

ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

JUDGMENT No. 2006-3

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

Introduction

1. On February 13, 14 and 15, 2006, the Administrative Tribunal of the International Monetary Fund, composed of Judge Stephen M. Schwebel, President, and Judges Nisuke Ando and Michel Gentot, Associate Judges, met to adjudge the case brought against the International Monetary Fund by Ms. “U”, a former staff member of the Fund. It gave final consideration to its Judgment and adopted it on June 7, 2006.
2. Applicant contests the decision of the Fund not to convert her fixed-term appointment to a regular staff position. Applicant contends that the decision failed to take account of all of the relevant evidence and therefore was arbitrary, capricious and an abuse of discretion. Additionally, Applicant maintains that the non-conversion decision was marked by procedural irregularities, that the Fund “mismanaged” her career, and that the decision not to convert her appointment represented discrimination on the basis of race and nationality.
3. Respondent, for its part, maintains that the decision not to convert Applicant’s fixed-term appointment to a regular staff position was a reasonable exercise of managerial discretion, carried out consistently with the Fund’s internal law and supported by the relevant evidence. In the Fund’s view, Applicant, despite regular feedback and monitoring, failed to achieve the level of performance and potential for a Fund career required for conversion to regular staff. The Fund denies that the non-conversion decision was affected by either procedural irregularities or discrimination.

The Procedure

4. On May 26, 2004, Ms. “U” filed her Application with the Administrative Tribunal. In accordance with the Tribunal’s Rules of Procedure, the Application was transmitted to Respondent on June 1, 2004, and on June 4, 2004, pursuant to Rule XIV, para. 4¹ of the Rules of

¹ Rule XIV provides in part:

“4. In order to inform the Fund community of proceedings pending before the Tribunal, the Registrar, upon the notification of an application to the Fund, shall, unless the President decides otherwise, issue a summary of the application, without disclosing the name of the Applicant, for circulation within the Fund.”

Procedure, the Registrar issued a summary of the Application within the Fund. On July 16, 2004, Respondent filed its Answer to Ms. “U”’s Application. Applicant submitted her Reply on August 18, 2004. The Fund’s Rejoinder was filed on September 20, 2004. On January 25, 2006, Applicant submitted a statement of her legal costs, for which she had requested reimbursement in the Application. Pursuant to his authority under Rule XXI, para. 3,² the President directed that the statement be transmitted to the Fund for its observations, which were submitted on February 13, 2006.

5. The Tribunal decided that oral proceedings, which neither party had requested, would not be held as they were not necessary for the disposition of the case.³ The Tribunal had the benefit of a transcript of oral hearings before the Grievance Committee at which Applicant and other witnesses 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.

Requests for Production of Documents

6. In her Application, Ms. “U” made the following requests for production of documents:
1. Any and all documents relating to performance standards for Fund Staff Assistants from 1999 until the date of Applicant’s separation;
 2. Any and all documents evidencing any actions by Respondent to share with Applicant any of the documents produced in response to point 1 above;
 3. Any and all documents relating to managerial responsibilities for the professional development of subordinates including but not limited to training materials for managers or supervisors, guidelines and manuals, the Fund’s *Performance Management Handbook*; and documents relating to the monitoring of fixed-term appointed staff;
 4. Any and all documents relating to or evidencing any action Respondent may have taken as it relates to developing Applicant’s skills for a career with the Fund;

² Rule XXI, para. 3 provides:

“The Tribunal or, when the Tribunal is not in session, the President may deal with any matter not expressly provided for in the present Rules.”

³ 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 decides that such proceedings are necessary for the disposition of the case.”

5. Any and all documents relating to the diversity (e.g., race, nationality, gender) of ["Department 1"]⁴ from 1999 until the date of Applicant's separation; and
6. Any and all communications regarding Applicant among ["Department 1"] personnel including but not limited to specified persons.

In accordance with Rule XVII⁵ of the Tribunal's Rules of Procedure, Respondent was provided the opportunity to present its observations on the matter, as both parties exchanged views in their subsequent pleadings as to whether the document requests should be granted. Following consideration of the views of the parties, the Administrative Tribunal, meeting in session, decided on December 7, 2005 to deny each of these requests on the following grounds.

7. As to Requests 1, 2, 4, 5 and 6, the Fund responded that all responsive documents were provided to Applicant during the Grievance proceedings. Applicant proffered no evidence to suggest that the Fund had in its possession additional responsive documents. Accordingly, these requests were denied on the basis that Applicant had not shown that she had been denied access to documents by the Fund. (Rule XVII, para. 1.) *See Ms. "W", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-2 (November 17, 2005), para. 14.

8. As to Request 3, for "[a]ny and all documents relating to managerial responsibilities for the professional development of subordinates..." Respondent partially satisfied the Request

⁴ In accordance with the Administrative Tribunal's policy on protection of privacy, adopted in 1997, the departments and divisions of the Fund will be referred to herein by numerals, except where such reference would prejudice the comprehensibility of the Tribunal's Judgment.

⁵ Rule XVII provides:

"Production of Documents

1. The Applicant may, before the closure of the pleadings, 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, accompanied by any relevant documentation bearing upon the request and the denial or lack of access. The Fund shall be given an opportunity to present its views on the matter to the Tribunal.
2. The Tribunal may reject the request to the extent that it finds that the documents or other evidence requested are clearly irrelevant to the case, or that compliance with the request would be unduly burdensome or would infringe on the privacy of individuals. For purposes of assessing the issue of privacy, 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.
4. When the Tribunal is not in session, the President shall exercise the powers set forth in this Rule."

while objecting to the Request insofar as it sought guidance materials for managers relating specifically to performance issues of regular staff members. The Fund contended that such documents are not relevant to assessing the legality of a decision concerning the conversion of a fixed-term staff member. The Tribunal sustains the Fund's objection that such documents are not relevant to the issues of the case of Ms. "U".

