

ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

JUDGMENT No. 2007-4

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

Introduction

1. On May 22 and 23, 2007, the Administrative Tribunal of the International Monetary Fund, composed of Judge Stephen M. Schwebel, President, and Judges Nisuke Ando and Michel Gentot, Associate Judges, met to adjudge the case brought against the International Monetary Fund by Ms. “BB”, a staff member of the Fund.
2. Ms. “BB” contests decisions of the Fund, including her performance rating for 2002, the percentage of her merit increase, and her lack of promotion to Grade A14. Applicant additionally maintains that she was subjected to harassment and a hostile work environment in contravention of the Fund’s internal law, and that these factors impermissibly affected the evaluation of her performance and impaired her career and her health. Applicant furthermore contests the Fund’s decision to discipline her for misconduct, pursuant to GAO No. 33, for alleged improper use of confidential personnel information in pursuing her request for administrative review of the above claims. Finally, Applicant challenges actions of the Fund’s Grievance Committee and Fund Management relating to the Grievance Committee’s review of her Grievance.
3. Respondent, for its part, maintains that it did not abuse its discretion in taking the decisions relating to Applicant’s performance rating, merit increase or career progress. The Fund contends that these decisions were reasonably supported by Applicant’s performance and were not influenced by any alleged harassment on the part of her supervisor. Additionally, the Fund maintains that Applicant is not entitled to compensation for workplace harassment additional to that already granted by the Fund on the recommendation of the Grievance Committee, a grant that the Fund asserts does not represent any acceptance of liability on its part. The Fund furthermore urges the Tribunal to sustain the disciplinary action against Ms. “BB” for misconduct pursuant to GAO No. 33. Finally, Respondent maintains that acts challenged by Applicant relating to the review of her Grievance are outside the Administrative Tribunal’s jurisdiction.

The Procedure

4. On November 9, 2005, Ms. “BB” filed an Application with the Administrative Tribunal. The Application was transmitted to Respondent on November 15, 2005. On November 28, 2005, pursuant to Rule IV, para. (f),¹ the Registrar circulated within the Fund a notice summarizing the

¹ Rule IV, para. (f) provides:

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

(continued)

issues raised in the Application. Respondent filed its Answer to Ms. “BB”’s Application on December 16, 2005.

5. Pursuant to Rule XVII, para. 3,² the President of the Administrative Tribunal suspended the pleadings so that the Tribunal could take account of Applicant’s requests for production of documents (*see* below). On February 16, 2006, the parties were informed that the requests had been denied,³ and the Fund’s Answer was transmitted to the Applicant.

6. On March 16, 2006, Applicant submitted her Reply. The Fund’s Rejoinder was filed on April 19, 2006.

Request for Production of Documents

7. Pursuant to Rule VII, para. 2(h)⁴ and Rule XVII⁵ of the Tribunal’s Rules of Procedure, in her Application, Ms. “BB” made the following requests for production of documents:

...

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

² Rule XVII, para. 3 provides:

“The Tribunal may, subject to Article X, Section 1 of the Statute, order the production of documents or other evidence in the possession of the Fund, and may request information which it deems useful to its judgment, within a time period provided for in the order. The President may decide to suspend or extend time limits for pleadings to take account of a request for such an order.”

³ At the same time, the Tribunal requested that Applicant submit, along with her Reply, a document disputed between the parties. *See infra*.

⁴ Rule VII, para. 2(h) provides:

“2. Each application shall contain:

...

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

⁵ Rule XVII provides:

(continued)

- “1. All documents showing the staff members and employees in [Applicant’s organizational unit, i.e. “Office 1”]⁶ who have been promoted to grade A14 and above since January 1, 2003, and showing the grade and date of promotion, and the reasons why those staff members and employees were promoted.
 2. All documents showing the merit increases, performance ratings, and staff members’ quartiles that were in fact given to all [“Office 1”] employees, including any staff members or employees who left [“Office 1”], for calendar year 2002, and what each staff member or employee received.
 3. All documents showing that the Applicant’s performance during the 2002 calendar year was insufficient for her promotion to grade A14 compared to that of her peers in [“Office 1”].”
8. In accordance with Rule XVII and Rule VIII, para. 5⁷, Respondent had the opportunity to present its views on the requests.

“Production of Documents

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

⁶ The Tribunal’s “Revised Decision on the protection of privacy and method of publication” (June 8, 2006), para. 3, provides in part: “The departments and divisions of the Fund shall be referred to by numerals unless specification is desirable for the comprehensibility of the Judgment or Order.”

⁷ Rule VIII, para. 5 provides:

9. As to Request 1, Respondent partially complied with the request by attaching to its Answer all notices of promotion to Grade A14 for the period requested, notices that are routinely circulated to the staff of the Fund. At the same time, the Fund objected to the portion of Applicant's request seeking the reasons for promotions, on the ground that production of responsive documents, such as Annual Performance Reports, would infringe on the privacy interests of other staff members. Likewise, as to Request 2, seeking documentation of the merit increases, performance ratings and staff members' salary quartiles for those staff serving together with Ms. "BB" in her organizational unit, the Fund objected that the responsive documents would infringe on the privacy of other staff members. Respondent has attached to its Rejoinder a redacted merit matrix. As to Request 3, Respondent maintained that it does not have in its possession any additional documents responsive to Applicant's request for documents relating to her performance compared to that of her peers.

10. On February 16, 2006, following consideration of the views of the parties, the Tribunal decided to deny Applicant's request for production of documents on the following grounds. As to Requests 1 and 2, the Tribunal sustained Respondent's objection that additional documentation relating to the performance and merit increases of other staff members would infringe on the privacy of those individuals. (Rule XVII, para. 2.) *See Mr. M. D'Aoust (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-3 (May 22, 2007), para. 10. As to Request 3, Applicant had not proffered any evidence suggesting that the Fund had in its possession additional responsive documents and, accordingly, Applicant had not shown that she had been denied access to requested documents by the Fund, as required by Rule XVII, para. 1. *See Ms. "W", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-2 (November 17, 2005), para. 14.

