consequently, Respondent argues, the Applicant could not have been promoted immediately to Grade A7 on the basis of this language.

Conclusions regarding the application of the Staff Bulletin and the Kennedy-Swain Memorandum

69. The Tribunal is not persuaded by Applicant’s contention that she could have been promoted immediately by decision of her supervisor; time-in-grade as prescribed in the Bulletin is a minimum requirement. As observed above, to hold that time spent in one grade contributes to meeting the time-in-grade requirement of another grade is to deprive time-in-grade requirements of their essential rationale. Moreover, it is noteworthy that in fact the Kennedy-Swain Memorandum allowed the Applicant to be promoted without fully meeting the conditions of the vacancy announcement, including the time-in-grade requirement.

70. In considering whether the applicable rules were correctly applied by the decision requiring underfilling, the Tribunal finds that the Staff Bulletin would not have allowed the Applicant, who was neither newly recruited nor appraised by her supervisors as having the potential to advance rapidly through several higher grades, to receive an immediate promotion. A like conclusion holds with respect to the policy laid down in the Kennedy-Swain Memorandum: the Applicant failed to meet the time-in-grade requirements.

71. The Tribunal’s conclusions on remaining salient contested issues of the case will now be stated. Those issues are: (a) did the vacancy announcement violate the Fund’s law; (b) was the decision that Applicant did not meet the conditions listed in the vacancy announcement justified; (c) did Ms. “Z.” have the authority to block the immediate effect of the

recommended promotion; and (d) was the final decision flawed because of being arbitrary, capricious, discriminatory, or in violation of law.

The vacancy announcement

72. The vacancy announcement in question advertised a position at Grade A7/A8 with the following qualifications:

“1. For Grade A7, a combination of education and specialized training equivalent to a university degree in human resources management, or a related field, is required, supplemented by a minimum of three years of progressively responsible experience in personnel work at Grade A6, or equivalent. A seasoned level of competence and technical expertise, including an in-depth knowledge of precedents in benefits administration is required at this grade level.

For Grade A8, in addition to the training and experience for Personnel Assistant/A7, a minimum of two years of progressively responsible work experience in the benefit administration area at Grade A7, or equivalent.

2. Thorough knowledge of Fund benefits policies, procedures, and precedents. . . .”

73. The Applicant argues that the posted requirements were unlawful and relies on the Job Standards for Grade A7 to argue that she met the desirable qualifications. The Job Standards for the Grade A7 position set forth as “desirable qualifications”:

“Educational development, including and/or supplemented by work experience, typically acquired through the completion of a university degree program; or progressively responsible experience in administrative work, including a minimum of three years of personnel work at Grade A6, or equivalent, is required.”

Applicant maintains that she not only met, but exceeded, these qualifications.

74. Her argument concerning the lack of legality of the posted requirements of the vacancy announcement is based on the view that they were predicated on a “modified” set of Job Standards, not yet issued. From this, Applicant concludes that the qualifications and requirements for the vacancy announcement for the position in question were predicated on a non-existent set of Job Standards, and that “a poisonous tree, yields poisonous fruit”.

75. The position of the Fund was that she failed to meet the posted requirements because, in addition to lacking the time-in-grade or its equivalent, she also did not have the required university degree, since her university degree in languages was neither a degree in the specified field nor a degree in a related field. Respondent asserts that it is not the job

description, but the vacancy announcement that is controlling and that that announcement was appropriately drafted:

“The testimony of the Fund officials responsible for the administration of the vacancy advertising procedures made clear that recruiting departments at the Fund that wish to advertise a position have the discretion to set more stringent qualifications than those stated in the Job Standards Manual. As made clear in the introduction to the Job Standards Manual, a job standard describes only in general terms the nature and level of the work and the desirable qualifications for successful performance of the work, and is meant to provide guidance and not a rigid rule . . . As such, it must paint with a broad brush, leaving the specifics to be filled in by job descriptions or vacancy announcements, which are geared towards particular positions.