The Factual Background of the Case

9. The relevant factual background may be summarized as follows. Additional factual elements will be included in the consideration of the issues of the case.

10. Applicant was first employed by the Fund beginning in February 1998 as a contractual employee⁶ to serve as a Staff Assistant in the Secretarial Support Group (SSG). Following two years in that capacity, Applicant was appointed as a fixed-term staff member in February 2000, in accordance with GAO No. 3, Rev. 6 (May 1, 1989) (Employment of Staff Members), which governed during the period of her employment.⁷

⁶ Contractual employees are distinguished, under the Fund's internal law, from staff members. *See generally* Mr. "A", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1999-1 (August 12, 1999).

⁷ GAO No. 3, Rev. 6 provided for two types of staff appointments, regular and fixed-term:

"Section 3. Types of Appointments

3.01 *Regular Appointments.* Regular appointments shall be appointments for an indefinite period. Persons holding such appointments shall be designated as regular staff members.

3.02 *Fixed-term Appointments.* Fixed-term appointments shall be appointments for a specified period of time. Persons holding fixed-term appointments shall be designated as fixed-term staff members."

GAO No. 3, Rev. 6 was superseded by GAO No. 3, Rev. 7 (May 1, 2003), which provides for fixed-term appointments as follows:

"3.02 Types of Staff Appointments

3.02.1 *Open-ended appointments*

....

3.02.1.2 Before being offered an open-ended appointment, staff shall be hired initially on a fixed-term appointment for a specified period of time to test their suitability for career employment. Persons holding fixed-term appointments shall be designated as fixed-term staff members.

(continued)

11. Applicant's letter of fixed-term appointment explained that the appointment was for a two-year period commencing on February 15, 2000 and would be probationary for the first six months. The letter advised Ms. "U" that, as a staff member on fixed-term appointment, she would be subject to the Guidelines for Fixed-Term Appointments (1995), which were enclosed with the correspondence.

12. Applicant was appointed to serve as a Staff Assistant in "Department 1," and, for the first nine months of her fixed-term, Ms. "U" worked as a "floater" within the Department. At the conclusion of the six-month probationary period, the Administrative Officer (AO) reported to the Human Resources Department (HRD) that Ms. "U" had successfully completed her probationary period with satisfactory performance: "She is conscientious in her approach to her work and has already acquired a good basic knowledge of Fund practices and procedures. Ms. ["U"] has the potential to become a good staff assistant." In a Memorandum to Files of the same date, the Administrative Officer reported that she had met with Ms. "U" to discuss her performance over the first six months, noting areas for improvement:

"We discussed areas for improvement and development during the next six months, among them: not to fear asking questions to ensure she has understood instructions correctly; to seek advice in prioritizing work at peak times; to check written work for

3.02.1.3 If fixed-term staff members meet the performance requirements, demonstrate potential for a career at the Fund, and meet the Fund's staffing requirement, their appointment may be converted from fixed-term to open-ended status at the expiration of the fixed-term appointment. Persons holding open-ended appointments shall be designated as regular staff members.

3.02.1.4 Staff recruited to fill senior level positions (Grades B3–B5) shall receive three- to five-year fixed-term staff appointments. After completion of the initial fixed-term appointment, these appointments may be renewed without limit for fixed-term periods up to five years up to mandatory retirement age, or converted to open-ended appointments.

3.02.1.5 Staff who rejoin the Fund may, at the discretion of the Fund, be offered an open-ended appointment without first having to complete successfully a fixed-term appointment, provided that they were regular staff at the time they separated from the Fund. This provision shall not apply to former staff members who are appointed to B3–B5 positions.

3.02.2 *Limited-term appointments*

...."

The present Application is governed by GAO No. 3, Rev. 6 and the Guidelines for Fixed-Term Appointments (August 1995), *see infra*.

accuracy, and to ask the senior assistant also to check such work before giving it to the supervisor.”

13. After approximately nine months serving as a departmental floater, on November 1, 2000, Applicant became assigned to “Division i” of “Department 1.” Applicant’s Annual Performance Report (APR) for calendar year 2000, signed by the Chief of “Division i,” rated her performance “2” on a rating scale of 1- 4. The 2000 APR took note of and attached the mid-year performance memorandum by the Administrative Officer who earlier had supervised Ms. “U”; the Division Chief “endorse[d] this assessment on the basis of her performance in the division.” Moreover, he noted: “Overall, her performance was good with some areas for improvement.... she has the potential to become a strong staff assistant particularly if she continues to make efforts to ensure the meticulousness and accuracy of her contributions.” Applicant’s Performance Plan, as recorded in the APR, was to “[c]ontinue to gain greater familiarity with Fund procedures and data management” by continuing in her assignment in “Division i” and to [c]ontinue to improve the meticulousness of the contributions” by taking an editing skills course and other courses in the preparation of Fund documents. The Reviewing Officer noted: “I encourage Ms. [“U”] to implement diligently her performance plan, so as to strengthen her performance.”