Request to strike documents from the record

11. Respondent requests that the Tribunal exclude from the record several documents submitted by Applicant. The first document contains Applicant's notes relating to her interactions with the Fund's Ombudsperson. The Fund maintains that because the Ombudsperson's Terms of Reference bar the Ombudsperson from being called as a witness before the Grievance Committee or Administrative Tribunal, the Fund would be prejudiced by the introduction into the record of Applicant's account of their interaction.

12. The Fund additionally objects to the inclusion in the record of documents relating to Applicant's health, on the ground that they cannot be rebutted by the Fund without a waiver of confidentiality by Applicant in respect of additional medical records. Moreover, in the Fund's view, the exhibits would be of no probative value as they do not assess the cause of symptoms or demonstrate any link between actions of the Fund and the Applicant's reported condition.

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

13. The Tribunal notes that Applicant testified before the Grievance Committee that she had experienced adverse health effects that she attributed to alleged harassment by her supervisor. Additionally, the HRD Director (the Fund's witness) testified to her own interaction with the Ombudsperson on the case of Ms. "BB", asserting that the Ombudsperson had requested that the HRD Director seek a transfer for Ms. "BB" because of problems she was encountering in her work relationship with "Supervisor 1". According to the testimony of the HRD Director, "... she [the Ombudsperson] felt that it [i.e. the work relationship] may be affecting [Ms. "BB"]'s health."

14. The Tribunal decides not to strike the health-related documents proffered by Applicant. It is unclear that Applicant has refused to submit related health documentation. Whether the documents in the record have any probative weight can be considered when the Tribunal addresses the question of liability, if any, of the Fund for harassment of Applicant and, in the event that it should find such harassment, the extent of damages arising out of that harassment.

15. Applicant's own notes as to her interaction with the Ombudsperson may be distinguished from a report that the Ombudsperson herself has generated. *See Mr. "F", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005), para. 9 and note 6 (denying request for report of Ombudsperson on personnel problems in Mr. "F"'s work unit). The Tribunal concludes that these notes should not be struck from the record.

Ms. "BB"'s January 13, 2004 Declaration

16. On February 16, 2006, the Tribunal requested and Applicant complied with the request to submit with her Reply the Declaration of January 13, 2004. In the view of the Tribunal, the contents of this document are essential to the disposition of Applicant's claims (a) that the HRD Director in taking her decision to discipline Applicant for misconduct took account of impermissible factors in violation of the Fund's internal law, and (b) that the Fund improperly submitted the document to the Fund's Grievance Committee, allegedly in violation of a "non-disclosure agreement."⁸

Request for Oral Proceedings

17. In her Application, Applicant requested oral proceedings, pursuant to Rule VII, para. 2(i)⁹ and Rule XIII, para. 1.¹⁰ Respondent opposed this request on the ground that the ample record before the Tribunal rendered additional oral proceedings unnecessary.

18. In accordance with Rule XIII, para. 1 of the Tribunal's Rules of Procedure, "[o]ral proceedings shall be held if ... the Tribunal deems such proceedings useful." The Tribunal in this case has the benefit of the transcript of the full evidentiary hearing before the Fund's Grievance Committee, at which Applicant, three supervisors, two co-workers and the Director of Human Resources ("HRD") 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.

⁸ *See infra* Consideration of the Issues of the Case; Alleged Misconduct.

D'Aoust, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1996-1 (April 2, 1996), para. 17.

19. In view of the extensive Grievance Committee record and the written documentation of the case, the Tribunal decided not to hold oral proceedings.

Request for Anonymity

20. Pursuant to Rule XXII,¹¹ Applicant requests that her name not be made public by the Tribunal. The Tribunal accedes to this request in view of the nature of this case and evidence

⁹ Rule VII, para. 2(i) provides:

“.... Each application shall contain:

....

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

¹⁰ Rule XIII, para. 1 provides:

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

¹¹ Rule XXII provides:

“Anonymity

1. In accordance with Rule VII, Paragraph 2(j), an Applicant may request in his application that his name not be made public by the Tribunal.

2. In accordance with Rule VIII, Paragraph 6, the Fund may request in its answer that the name of any other individual not be made public by the Tribunal. An intervenor may request anonymity in his application for intervention.

3. In accordance with Rule VIII, Paragraph 5, and Rule IX, Paragraph 6, the parties shall be given an opportunity to present their views to the Tribunal in response to a request for anonymity.

4. The Tribunal shall grant a request for anonymity where good cause has been shown for protecting the privacy of an individual.”

brought to light in the course of it. The Tribunal so concludes on the basis that the case involves allegations of misconduct against Applicant, as well as allegations by Applicant of mistreatment by her supervisor. *See Ms. "AA", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2006-5 (November 27, 2006), paras. 14-15.

The Factual Background of the Case

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

Overview

22. Ms. "BB" began her employment with the Fund in October 1998 as a contractual employee in "Office 1" (or "the Office"), one of the organizational units of "Department 1". In September 2001, as the result of competition for a vacancy, she was appointed as a staff member of the Fund, remaining in "Office 1". Applicant alleges that beginning in October 2000 she became subject to harassment and a hostile work environment on the part of "Supervisor 1", and that the mistreatment continued for nearly three years, i.e. until Ms. "BB" transferred from her assignment with the Office.

23. In August 2003, Applicant filed a request for administrative review, contesting her merit increase for the year 2002, her performance rating and lack of promotion to Grade A14, as well as harassment by "Supervisor 1". A misconduct investigation was initiated against Applicant for alleged improper use of confidential personnel information in preparing the request for administrative review. She was placed on administrative leave with pay pending the outcome of the misconduct proceedings. In February 2004, Applicant was disciplined for misconduct. On March 1, 2004, Applicant returned to work at the Fund, taking up an assignment in "Department 2".

Applicant's Work in "Office 1"

24. During the period of Applicant's employment in "Office 1", the Office was directed by "Office Director 1", who served as Director from September 1999 until March 2003 and "Office Director 2", who served as Assistant Director until May 2002 (when he transferred to another assignment) and later returned as Director of the Office in March 2003. During the period of his absence, "Supervisor 1" served as Acting Assistant Director.