Moreover, the express language of the introduction to the Job Standards Manual states that the ‘desirable qualifications’ section describes only the “desirable minimum amount and kind of training and experience.” . . . (emphasis added). Accordingly, the Job Standards do not preclude the recruiting department, in consultation with CPD, from tailoring the requirements for a particular position by making reasonable additions to those minimum requirements. Rather, it envisions that this will be done and, as Mr. Kennedy observed in his testimony before the Grievance Committee, it has been a long standing practice for the recruiting departments to do so. [Footnote omitted.] Thus, with respect to whether a selected candidate meets the qualifications for appointment at the particular grade of an advertised position, the requirements set forth in the applicable vacancy announcement, rather than the Job Standards Manual, are controlling.

It is undeniably a managerial prerogative to determine what qualifications are appropriate for a particular position. [Footnote omitted.] A judicial body should not disturb such a determination unless there is no rational relationship between the requirements and the position in question. With respect to the Personnel Assistant position at issue in this case, the requirements for appointment at Grade A7 were manifestly reasonable. The required combination of experience and . . . training was essentially a response to the concerns expressed during a 1992 staff survey about the lack of professionalism in some divisions in the Administration Department and the result of that Department’s effort to strengthen its professional qualifications. As such, they were rationally related to the position advertised.”

76. The Fund refers to the Job Standards for Grade A7 staff that Applicant maintains were illegally altered in the vacancy announcement, which require “the completion of a university degree program”. These Job Standards, the Fund points out, are generic and used all over the Fund. The mere reference to a “university degree program” cannot be generically

applied, but needs to be tailored to the requirements of the recruiting department and the post.

77. The Tribunal concludes that vacancy announcements may properly refine and particularize qualifications set out in the Job Standards and legally did so in the instant case. It is also noted that the underfilling policy, as articulated in the Kennedy-Swain Memorandum, permitted the promotion of Applicant to Grade A7 without her ever attaining a university degree in human resources management, just as it permitted her promotion without her having met the three year minimum time-in-grade at Grade A6.

The authority of Ms. "Z." to block the request for immediate promotion

78. Applicant contests the authority of Ms. "Z." to "overrule" the requested promotion. She argues that the personnel of the SDD "had no authority whatsoever, under Staff Bulletin No. 89/28, to overrule the decision of supervisors and senior personnel managers to promote a candidate immediately to the grade of an announced vacancy".

79. The Fund's Answer sets forth the structure of the decision-making process with respect to promotions and grading within the Fund and in that context explains the respective functions of SPM and the SDD. It maintains that the SPMs do not have the final authority to approve promotions; rather, the role of a Senior Personnel Manager is one of coordination and oversight in personnel matters and is not intended to supplant the responsibility of the appropriate divisions in ADM. Approval by the appropriate divisional authority in ADM is required.

80. The Tribunal concludes that the Senior Personnel Manager, in requesting approval of the Applicant's promotion rather than purporting to take a decision effecting it, acted properly. Equally, the decision of the Staff Development Division of the Administration Department declining to approve promotion of the Applicant with immediate effect was an appropriate exercise of its authority to monitor the conformity of promotions with Fund-wide rules in force.

81. On the basis of the considerations set forth above, the Tribunal decides that the decision to underfill the position to which the Applicant was promoted was proper, legal and in conformity with the Fund's governing practice and prescription.

Decision

FOR THESE REASONS

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

(A) Requiring the Applicant to underfill, for approximately one year, a position to which she was promoted on September 20, 1995 did not contravene the internal law of the Fund and reflected a proper application of lawful rules concerning promotions and time-in-grade requirements;

(B) The Application is rejected and the Applicant's demands for relief are dismissed.

Stephen M. Schwebel, President

Georges Abi-Saab, Associate Judge

Nisuke Ando, Associate Judge

Stephen M. Schwebel, President

Philine R. Lachman, Registrar

Washington, D.C.
December 23, 1997