14. On August 2, 2001, Applicant addressed a memorandum to the Office Manager (OM) of “Division i” regarding “My Responsibilities in [Division i],” which noted in part:

“Since the arrival of the new Administrative Assistant the workload is not as heavy anymore, so I did not get much practice in working on documents[.] I hardly get hand written memos or letters to work on. As a result, I found it difficult to get exposed to the division chief’s handwriting. On my mid-year APR discussion (July 23, 2001), I also mentioned to [the Division Chief] about it and he told me that he would ask the Admin. Asst. to share the hand written work with me. However, I would like to state that I handled almost all the administrative work in the division.”

15. Eighteen months following the commencement of Applicant’s fixed-term appointment, in keeping with the checkpoints set out in the Guidelines for Fixed-Term Appointments,⁸ the Senior Personnel Manager (SPM) of Applicant’s Department prepared the Expiration of Fixed-Term Appointment form, reflecting his decision to extend the appointment for 6 months beyond its February 14, 2002 scheduled expiration date rather than either to convert Applicant’s appointment to regular staff or to let the appointment expire at the conclusion of the two-year term. (The form is dated August 15, 2001 and signed by the SPM on September 10, 2001.)

16. The Expiration of Fixed-Term Appointment form of August 15, 2001, recorded the assessment of Applicant’s performance and the rationale for the 6-month extension as follows:

⁸ See *infra* Consideration of the Issues of the Case; Conversion of Fixed-Term Appointments.

“Overall performance and particular strengths/weaknesses:

Ms. [“U”] has the potential to become a good staff assistant. She is reliable, cooperative and has a flexible attitude. A particular weakness is a continuing lack of accuracy in her typewritten work from heavily edited drafts--a core competency for staff assistants. Two other areas for improvement and development are to take the initiative in asking questions to ensure she has understood instructions correctly and to seek advice in prioritizing work at busy times.

In the case of an extension, please explain reasons and, when applicable, what aspects of performance will be monitored and how the staff member will be assisted in meeting the requirements.

Ms. [“U”] is being transferred to another division where she will be one of two assistants, instead of one of three. In this situation she will have daily opportunities to hone her editing and proofing skills. She is applying for Editing Skills I course, and studying at the SDC. The OM will monitor improvement in her accuracy and other areas monthly with the Division Chief/Admin. Assistant.”

17. Accordingly, on September 10, 2001, Ms. “U” was transferred to “Division ii” and placed under the close supervision of the Senior Administrative Assistant to hone her skills. In two Notes to Files of November 2001, the Office Manager of “Division ii” reported that both the Senior Administrative Assistant and an economist had observed that Applicant was making progress.

18. In February 2002, as Applicant’s 2001 Annual Performance Report was being prepared and the 6-month point in advance of the revised (August 14, 2002) termination date of Applicant’s fixed-term approached, the decision was made to seek an additional 6-month extension of Ms. “U”’s appointment. In his memorandum of March 13, 2002 to HRD, the SPM of Applicant’s Department explained:

“Although she has not been learning the skills quickly enough to justify a conversion now, Ms. [“U”] is keen and anxious to improve her skills. Consequently, [“Department 1”] in coordination with SDD [the Staff Development Division, HRD] designed a development plan, because both the Department and SDD considers she has potential. Implementation of the development plan, the assistance she received from her colleagues in the Division together with her efforts, has resulted in considerable improvement of Ms. [“U”]’s skills and performance. Also, very recently, because of a departmental reorganization, she

is now in Division ["iii"]⁹ where she can continue to be closely supervised and coached. However, six months is not an adequate period to evaluate and judge her improvement."

19. The request for extension of Applicant's fixed-term through February 14, 2003 was approved and efforts continued to monitor her performance.

20. In her Annual Performance Report for calendar year 2001, Applicant was rated "3", and the Overall Assessment stated:

"In working closely with the administrative assistant in the division, she is becoming more familiar with the Fund's working practices and software.... Ms. ["U"] has not yet performed strongly enough to justify conversion to regular staff at this time and will need to show significant improvement at the end of the extension period."

The Division Chief additionally noted that, in view of the extension of her appointment into February 2003, another formal evaluation of Ms. "U"'s performance would be made in September 2002. As Development Objectives, Applicant was to "[g]ain speed and accuracy in incorporating comments on drafts[,] [p]ay particular attention to proofreading [and] [g]ain increased familiarity with the preparation of Fund documents," by continuing to work closely with the Senior Administrative Assistant and completing specified training courses. In Applicant's comments on the APR, she noted that, while disappointed by the rating, she "...appreciate[d] the willingness of [her] manager to provide regular feedback."

21. On June 18, 2002, a Human Resources Officer (HRO) from the Staff Development Division (SDD) of HRD held an additional performance discussion with Applicant "(i) to discuss her work performance as described in the APR and the corresponding performance action plan, and most importantly, (ii) to ascertain her understanding of her weaknesses and the steps identified for her to improve." In a Memorandum for Files of July 3, 2002, the HRO concluded:

"A brief report by [the mission chief] on Ms. ["U"]'s current performance indicated her strong effort in improving her performance with visible results. Ms. ["U"] has been able to cope with a heavy workload and has successfully completed her tasks on time. The monitoring of her performance by her supervisors will continue.

I assured Ms. ["U"] of my availability to provide any appropriate form of assistance in order for her to further improve her

⁹ As a result of a departmental reorganization, Applicant, along with the Senior Administrative Assistant and Division Chief, had been reassigned from "Division ii" to "Division iii."

performance. I also informed her of the possibility that her current status as a fixed-term staff will not be converted to regular if her performance continues to suffer.”