25. During Applicant's employment in "Office 1", she undertook several large work projects under the direction of "Supervisor 1" and each of the Office Directors. Elements of Applicant's work relationships with her supervisors are considered below.¹²

26. On her 2002 Annual Performance Report ("APR"), Applicant was rated "2" (on a scale of "1" to "4", "1" being "outstanding"), with a merit increase of 3.0%. The APR was signed by "Supervisor 1" and "Office Director 2". The majority of comments were quite positive, including

¹² See *infra* Consideration of the Issues of the Case; Alleged Harassment.

“very strong analytical skills,” “extremely articulate” oral communication skills, and “writing is also very articulate.” At the same time, the APR encouraged “continued improvements in balancing timeliness and scope/precision” and “more frequent, informal progress reporting especially as regards work product schedules.” For her part, Applicant noted under “Career and Work Interests,” that she sought: “Inter-departmental mobility, post-haste, for the good of the department, my personal well-being and for satisfying career involvement and development opportunities.”

Applicant’s Request for Administrative Review and the Charge of Misconduct

27. On August 8, 2003, pursuant to GAO No. 31, Applicant through counsel filed with “Office Director 2” a request for administrative review “... of the May 19, 2003 decision by you as director and [“Supervisor 1”] as the primary supervisor to give Ms. [“BB”] a 3.0% merit award for the period of January 1, 2002 to December 31, 2002, on the ground that the decision violates the Fund’s personnel policies because it is erroneous, disregards essential facts, was improperly influenced by irrelevant factors, including bias, discrimination and retaliation, and is inconsistent with Ms. [“BB”]’s performance and work output for the year. I also seek administrative review of the harassment, discriminatory and retaliatory treatment of Ms. [“BB”] since October, 2000 by her primary supervisor.”

28. Specifically, the request for administrative review alleged that Ms. “BB” received a 3% merit increase for her 2002 performance “even though” she received a “2” performance rating, and that this merit increase was in “striking disparity” to the merit increases given to other A-level professional staff in “Office 1”. The request further alleged that “[t]his disparate treatment which Ms. [“BB”] received constitutes discrimination and retaliation in violation of the Fund’s personnel policies,” and referred to a “failure to communicate” with Ms. “BB”, which “... constitutes a pattern of acts (or non-acts) of discrimination, retaliation, harassment and bias of which Ms. [“BB”] has suffered at the hand of [“Supervisor 1”] since October, 2000 which were designed to isolate Ms. [“BB”] from much of [“Office 1”]’s office life and impair her work and career in the Fund.”

29. The request for review also made the following allegations with regard to lack of promotion:

“When Ms. [“BB”] inquired about receiving a promotion to grade A14 in each of the past three years, she was told that the promotion spots, when they became available, were being preserved for others. The reasons Ms. [“BB”] did not receive a promotion were not made clear, other than that excellent performance (which was not further explained) and extra effort was required, and that seniority was also a factor. On the latter point, Ms. [“BB”] indicated that she had been in [“Office 1”] and the Fund longer than a male European [staff member] who was promoted to A14 this year. She also noted that three prior promotions to grade A14 within [“Office 1”] went to females who were United States nationals. This is inconsistent with the Fund’s policies on discrimination.”

As to the charge of harassment, Applicant maintained:

“In late 2000, without justification [“Supervisor 1”] criticized virtually everything Ms. [“BB”] wrote or verbally proposed, including non-work related matters. Since then the situation deteriorated, and [“Supervisor 1”] made comments to others and engaged in actions (and failed to interact) in order to isolate Ms. [“BB”] in an attempt to cast doubt on her productivity, work methods, and fitness to work in the Fund.

.... this treatment most recently manifested itself in the 3% merit award she received on May 19, 2003.

In short, [“Supervisor 1”]’s actions and inactions amount to bullying and harassment.... Ms. [“BB”] has even experienced stress-related health problems, including elevated blood pressure which her family has a history of, as a result of the supervisory treatment.”

The request for review also asserted that while Ms. “BB” had sought to improve the working relationship by “dealing proactively with the issues,” she had also turned to intervention resources, including the Ethics Officer, Harassment Advisors and Ombudsperson. Finally, she alleged, the failure of “Office 1” to address “Supervisor 1”’s actions further contributed to the deterioration of the work environment for Ms. “BB”.

30. Applicant appended to her request for administrative review several tables of data showing, by name, the salary, merit increase, and performance ratings of all “Office 1” staff, as well as other data relating to the work products of the Office and overtime hours of its personnel. In addition, she included data indicating, by grade level, the numbers of staff throughout the Fund who had received merit increases within a particular range.

31. Upon noting the personnel data that had been included in Applicant’s request for review, “Office Director 2”, with whom the request had been lodged pursuant to GAO No. 31, brought the request to the attention of the Acting Director of the Department of Human Resources (“HRD”).

32. By memorandum of August 21, 2003, the Acting Director of HRD requested the Fund’s Ethics Officer to investigate “apparent misconduct involv[ing] improper access to and use of confidential personnel information, including the provision of such information to person(s) outside the Fund.” On the same date, the Acting HRD Director advised Ms. “BB” of this action, noting:

“It thus appears that confidential personnel information pertaining to your colleagues in [“Office 1”] and the Fund staff at large was

improperly accessed, and that such information was used, including its provision to person(s) outside the Fund, for purposes of your own case.”

33. Applicant was further informed that, consistent with GAO No. 13, Rev. 5, Section 9.01 and GAO No. 33, Section 10.08(ii), she was being placed on administrative leave with pay, which was later extended until a decision on the alleged misconduct was reached by the HRD Director in February 2004. Finally, Ms. “BB” was advised that, as to the request for administrative review, she could proceed directly to the Grievance Committee.