22. On June 11, 2002, the Assistant to the Senior Personnel Manager (ASPM) reiterated the performance concerns of the Department and plans for assistance in an email communication to Applicant:

“I consider that there are two major issues that you need to focus in order to develop your performance.

1. Improve the speed of your work together with accuracy, and
2. Improve your communication with your supervisors and colleagues and feel comfortable and willing to ask any questions if unsure of your assignment.

As you know we have worked out a training program together with you and the SDD training expert. You should complete attending the courses by the end of July and I would like to hear your comments about the courses and how effective will they be in your performance development.

Since it has been one month from the date which the results of APR were communicated to you, would you please let me know your evaluation of your performance in the last month. i.e. improvements, areas that you need to work on. What were your assignments and how would you assess your accomplishment? And the last is how we could assist you further.”

23. Meanwhile, on the advice of HRD, the Senior Administrative Assistant maintained a daily log from June 3 - July 12, 2002, describing in detail the specific efforts at coaching that she engaged in with Ms. “U”. In a cover memorandum of July 12, 2002 addressed to the ASPM and copied to the Division Chief and OM, the Senior Administrative Assistant observed: “In my view, she is making progress. Her work requires less intervention, and she now seems to have a clearer understanding of what is expected of her and how to handle her various tasks.”

24. A month later, the ASPM recorded meetings of August 12, 2002 with the Division Chief, the Senior Administrative Assistant, and Ms. “U” to assess Applicant’s performance during July 2002. On August 27, 2002, the Division Chief completed a Quarterly Performance Review, noting that Applicant’s “communications skills have improved considerably,” but, nonetheless, the following concerns remained:

“While she is becoming more aware of the Fund’s office practice and document preparation procedures, the speed with which she completes her assignments often falls short of the Fund’s standards. Ms. [“U”] must also pay greater attention to details and

accuracy in performing even relatively small tasks, such as photocopying and preparing leave slips. In addition, Ms. ["U"] does not, on a sufficiently regular basis, fully incorporate comments received from economists into revised texts and proofread documents before they are sent from the division."

25. In late August, the SPM convened a meeting of the Division Chief, the alternate SPM, the ASPM, the OM, and mission chief. The preceding day, the ASPM had circulated to the participants Applicant's APRs and other documentation relating to her performance. According to the SPM's Grievance Committee testimony:

"That meeting was quite lengthy and I spent a good bit of time questioning people on that judgment and asking in more detail questions about whether the performance improvement really did or did not meet the qualifications, what were the real shortcomings, what were the prospects that this could be overcome, looking at the history of the performance from the beginning -"

The SPM further testified that there was unanimity on the question of non-conversion. The ASPM, for her part, recalled that the decision was a "collective" one:

"So the division chief just took the case at the table and he said she's barely adequate, her performance, and given the training that she has received and all the attention that she has received, she was not very attentive to the details and he recommended, but left it to the management, so it was a collective decision."

26. On September 6, 2002, the SPM notified Applicant of the decision not to convert her appointment. On the Expiration of Fixed-Term Appointment form of the same date, the SPM recorded:

"Overall performance and particular strengths/weaknesses:

While Ms. ["U"]'s performance has shown improvement in the last 6 months, it continues to be just below the level expected of a staff assistant at Grade A5. In spite of her positive attitude and willingness to develop and improve, training received and close supervision according to her performance plan, the quality and timeliness of her work falls short of standards. She is not being attentive to details, the work continues to have many inaccuracies, has not become adequately familiar with Fund style with respect to correspondence and drafts, still needs close supervision, and cannot substitute adequately for higher level assistants.

Potential for the longer term:

Given the weaknesses referred to above, we do not believe that Ms. [“U”] has long term career prospects in the Fund. Despite all the efforts of both parties, the improvement of her performance has not been sufficient to meet the Fund standards for an A5 staff assistant, and even if she eventually may be able to perform at that level, we judge that she would not be able to advance beyond that level.”

The Channels of Administrative Review

27. Following the September 6, 2002 decision not to convert her fixed-term appointment, Applicant sought administrative review pursuant to GAO No. 31. Applicant’s Grievance was filed on February 4, 2003. The Grievance Committee considered Ms. “U”’s complaint in the usual manner, on the basis of oral hearings and the briefs of the parties. On February 9, 2004, the Committee issued its Recommendation and Report, recommending denial of Applicant’s Grievance on the ground that Applicant had not shown that the non-conversion decision was arbitrary, capricious, discriminatory or procedurally defective in a manner that substantially affected the outcome. The Committee’s recommendation was accepted by Fund management on March 2, 2004.

28. On May 26, 2004, Applicant filed her Application with the Administrative Tribunal.

Summary of Parties’ Principal Contentions

Applicant’s principal contentions

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

1. The decision not to convert Applicant’s fixed-term appointment failed to consider all of the evidence and therefore was arbitrary and capricious.
2. The non-conversion decision was affected by procedural irregularities.
3. The Fund “mismanaged” Applicant’s career.
4. The non-conversion decision was discriminatory on the basis of Applicant’s race and nationality.
5. Applicant seeks as relief:
 - a. reinstatement with a fair opportunity to demonstrate suitability for conversion to regular staff;

b. compensatory and moral damages in the amount of three years net salary; and

c. legal costs.