34. On September 3, 2004, the Ethics Officer interviewed Ms. “BB” in the presence of her counsel, and on September 10, 2003, Applicant through counsel set out her views on the matter as follows. Ms. “BB” identified the issue as “... whether use of the data was proper, when the data was used by Ms. [“BB”] in good faith in exercising her right through her attorney representative to request administrative review under GAO 31....,” in view of generally recognized principles of law including the right to be heard and the right to be represented by counsel. She asserted that she used the data solely for purposes of her administrative review and disclosed the data only to her counsel for that purpose. Additionally, she maintained that she was “obligated to use the facts and data known to her as part of her administrative review,” citing GAO No. 31, Section 6.01.2, which provides “... in order to facilitate a thorough and expeditious review of the matter, staff members requesting such a review should endeavor to provide the following information in writing...(3) all facts known to the staff member that tend to support his or her allegations, including, in the case of a discretionary decision, the factual bases for the contention that the decision was arbitrary, capricious, or discriminatory.” Applicant concluded that “[t]aking any adverse action against Ms. [“BB”] for exercising her rights, including her right to administrative review, constitutes retaliation in violation of GAO 31.”

35. Pursuant to the Deputy Managing Director’s Memorandum to Staff of August 10, 2001 “E-mail and the Internet – Updated Guidelines for Appropriate Use,” para. 8, the Ethics Officer in the course of his investigation was authorized to access Ms. “BB”’s computer hard drive and emails. Based on the Ethics Officer’s review of Applicant’s computer records, he found: 102 downloads of PeopleSoft data, including a 157 page list of merit increases given to all Fund staff grades A-2 through B-5, for 2003; 21 pages of “chrons”¹³ pertaining to “Office 1” staff; and 100 BRS reports for “Office 1” for various pay periods during 2000-2003. Some of the data had been sent by email to Ms. “BB”’s counsel and to her home email account. (Ethics Officer’s Report of Investigation.)

36. For purposes of her work responsibilities, Applicant had access to Fund-wide confidential personnel databases, as well as an additional data system specific to “Office 1”, and, according to the Report of the Ethics Officer, she “readily acknowledge[d]” using these systems to produce the data included in the request for administrative review and the attachments to it, and sending

¹³ The “chron” is a computer-generated listing maintained on each staff member, chronicling each personnel action taken, such as promotion, transfer, merit increase, the dates thereof, associated salary information and performance ratings, as well as identifying personal data.

these via email outside the Fund to her counsel. Additionally, the Ethics Officer found that Ms. “BB”:

“... did not believe she was doing anything wrong – but simply adhering to the provisions of paragraph 6.01.2 of GAO-31, which requires staff to attach all relevant documents **in their possession** to a Request for Administrative Review. She reasoned that she was only providing the data to its official Fund custodian (i.e. HRD) which, in any event already had custody and control of it.”

(Ethics Officer’s Report of Investigation.) (Emphasis in original.)

37. On September 17, 2003, the Ethics Officer issued his Report of Investigation, which described his findings in detail, concluding as follows:

“... [Ms. “BB”]’s search for, and extraction of, the relevant data was not proper...[A]lthough [Ms. “BB”] had authorized ‘access,’ in a general sense, to the entire body of data included in the ... modules to which she had been given access for business reasons, she could not have searched those modules and extracted relevant bits of confidential information in order to support her Request for Review without violating Fund regulations which clearly prohibit such use. I simply cannot accept the proposition that the aforementioned language of GAO-31 was intended to require (or even permit) staff to scour confidential Fund databases to which they might have authorized access (for business reasons) in order to select those data which, in their view, support a particular position in an individual Request for Review, or grievance.”

Accordingly, the Ethics Officer concluded that Ms. “BB” had “...**retrieved and used** confidential Fund information, pertaining to her colleagues, for her own **private advantage** in violation of N-Rule 6, as well as the Code of Conduct and Section 7.01(vi) of GAO 33.” (Emphasis in original.) The Ethics Officer additionally noted what he described as Ms. “BB”’s “considerable good faith” in initially seeking guidance from Fund officials as to what information properly could be included in a request for administrative review, specifically mentioning Fund databases; her inquiries had not elicited any substantive response.

38. On the basis of the Ethics Officer’s Report of Investigation, on September 23, 2003, the Acting Director of HRD formally charged Applicant with misconduct pursuant to GAO No. 33, Section 10.02, informing her of the opportunity to respond to the charge.

39. Applicant responded through counsel on October 7, 2003, contending that using confidential information in a request for administrative review does not constitute use for a “private advantage” (Rules N-6, N-11) because the purpose of GAO No. 31 is to “facilitate the ... resolution of disputes.” (GAO No. 31, Section 1.) The “private advantage” referred to in the

Fund Rules, Applicant asserted, is “an advantage obtained by fraudulently using the information for private gain, not by using it to support a request for administrative review under the Fund’s own internal rules which were expressly adopted by management in the form of GAO 31 to serve the interest of the Fund in reviewing employment disputes.” Applicant additionally noted the example given in the Code of Conduct, para. 20, relating to “private business dealings.” Finally, Applicant maintained that the right to be heard, as a generally recognized principle of international administrative law, is a right to which the Fund’s rules on the use of confidential information are subordinate.

40. Further clarification was sought by the HRD Director on October 9, 2003, and Applicant responded on October 24, 2003.

41. Settlement negotiations followed, during which, consistent with customary practice, the parties agreed that offers or admissions made in the course of such discussions would not be admissible in the event of subsequent litigation.

42. On January 13, 2004, Ms. “BB” executed the following Declaration:

“DECLARATION OF [Ms. “BB”]”

...

1. I agree that it is not permissible under the Fund’s regulations for a staff member to use confidential information, including the confidential personnel data and information of other Fund employees, for private use.
2. I now know that the Fund considers the use of confidential personnel data and information by a staff member in seeking the remedies available under the Fund’s internal employment dispute resolution mechanisms to be a private use.
3. I now know that the Fund considers seeking remedies under the Fund’s internal employment dispute resolution mechanisms to not be part of a staff member’s job function.
4. I agree that confidential personnel data and information which a staff member is given access to for purposes of their job function, whether in [“Department 2”] or any other department in the Fund, cannot be accessed or used for any purpose other than their job function.
5. I agree that it is not permissible under the Fund’s regulations for confidential personnel data and information of other

Fund employees to be accessed, viewed, or used by me for any purpose which is not part of my job function, without the prior approval of my supervisor or other Fund employee(s) authorized to grant such approval.

6. I assure the Fund that I understand the serious institutional need the Fund has to ensure that its staff be granted access to confidential personnel data and information only for the purposes of their job function, and that the Fund must have a high degree of trust and confidence that I will not access or use the confidential personnel data and information of other Fund employees for any purpose which is not part of my job function.

7. I fully understand the Fund's need to protect the privacy of the Fund's employees, and for the Fund to ensure that the privacy of the Fund's employees is not compromised by permitting access to the confidential personnel data and information of other Fund employees by me for any purpose which is not part of my job function.

8. I fully understand that any future unauthorized disclosure or use of the confidential personnel data and information of other Fund employees to or by persons outside the Fund for any purpose which is not part of my job function is considered by the Fund to constitute misconduct under the Fund's regulations, and such misconduct would be grounds for the Fund to impose disciplinary action against me, including termination from employment.

9. I fully understand that I have the same rights as all other Fund staff in accessing and using confidential personnel data and information obtained through the discovery processes provided under the Fund's internal employment dispute resolution mechanisms.

....”

The Disciplinary Decision

43. On February 25, 2004, the HRD Director rendered her decision on Ms. “BB”'s alleged misconduct, announcing that she had decided to impose disciplinary measures less severe than termination of employment. The Decision provides in part as follows:

“The essential facts in this matter are straightforward and are not in dispute. As you acknowledged to the Ethics Officer, you retrieved and downloaded confidential Fund data pertaining to your colleagues in [“Office 1”] and on Fund staff generally for the purpose of preparing your Request for Administrative Review in August 2003; you shared some of these data with your attorney; and you used the confidential personnel data to support your arguments in your Request for Administrative Review and included some of the data in your submission to the Director [of “Office 1”]. While you had general access to the confidential personnel data by virtue of your position in [“Office 1”], you acknowledge that the acquisition and use of the data in question was not required by or connected to the performance of your assigned duties in [“Office 1”]; its acquisition and use were rather for the sole purpose of preparing your Request for Administrative Review.”

The HRD Director concluded that Ms. “BB”’s “retrieval and use of confidential Fund data on Fund employees for [her] private advantage violated Fund rules and regulations; it also amounted to a very serious violation of the privacy of your [“Office 1”] colleagues and other staff, and of the trust that the Fund placed in you as an official with privileged access to such data. Such acquisition and use of confidential personnel information constitutes serious misconduct on your part.”

44. As to the penalty, the HRD Director noted:

“... subsequent to our meeting, I have received and taken account of your January 13, 2004 Declaration, in which you state, among other things, your agreement with the principle that ‘confidential personnel data and information which a staff member is given access to for purposes of their job function, whether in [“Department 2”] or any other department in the Fund, cannot be accessed or used for any purpose other than their job function.’ I accept this statement and the others in your Declaration as an acknowledgement of your understanding and acceptance of responsibility for the proper use of confidential information, and an essential assurance that your improper acquisition or use of such information will not be repeated.

In light of these assurances, I have decided against the termination of your employment.”

Accordingly, Applicant was informed that the Decision constituted a “formal written reprimand,” pursuant to GAO No. 33, Section 8.01. In addition, she was put on official notice that “any future access to or acquisition or use of confidential Fund information or data by you for any purpose other than carrying out your assigned Fund duties” would be grounds for immediate termination of employment. Applicant also was informed that her access to and use of confidential Fund data would be subject to monitoring for a period of two years, and that she would be required to undertake ethics training.

45. Also on February 25, 2004, the HRD Director notified the Grievance Committee Chair that Applicant’s original (October 10, 2003) Grievance should be reactivated, as efforts to resolve the dispute had not been successful. The HRD Director further stated that while Ms “BB”’s merit increase had, in the Fund’s view, been determined in accordance with applicable procedures of the Fund and of Applicant’s organizational unit, the Fund had decided to adjust the merit increase from 3 percent to 4.58 percent (retroactive to May 1, 2003), consistent with the Fund-wide average increase for staff in her grade and salary range quartile who were rated “2” in the May 2003 merit pay exercise.

The Channels of Administrative Review

46. As detailed above, on August 8, 2003, Applicant through counsel, submitted to “Office Director 2” a request for administrative review of decisions relating to her “work and career” (GAO No. 31, Section 6.02), including her merit increase for 2002 and alleged harassment by her supervisor. On August 21, 2003, the Acting HRD Director informed Applicant that she could proceed directly to the Grievance Committee.

47. Accordingly, on October 10, 2003, Applicant filed a Grievance, contesting the percentage of her merit increase for 2002 as inconsistent with her performance and improperly influenced by bias, discrimination and retaliation. Applicant additionally alleged that she had been subjected to harassment, bias and retaliatory treatment by “Supervisor 1”. On August 24, 2004, Applicant filed a second Grievance, contesting the February 25, 2004 disciplinary decision taken against her for alleged misconduct. By request of the parties, the two Grievances were consolidated. The Grievance Committee considered Ms. “BB”’s Grievances in the usual manner, on the basis of oral hearings and the briefs of the parties.

48. On May 16, 2005, the Grievance Committee issued its Recommendation and Report. The Committee concluded: (1) the Fund’s decision that Ms. “BB” had engaged in misconduct was appropriate, as was the penalty imposed; (2) the decisions to assign Ms. “BB” a performance rating of “2” for the year 2002 and not to promote her to Grade A14 were not arbitrary, capricious, discriminatory or procedurally defective in a manner that substantially affected the outcome, and the Fund had remedied her complaint in respect of her 3 percent merit increase through its retroactive adjustment to 4.58 percent; and (3) Ms. “BB” had succeeded in showing that she had been subjected to harassment in violation of Fund policies, for which the Committee recommended compensation in the amount of \$80,000.