Respondent's principal contentions

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

1. The decision not to convert Applicant's fixed-term appointment to regular staff was taken in the reasonable exercise of managerial discretion and consistently with the applicable Guidelines for Fixed-Term Appointments.
2. The non-conversion decision was based on a proper assessment of Applicant's performance and potential for continued employment with the Fund, and did not fail to take account of any material facts.
3. Applicant was given regular feedback and monitoring, as well as ample opportunities to improve her performance but nonetheless did not attain the level required for conversion to regular staff.
4. Applicant has not shown that the non-conversion decision was affected by procedural irregularities or that the Fund "mismanaged" her career.
5. Applicant has not shown that the non-conversion decision was affected by discrimination on the basis of race or nationality.

Consideration of the Issues of the Case

Conversion of Fixed-Term Appointments

31. The case of Ms. "U", and another decided this day of Ms. "T", are the second and third in which the Administrative Tribunal has considered a challenge brought by a former staff member to the non-conversion of a fixed-term appointment. In an earlier Judgment, Ms. "C", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1997-1 (August 22, 1997), the Tribunal sustained the non-conversion decision while at the same time concluding that irregularities in the non-conversion process gave rise to a compensable claim.¹⁰

¹⁰ Ms. "C" contended that the non-conversion of her appointment was improperly motivated by retaliation for allegations she had made of sexual harassment. The Tribunal found no merit to the claim that the non-conversion decision was so motivated. Moreover, the Tribunal sustained as a reasonable exercise of the Fund's managerial discretion the decision not to convert the appointment, noting that the evidence showed a pattern of deficiencies in interpersonal skills, which reservations had been conveyed to Ms. "C" in her first performance reviews. Ms. "C", paras. 38, 41.

(continued)

32. It has been, and remains, the Fund's policy to hire virtually all new staff on a fixed-term basis preliminary to their attaining an appointment of indefinite duration,¹¹ and therefore the significance of the conversion process and the requirement that it be carried out consistently with legal norms cannot be overstated. For appointments commencing prior to December 2002, the Fund's Guidelines for Fixed-Term Appointments (August 1995) govern.¹² These Guidelines, with which Ms. "U" was provided at the time of her appointment, are intended by their terms "... to ensure that staff on fixed-term appointments gain an accurate understanding of the meaning of their fixed-term status and a realistic view of their prospects of being converted to a 'regular' (indefinite) appointment upon expiration of their fixed term." (Guidelines, p. 1.) The Guidelines inform appointees that "[t]he Fund's legal obligation does not go beyond the initial term ..." (emphasis in original) and set out three criteria for conversion, i.e. (a) performance during the fixed-term, (b) potential for a career with the Fund, and (c) the staffing needs of the organization:

"... the conversion decision depends in large part on the departmental assessment of the staff member's performance during the fixed-term appointment and the related judgment about the individual's potential for a successful career with the Fund. There

At the same time, the Tribunal held in Ms. "C" that procedural irregularities did affect the non-conversion decision and that these permitted the applicant to prevail, not wholly, but in part:

"Two irregularities stand out. First, when Ms. "C" was accorded an extension of a year and transferred to ADM, she should have been given to understand (a) precisely why she was not converted to permanent status at the end of two years and (b) what steps should be taken by her to correct her perceived problems in interpersonal relations. Neither appears to have been done. Second, at the dispositive session of 29 March 1995, where Mr. "B"'s earlier highly positive appraisal was peremptorily overturned, Ms. "C" was confronted not by her critics nor by specific and rebuttable incidents of their criticism. That in particular was a lapse in due process."

Ms. "C", para. 41. For the procedural irregularities that affected the non-conversion decision, the Tribunal awarded Ms. "C" compensation in the sum equivalent to six months of salary. Ms. "C", Decision, para. Second.

¹¹ See Guidelines for Fixed-Term Appointments (1995) ("It is the Fund's current policy to maintain a large proportion of its staff on an indefinite basis, through 'regular' staff appointments. Initially, however, virtually all new staff are hired on a fixed-term basis for two or three years (a period of five years can be considered in exceptional circumstances regarding senior staff)" (emphasis in original) and GAO No. 3, Rev. 7 (May 1, 2003), Section 3.02.1.2 ("Before being offered an open-ended appointment, staff shall be hired initially on a fixed-term appointment for a specified period of time to test their suitability for career employment.")

¹² A revised fixed-term monitoring process became effective on December 2, 2002 (and was further updated as of January 1, 2005), applicable to fixed-term staff members appointed on or after that date, providing more specific monitoring requirements. The criteria for conversion, however, remain unchanged, i.e. that the staff member meets the performance requirements established for the position, that the staff member demonstrates potential for a career in the Fund, and that the conversion decision is consistent with the Fund's staffing needs. These same criteria are given effect in GAO No. 3, Rev. 7 (May 1, 2003), Section 3.02.1.3, *see supra* note 7. It is the 1995 Guidelines that govern the instant case.

must be a clearly positive assessment for taking the important step of committing the Fund to providing a career opportunity for the individual. However, the short- and long-term staffing needs of the Fund are of paramount importance in this process.”

(Id.)

33. With respect to the monitoring and decision-making process, the Guidelines impose obligations on both the fixed-term appointee and supervisors:

“The mutual objective during the fixed-term appointment is to enable the staff member to perform at full capacity as quickly as possible, not just to maximize the contribution to the Fund’s work but also to provide an opportunity for the staff member to demonstrate potential for the future. Both the staff member and the supervisor(s) concerned have obligations in this respect.

The supervisor should endeavor to provide suitable assignments, clear expectations, appropriate guidance, and timely feedback. However, the fixed-term staff member must be prepared to seek this assistance from the supervisor(s). The staff in the Recruitment Division also stand ready to assist upon request, should the staff member or the supervisor find this necessary.”

(Guidelines, pp. 1-2.)