49. Following the transmittal of the Committee’s Recommendation and Report to Fund Management, by memorandum of June 30, 2005, the Deputy Managing Director informed the Chair of the Grievance Committee that “...while management accepts the findings and

conclusions of the Grievance Committee that are based on its review of the record and testimony of the witnesses in this case, we have some concerns regarding the basis for the Committee's award of damages." Accordingly, Management was "... remanding the case to the Committee for further consideration and explanation." The Deputy Managing Director advised that the Legal Department, at Management's request, would be preparing a submission providing its views on "... a framework for consideration of damage awards in general, under the Fund's dispute resolution system." The Deputy Managing Director further requested that the Grievance Committee, following consideration of the views of the Fund and the Grievant, "... provide management with an explanation of its reasoning, based on the facts of the case and the circumstances of the Grievant, for a revised or confirmed recommended remedy in this case."

50. On July 21, 2005, there followed a memorandum from the Fund's General Counsel titled "Determination of Monetary Damages by the Grievance Committee," asserting that relief awarded by the Grievance Committee "... could include monetary relief, including damages for intangible injury, but an award that would be in excess of the compensation considered necessary to make the grievant whole would essentially be punitive in nature" and would "exceed the mandate of the Committee." The memorandum concluded by setting out factors to be weighed in assessing monetary damages in cases of discrimination, harassment or a hostile work environment.

51. Thereafter, the Grievance Committee Chair invited Grievant to "submit her views on the Grievance Committee's Report and Recommendation as they relate to its award of damages." On August 11, 2005, Ms. "BB" responded through counsel by declining to express any views on the Committee's recommended remedy and urging the Committee to reject as not authorized by GAO No. 31 the Deputy Managing Director's "remand" of the case for "further consideration and explanation."

52. By memorandum of August 22, 2005, the Grievance Committee Chair informed the Deputy Managing Director that, having considered the views of the Fund, the Committee confirmed its originally recommended remedy. The memorandum tracked the specific factors for monetary awards that had been set out in the General Counsel's memorandum and asserted that the relief recommended in the case of Ms. "BB" was "not in any way intended to be punitive."

53. On September 29, 2005, Management notified Ms. "BB" that it accepted the Grievance Committee's recommendation. It is not disputed that, in accordance with the Committee's recommendation of monetary compensation for workplace harassment, the Fund paid Applicant the sum of \$80,000. Following an exchange of views by the parties, the Grievance Committee additionally recommended that Applicant be awarded partial attorneys' fees based upon her partial success on the merits of her Grievances. Management also accepted this recommendation.

54. On September 30, 2005, the Fund's General Counsel addressed an additional memorandum to the Grievance Committee Chair, noting that while the Fund "consider[ed] the matter closed for the case at hand," Management had authorized the Legal Department to communicate further views. The General Counsel expressed concern, based on the explanation provided in the Committee's August 25, 2005 memorandum, that despite its assertion to the contrary, the Committee had in fact awarded damages that were "at least in part" punitive in nature. The memorandum also questioned the Committee's invocation of the legal doctrines of

stare decisis and *res judicata* as grounds for its reliance on the Administrative Tribunal's Judgment in Mr. "F" as the basis for its calculation of the recommended damage award in the case of Ms. "BB". The General Counsel's memorandum concluded by suggesting that "[w]e are hopeful that the Committee will take these comments into account in its deliberations in future cases."

55. On November 9, 2005, Ms. "BB" filed her Application with the Administrative Tribunal.

Summary of Parties' Principal Contentions

Applicant's principal contentions

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

1. Applicant was subjected for a period of three years to a hostile work environment, harassment, bias, discrimination, deprivation of resources, intimidation, retaliation and abuse of power by her immediate supervisor, in violation of Fund regulations.
2. Respondent did not take sufficient action to respond to the harassment by removing Applicant from "Supervisor 1"'s immediate supervision in mid-2002, as she still served as her supervisor for purposes of determining the 2002 performance rating and merit increase. The Director of the Office "tacitly approved of and supported" the mistreatment.
3. The mistreatment "manifested itself" in Applicant's performance rating of "2" for 2002, her 3 percent merit increase, and lack of promotion to Grade A14.
4. Respondent's failure to promote Applicant to Grade A14 was based on erroneous facts, or disregarded essential facts, was based on an erroneous assessment of her performance, and was improperly influenced by harassment, bias and disparate treatment.
5. The Fund erred in awarding Applicant a 3 percent merit increase for 2002, in light of her level of performance and the treatment she was subjected to by "Supervisor 1". For purposes of the merit increase, her peers were other staff in her organizational unit rather than within the Fund at large. Her increase should have been more than 6 percent. Accordingly, the merit increase remained too low following a retroactive adjustment to 4.58 percent. That HRD had to "correct" the original 3 percent increase demonstrates that Applicant's performance was unfairly evaluated by her supervisors.
6. The disciplinary decision is invalid. The HRD Director violated the legal doctrines of "separation of functions," fair investigation, and due process. In addition, the disciplinary decision violated GAO No. 33 by imposing discipline for "conduct which did not constitute misconduct." In determining the penalty, the HRD Director took into account factors not included in GAO No. 33, Section 8.02. The penalty was disproportionate to the alleged misconduct.

7. The Grievance Committee: (a) failed to issue its Recommendation and Report to Management within 30 days of closure of the record as required by GAO No. 31; (b) transmitted a copy of its Recommendation and Report to the Staff Association without deleting Applicant's name as she had requested under the Committee's procedures; (c) improperly relied on Applicant's Declaration of January 13, 2004 in deciding Applicant's challenge to the validity of the misconduct decision, while failing to address the merits of Applicant's claim for breach of the non-disclosure agreement; and (d) "reopen[ed] the record of proceedings after the record was closed."
8. The Fund breached a non-disclosure agreement between the parties by submitting to the Grievance Committee Applicant's Declaration of January 13, 2004, as well as an unredacted copy of the disciplinary decision, which referred to the Declaration.
9. Applicant seeks as relief:
 - a. a merit increase of at least 6 percent (retroactive to May 1, 2003);
 - b. promotion to Grade A14 (retroactive to May 1, 2003);
 - c. a performance rating of "1" for 2002;
 - d. \$200,000 for "egregious mistreatment" by "Supervisor 1," including a hostile work environment, harassment, discrimination, intimidation and retaliation, plus eighteen months' salary for failure of the Office Director to take action against this conduct;
 - e. continuation of Applicant's employment in a department other than the organizational unit, or under the same supervisor, in which she had experienced harassment;
 - f. \$500,000 "for moral injury, or alternatively, as punitive damages;"
 - g. \$50,000 for the Fund's alleged breach of the non-disclosure agreement;
 - h. \$10,000 for actions of the Grievance Committee;
 - i. rescission of the misconduct decision and associated disciplinary measures; removal of related documentation from Applicant's personnel file; and six months' salary for violation of due process and injury to professional reputation and health as a result of the disciplinary proceedings; and
 - j. attorney's fees and costs.

Respondent's principal contentions

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

1. Applicant has not shown that as a result of the work environment in her Office she is entitled to compensation in addition to that already recommended by the Grievance Committee and implemented by the Fund. The Tribunal should not consider Applicant's complaint of a "hostile work environment" as a basis for awarding relief absent a clear connection to any action on the part of the Fund that adversely affected her as a result. Applicant has not shown that her difficult relationship with her supervisor tainted the administrative acts she is challenging.
2. Applicant's claim of harassment was effectively addressed by her supervisors and the HRD Director.
3. The fact that the Fund decided to "honor the tradition" of accepting the Grievance Committee's recommendation in Applicant's case in an effort to resolve the dispute should not be regarded as an admission on its part that the Committee's findings in respect of the harassment claim are true and uncontested.
4. The Fund's decisions relating to Applicant's merit increase, performance rating, and non-promotion to Grade A14 were fair and appropriate and taken with due regard to Applicant's performance in comparison to her peers.
5. Applicant has not shown that she should have received a merit increase of "at least 6 percent" for 2002. The Fund's retroactive adjustment (from 3 percent to 4.58 percent) of Applicant's 2002 merit increase was appropriately based on comparison with staff members Fund-wide in Applicant's grade and salary quartile.
6. Applicant has not demonstrated that she was entitled to a "1" ("outstanding") performance rating for 2002 or that the assessment of her performance was unfairly influenced by the supervisor who allegedly was responsible for harassment.
7. Applicant's non-promotion to Grade A14 was not inconsistent with the assessment of her performance by three different supervisors and cannot be attributed to the supervisor responsible for alleged harassment. A number of factors limited her opportunities for promotion, including constraints on the number of Grade A14 positions in her Office and her lack of professional certification.
8. There was no substantive or procedural error in the disciplinary decision challenged by Applicant. The HRD Director did not violate any legal doctrine of "separation of functions" by meeting with Applicant before imposing the disciplinary sanction. The meeting was not part of the investigation of the alleged

misconduct but rather provided Applicant the opportunity to respond to the charges as provided for by GAO No. 33.

9. The conduct for which Applicant was disciplined constituted misconduct under the Fund's regulations. In determining the disciplinary measures to be imposed, the HRD Director did not take account of impermissible factors in contravention of GAO No. 33.
10. The Fund's submission to the Grievance Committee of an unredacted copy of the disciplinary decision and a copy of Applicant's Declaration of January 13, 2004 did not violate a "non-disclosure agreement" between the parties. The Declaration was not in the nature of an "offer or compromise" linked to settlement discussions. The disputed documents were necessary to the Grievance Committee's review of Applicant's claims.
11. The Fund is not responsible for alleged acts of the Grievance Committee relating to the timeliness of its Report, transmission of the Report to the Staff Association without deleting identifying information, or "reopening the record of the proceedings after the record was closed." There was nothing improper about the communications that followed receipt of the Recommendation and Report by Fund Management.
12. Applicant is not entitled to damages for "moral injury" or "punitive damages" for acts of the Fund, including its decision to promote her former supervisor.

Consideration of the Issues of the Case

58. Ms. "BB"'s Application raises the following issues for consideration by the Administrative Tribunal: (a) is Applicant entitled to monetary compensation for workplace harassment additional to that already granted by the Fund on the basis of the recommendation of the Grievance Committee; (b) did the Fund abuse its discretion in respect of Applicant's merit increase, performance rating and non-promotion to the next grade level as a result of the appraisal of Ms. "BB"'s work performance for the calendar year 2002; (c) was Applicant improperly disciplined for misconduct for allegedly using confidential personnel information in the preparation of her request for administrative review; and (d) did the Fund (i) violate the terms of a non-disclosure agreement with Applicant by submitting to the Grievance Committee particular documents, or (ii) improperly interfere in the Grievance Committee process by raising concerns as to the remedy recommended in Applicant's case?

Alleged Harassment

Is Applicant entitled to monetary compensation for workplace harassment additional to the sum granted by the Fund on the basis of the recommendation of the Grievance Committee?

59. As noted above, the Fund, while questioning the remedy recommended by the Grievance Committee, granted Applicant \$80,000 on the basis of the Committee's recommendation that she be compensated for workplace harassment. In her Application before the Administrative

Tribunal, Applicant additionally seeks \$200,000 for “egregious mistreatment” by “Supervisor 1”, as well as \$500,000 for “moral injury, or alternatively, as punitive damages.”

What is the effect of the Grievance Committee’s recommendation, and its acceptance by Fund Management, on the Tribunal’s disposition of the question of harassment?

60. The Tribunal must address as a preliminary matter what effect the Grievance Committee’s recommendation, and its acceptance by Fund Management, shall have upon its disposition of Applicant’s allegation that she was the object of harassment by her supervisor in contravention of the Fund’s internal law.

61. Respondent maintains that the fact that it decided to “honor the tradition” of accepting the Grievance Committee’s recommendation in this case in an effort to resolve the dispute should not be regarded as an admission on its part that the Committee’s findings are “true and uncontested.” The Tribunal recalls that following the transmittal of the Grievance Committee’s Recommendation and Report to Fund Management, by memorandum of June 30, 2005, the Deputy Managing Director informed the Chair of the Grievance Committee that “...*while management accepts the findings and conclusions of the Grievance Committee that are based on its review of the record and testimony of the witnesses in this case, we have some concerns regarding the basis for the Committee’s award of damages.*” (Emphasis supplied.) Accordingly, the question arises as to what effect this “acceptance” shall have.