34. Under the Guidelines, checkpoints for performance assessment are provided at six, twelve and eighteen months after appointment. In the case of Grade A1-A8 staff, the first six months normally constitute a formal probationary period. At the time of the 12-month assessment, the “... prospects for conversion should be discussed ..., and this discussion should be reflected in the write-up, but no commitment can be made at this early stage. The complete assessment is reviewed by the Recruitment Division, and issues are raised with the staff member and the department as appropriate.” *(Guidelines, p. 2.)*

35. The formal decision as to conversion is to be taken eighteen months following the date of appointment. The Guidelines provide that, on an exceptional basis, a fixed-term appointment may be extended, as it was twice in the case of Ms. “U”, to allow for an additional period of testing:

“As an exception, if a department finds that it has inadequate information upon which to base a final decision about a fixed-term appointee’s conversion to regular staff, the department may request a one-time extension of the appointment for up to one year. A staff member receiving such an extension should not take the extended affiliation with the Fund as any kind of indication, in itself, regarding the prospects for eventual conversion.”

(*Id.*)

Did Respondent abuse its discretion in deciding not to convert Applicant's fixed-term appointment to a regular staff appointment?

36. In cases involving the review of individual decisions taken in the exercise of managerial discretion, the Administrative Tribunal consistently has invoked the standard set forth in the Commentary on the Statute which provides:

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

(Report of the Executive Board, p. 19.) As this Tribunal observed in summarizing its jurisprudence with respect to standards of review, the decision whether to convert a fixed-term appointee is essentially a “performance-based decision.” Ms. “J”, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2003-1 (September 30, 2003), para. 108. “Noting evidence in the record of performance deficiencies, the Tribunal [in Ms. “C”] deferred to management’s assessment...” that the applicant had not met the standard of performance required for conversion of her appointment to regular staff. Ms. “J”, para. 108. The Tribunal further cited the following excerpt from the Commentary on the Statute:

““This principle [of deference to managerial discretion] is particularly significant with respect to decisions which involve an assessment of an employee’s qualifications and abilities, such as promotion decisions and dismissals for unsatisfactory performance. In this regard, administrative tribunals have emphasized that the determination of the adequacy of professional qualifications is a managerial, and not a judicial, responsibility.[footnote omitted]”

(Report of the Executive Board, p. 19.)” Ms. “J”, note 27. *See also* Mr. “F”, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2005-1 (March 18, 2005), para. 70 (citing the same provision while finding “persuasive” the Fund’s position that Mr. “F” was not qualified for the position that had been redesigned following the abolition of his post). In the context of conversion of fixed-term appointments, the World Bank Administrative Tribunal (WBAT) has observed: “... the Tribunal will not substitute its own judgment for that of the Respondent on the staff member’s suitability for permanent employment.” Salle v. International Bank for Reconstruction and Development, WBAT Decision No. 10 (1982), para. 30.

37. Moreover, the discretion at issue in the conversion of fixed-term appointments is necessarily distinct from that exercised by management in the separation of a staff member for

unsatisfactory performance. Accordingly, "...the concept of unsatisfactory performance as used in respect of probation is wider than the same concept used with respect to a confirmed staff member." McNeill v. International Bank for Reconstruction and Development, WBAT Decision No. 157 (1977), para. 34. The Fund's Guidelines emphasize that "[t]here must be a clearly positive assessment for taking the important step of committing the Fund to providing a career opportunity for the individual."¹³ A fixed-term appointee has no entitlement to the continuation of his employment beyond the term of the appointment, and the burden of proof rests squarely with the applicant in challenging a decision not to convert his fixed-term appointment to regular staff. Ms. "C", para. 21.

38. While it is within the purview of the Fund's discretionary authority to decide upon a staff member's suitability for conversion to an appointment of indefinite duration, that discretion is necessarily constrained by principles of fairness, in particular adequate opportunity to demonstrate satisfactory performance and suitability for career employment. *See* McNeill, para. 44 ("While the probationer has no right to be confirmed, he has the right to be given fair opportunity to prove his ability, and the Tribunal will review whether this right has been respected and whether the legal requirements in this regard have been met.") Such opportunity should indicate that the decision "... has not been based on a performance which has manifestly not benefitted from adequate supervision and guidance" (Salle, para. 32), that the appointee has been evaluated periodically, and that he has been given adequate warning of performance deficiencies and a reasonable opportunity to remedy them. These principles are recognized in both the Fund's Guidelines and the jurisprudence of international administrative tribunals.

39. Accordingly, the following questions arise. Was the non-conversion of Ms. "U"'s appointment taken consistently with the Fund's internal law and general principles of international administrative law governing conversion of fixed-term appointments? Did Applicant's supervisors provide Ms. "U" with appropriate monitoring and feedback? Was the non-conversion of Ms. "U"'s fixed-term appointment affected by procedural irregularities that give rise to a compensable claim?

40. The record indicates that Ms. "U"'s performance as perceived by her supervisors over time was mixed. At various points, effort and improvement were noted, while the overall level of Applicant's performance was assessed as below the norm required for conversion. Fluctuation in the assessment of a fixed-term appointee's performance, such as was recorded in the case of Ms. "U", does not, of itself, serve as an indication of any irregularity of process.¹⁴

¹³ By contrast, a staff member who already has attained an appointment of indefinite duration is presumed to continue in the Fund's employment in the absence of a showing of unsatisfactory performance, consistent with the requirements of GAO No. 16. The Fund observes in its pleadings in this case that in cases of dismissal for unsatisfactory performance the burden rests with the Fund.

¹⁴ Such fluctuations in perceptions of Applicant's performance are to be contrasted with the facts of Ms. "C", in which the Tribunal concluded irregularities marked the process of conversion in part because aspects of the appraisal of Ms. "C"'s performance as assessed in her APR were "...sharply reversed by her supervisor and the

(continued)

“It is also of the essence of probation that the evaluation of the probationer’s suitability for Bank employment may be subject to changes during his period of probation. Favourable appraisals at one stage of this period do not dictate confirmation of employment, any more than unfavourable ones necessarily lead to termination of employment.”

Salle, para. 28.

41. What is significant is that in the case of Ms. “U” cautionary evaluations repeatedly were communicated. At the same time, Ms. “U”’s supervisors reasonably offered encouragement at signs of improvement, most particularly by extending for two 6-month intervals the opportunity for Applicant to demonstrate her suitability for a career with the Fund. It is noted that the second 6-month extension of Applicant’s fixed-term was effected on the ground that “[a]lthough she has not been learning the skills quickly enough to justify a conversion now, Ms. [“U”] is keen and anxious to improve her skills” (SPM’s Memorandum to HRD of March 13, 2002.)

42. The periodic appraisals, both formal and informal, of Applicant’s performance nonetheless demonstrated—or should have demonstrated—to Ms. “U” that the Fund retained doubts about the prospects of her conversion to an appointment of indefinite duration. *See, e.g.*, 2001 Annual Performance Report (Ms. “U” “...will need to show significant improvement at the end of the extension period” to justify conversion.) That Applicant’s fixed-term appointment was extended for a further period of development and testing should have signaled continued lack of demonstrated fitness for conversion of her appointment:

“Neither does the fact that the probationary period is extended give any decisive indication as to the likelihood of ultimate confirmation. Although continuation beyond the normal probationary period demonstrates that the staff member’s performance is not so substandard as to justify immediate termination, it ought properly to alert him to the fact that up to that date his performance has not warranted the immediate grant of a permanent appointment and that a satisfactory level of performance must be achieved before confirmation becomes appropriate.”

reviewing officer a month later.” (Para. 40.) *Compare Ms. “C” with McNeill*, para. 47 (“The record also shows that the Applicant was advised very early of the deficiencies in his communication skills. The Tribunal cannot accept, therefore, the Applicant’s view that the warnings given to him by Ms. X on the occasion of his interim evaluation came, so to speak, out of the blue and that his attention had previously never been drawn to any shortcoming or deficiency.”)

Salle, para. 28. *See also* Fund's Guidelines, p. 2, quoted *supra* para. 35.

43. Moreover, at intervals throughout Ms. "U"'s employment, she was provided with clear indications of the areas of required improvement, as well as assistance in meeting these goals, most particularly through transfer to a Division in which she would have both additional opportunities to apply and develop her skills and the close supervision of an experienced senior assistant. The conduct of Applicant's managers in this regard may be compared with the facts reviewed in Ms. "C", in which the Tribunal found that among the failures giving rise to a compensable claim was that "... the Fund should have taken steps to ensure that, when transferred to ADM, and in the course of her work there, Ms. "C" was fully aware of her need to improve her interpersonal skills and the possibilities of so doing." Ms. "C", para. 42. By contrast, Ms. "U" was advised on a series of occasions of shortcomings in the speed and accuracy of her work and aspects of her communication skills. The documentation of her first 6-month extension and transfer to "Division ii" noted:

"A particular weakness is a continuing lack of accuracy in her typewritten work from heavily edited drafts--a core competency for staff assistants. Two other areas for improvement and development are to take the initiative in asking questions to ensure she has understood instructions correctly and to seek advice in prioritizing work at busy times."

(Expiration of Fixed-Term Appointment Form of August 15, 2001.)

44. As set out in the Fund's Guidelines, "[t]he supervisor should endeavor to provide suitable assignments, clear expectations, appropriate guidance, and timely feedback." Among the indicia of adequate supervision is that the fixed-term appointee is "... exposed to the types of tasks which would have been required of him as a permanent employee and that he had been given the opportunity to benefit from [his supervisors'] guidance and comments." Salle, para. 33.

45. It is recalled that Ms. "U", while assigned to "Division i," alerted the Office Manager that she did not believe that she was being provided in that assignment with adequate opportunities to develop her skills as a Fund staff assistant.¹⁵ The record indicates that it was in recognition of the importance of providing Applicant a fuller opportunity to gain exposure to the skills that would be required for a career with the Fund, that Ms. "U"'s fixed-term appointment was extended and she was transferred to "Division ii," in which she was to have "daily opportunities to hone her editing and proofing skills." (Expiration of Fixed-Term Appointment Form of August 15, 2001.) As the WBAT has recognized, "... supervision and guidance do not necessarily take the form of recorded conversations or otherwise specific acts or activities; they may consist as well in day to

¹⁵ As set out in the Fund's Guidelines, "[t]he supervisor should endeavor to provide suitable assignments, clear expectations, appropriate guidance, and timely feedback. However, the fixed-term staff member must be prepared to seek this assistance from the supervisor(s)" The action of Ms. "U" and her supervisors in this regard was consistent with that contemplated by the Guidelines.

day work and contacts with supervisors and colleagues and in the exposure to the kind of tasks which the staff member would have to accomplish if his appointment were to be confirmed.” Salle, para. 36.

46. Applicant contends that the Fund already had made up its mind not to convert Applicant’s appointment and did not consider all of the evidence, and that even if all of the evidence was considered management failed to weigh it appropriately and ultimately drew an unsubstantiated conclusion. For the following reasons, the Tribunal cannot sustain Applicant’s contention.

47. This Tribunal has emphasized “[t]he importance of performance evaluation systems in avoidance of arbitrariness and discrimination...,” Ms. “C”, para. 36, citing Lindsey v. Asian Development Bank, AsDBAT Decision No. 1 (1992). *See also* Salle, para. 46 (“[t]he Respondent’s duty to evaluate periodically the probationer’s work is no doubt an important one, because it gives the staff member an opportunity to assess from time to time his deficiencies and to improve his performance before a final decision is made on his confirmation.”)

48. Moreover, “... it is the obligation of the Respondent, when assessing the performance of staff members for a given period of review, to take into account all relevant and significant facts that existed for that period of review.” Romain (No. 2) v. International Bank for Reconstruction and Development, WBAT Decision No. 164, para. 19. That the Fund met this obligation in the case of Ms. “U” is evident from the record. As reviewed above,¹⁶ the Chief of “Division i” in completing the 2000 APR expressly took note of and attached to the APR the mid-year performance memorandum prepared by the Administrative Officer who supervised Ms “U” during the period in which she had served as a Departmental “floater.” Similarly, the “Division ii” Chief testified to a collaborative process in preparing Applicant’s 2001 APR, by which he solicited input from the earlier Division Chief under whom Applicant had served during a portion of the relevant appraisal period. Finally, the Chief of “Division ii” testified to his direct observations of Ms. “U”’s performance:

“There were some improvements in communications, improvements in talking with economists, in reaching out. In terms of the problem with accuracy and paying attention to details and so on, quite frankly, I was quite disappointed. In both my direct experience in getting those memos up to management and again, also the production of the staff report last year, there was just an inordinate amount of mistakes that ended up in the final document. That was disconcerting.”

49. Accordingly, the Tribunal finds no merit to Applicant’s contention that Respondent failed to take account of relevant evidence or that the SPM could not reasonably have reached the decision not to convert Ms. “U”’s appointment. The Tribunal concludes that there was no

¹⁶ *See supra* The Factual Background of the Case.

irregularity of procedure and no “career mismanagement” with respect to the non-conversion of Ms. “U”’s fixed-term appointment. *Compare Toivanen v. Asian Development Bank*, AsDBAT Decision No. 51 (2000), para. 50 (non-conversion decision invalid where it was “...based not on facts accurately gathered, but rather on unsubstantiated beliefs, and was induced by suppression and misrepresentation of material facts, as to the Applicant’s past performance, her suitability for further employment, and her skills.”)

50. Finally, Applicant contends that the decision not to convert her fixed-term appointment was affected by discrimination on the basis of her race and nationality, a serious accusation implicating the N Rules and later adopted policies prohibiting discrimination in the Fund. *See generally Mr. “F”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005), paras. 81-84. Ms. “U”, however, advances no specific allegations in support of this claim, still less proof of discrimination, asserting that her departure from the Fund resulted in a “discriminatory impact” by decreasing the number of persons in her Department of her racial background. The Tribunal finds this alleged fact far from probative of discrimination,¹⁷ and concludes that Applicant has not shown that the decision not to convert her fixed-term appointment to a regular staff position was affected by discrimination on the basis of her race or nationality.

51. In sum, in light of its review of the extensive evidence of the issues of the case, the Tribunal concludes as follows. Applicant repeatedly was warned of the shortcomings in her performance. These warnings were consistent with the feedback required of supervisors by the Guidelines for Fixed-Term Appointments. Applicant was assigned to an experienced Senior Administrative Assistant who, as one of her principal responsibilities, engaged in detailed monitoring and coaching of Applicant’s performance. In addition, the management of Applicant’s Department sought and received the guidance of the Staff Development Division of the Human Resources Department, which provided additional assistance in seeking to advance Ms. “U”’s skills so that she might attain a degree of performance and promise for future Fund assignments that would justify her conversion to regular staff. In connection with her extension and transfer, and on a number of occasions before and after, Ms. “U” was advised of continued shortcomings in her performance, perhaps most critically in respect of the accuracy of her typewritten work, which was cited by her supervisors as a core competency for staff assistants.

52. While Applicant contended that her initial assignments in the Department failed to expose her to adequate opportunities for skill development, her transfer to “Division ii” and assignment with the Senior Administrative Assistant made up for any possible deficiency in the opportunities afforded Applicant to prove her skills as a Staff Assistant. Finally, the management of Applicant’s Department engaged in a collaborative process in completing her Annual Performance Reviews, taking into account the views of former supervisors when she transferred between Divisions of the Department.

¹⁷ *See Ms. “Z”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-4 (December 30, 2005), para. 74 (rejecting the view that statistics alone prove discrimination).

53. The Tribunal concludes that while, at various points, Applicant was seen by supervisors as making progress, in the end (following two extension periods) this progress remained, in their view, insufficient and Ms. "U"'s potential for a Fund career unproven in the judgment of those properly charged with making the conversion decision. When managers take such a decision, as the evidence shows they have in this case, with deliberation and in the absence of improper motive, it is not for the Tribunal to substitute its judgment for their considered determination.

Decision

FOR THESE REASONS

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

The Application of Ms. “U” is denied.

Stephen M. Schwebel, President

Nisuke Ando, Associate Judge

Michel Gentot, Associate Judge

Stephen M. Schwebel, President

Celia Goldman, Registrar

Washington, D.C.
June 7, 2006