62. The Tribunal has held that its review authority “fully penetrates the layer of administrative review provided by the Grievance Committee,” Ms. “J”, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2003-1 (September 30, 2003), para. 96, because the Tribunal “decides each case *de novo*,” Mr. “V”, Applicant v. International Monetary Fund, Respondent, Judgment No. 1999-2 (August 13, 1999), para. 130. Nonetheless, it “draws upon the record assembled through the review procedures,” Ms. “J”, para. 96. “[T]he Grievance Committee’s recommendations do not constitute ‘administrative acts’ in the sense of Article II, Sections 1.a. and 2.a., because the Committee is not qualified to take ‘decisions.’” D’Aoust, para. 17.

63. The instant case is the first, however, in which the Tribunal has confronted the question of the effect upon its own disposition of questions of fact and law when the Grievance Committee has made a recommendation *in favor of* a Grievant, the recommendation has been accepted by the Fund’s management, and a remedy has been granted consistent with that recommendation.

64. As the Grievance Committee is advisory to management, the Fund’s management is free to reject its recommendations, although it has made a practice of accepting them.¹⁴ This fact of consistent “acceptance” of the recommendations of the Grievance Committee serves to

¹⁴ See “Summary: The Report of the External Panel on the Fund’s Dispute Resolution Systems and Implementation Plans” (April 15, 2002), <http://www.imf.org/external/hrd/dr/index.htm>, p. 19, noting that over a period of twenty years the Managing Director had accepted all of the Grievance Committee’s recommendations.

underscore that the Committee’s work is a component part of a process for the settlement of disputes rather than that of an adjudicatory body. Indeed, as this Tribunal has recognized, the Grievance Committee’s constitutive instrument GAO No 31, by its terms provides that its purpose “... in accordance with Rule N-15, is (1) to establish a Grievance Committee to hear cases within its jurisdiction and *to make recommendations to the Managing Director in order to facilitate the fair and expeditious resolution of disputes...*” GAO No. 31, Rev. 3 (November 1, 1995), Section 1 (Emphasis supplied.) See Ms. “J”, note 23 and para. 97 (“... the Grievance Committee is empowered only to make recommendations to the Managing Director, who is charged with taking the final administrative decision... Accordingly, there is no ‘standard of review’ that applies as between the Tribunal and Grievance Committee.”)

65. Moreover, this Tribunal has observed that “[t]he authority of the Administrative Tribunal to make both findings of fact and conclusions of law, and therefore to review *de novo* the legality of an administrative act of the Fund, stems from the Tribunal’s unique role as the sole judicial actor within the Fund’s dispute resolution system.” Ms. “J”, para. 95, citing Report of the External Panel, Review of the International Monetary Fund’s Dispute Resolution System (November 27, 2001). The mandate of the Tribunal, in contrast to that of the Grievance Committee, is not simply to resolve disputes but to interpret the law of the Fund.

66. Accordingly, the Tribunal, weighing the record of the Grievance Committee as part of the evidence before it, shall consider whether Ms. “BB” experienced “harassment,” as that term is defined by the Fund’s internal law, and, if so, whether the Fund is liable for failing to take effective measures in response.

Did Applicant experience harassment in contravention of the Fund’s internal law?

67. The Tribunal in Mr. “F”, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2005-1 (March 18, 2005), while concluding that the discretionary decision to abolish Applicant’s post was not motivated by religious discrimination, went on to consider whether he had been subjected to a hostile work environment to which Fund supervisors failed effectively to respond. The Tribunal observed that the Fund’s prohibition on harassment broadly provides as follows:

“What is harassment?”

3. Harassment is any behavior, verbal or physical, that unreasonably interferes with work or creates an intimidating, hostile, or offensive work environment. It can take many different forms, including intimidation or sexual harassment.”

(“Policy on Harassment,” Staff Bulletin 99/15 (Harassment – Policy and Guidance to Staff) (June 18, 1999, revised July 21, 1999).)

68. The Policy on Harassment also describes intimidation:

“4. **Intimidation** includes physical or verbal abuse; behavior directed at isolating or humiliating an individual or a group, or at preventing them from engaging in normal activities. Behaviors that might constitute intimidation include, *inter alia*:

- a. degrading public tirades by a supervisor or colleague;
- b. deliberate insults related to a person’s personal or professional competence;
- c. threatening or insulting comments, whether oral or written—including by e-mail;
- d. deliberate desecration of religious and/or national symbols; and
- e. malicious and unsubstantiated complaints of misconduct, including harassment, against other employees.”

69. In 1998, the Fund introduced the Code of Conduct which provides *inter alia*:

“Courtesy and respect

14. You should treat your colleagues, whether supervisors, peers, or subordinates, with courtesy and respect, without harassment, or physical or verbal abuse. You should at all times avoid behavior at the workplace that, although not rising to the level of harassment or abuse, may nonetheless create an atmosphere of hostility or intimidation.”

70. The relevant policies also speak to the responsibilities of supervisors. In matters of harassment, the Fund’s policy states:

“18. The Fund strives for an environment which is free of harassment, and supervisors are expected to support this objective, including stopping harassment in the areas under their supervision....”

(Policy on Harassment.) Similarly, the Fund’s Code of Conduct specifies:

“Conflict resolution

19. Managers have a responsibility to make themselves available to staff members who may wish to raise concerns in confidence and to deal with such situations in an impartial and sensitive manner. Managers should endeavor to create an atmosphere in which staff feel free to use, without fear of reprisal, the existing institutional channels for conflict resolution, [footnote omitted] and to express concerns about situations which are, or have the potential to be, conflictive.”

71. The Tribunal additionally notes that the Policy on Harassment also provides, under “Conduct that would not be considered harassment,” the following caveat:

“14. ... a negative performance report, as such, is not harassment. Supervisors have a responsibility to give appropriate feedback and to take appropriate corrective action. However, such feedback should be made in a reasonable and constructive manner and should not be used as retaliation.”

72. In Mr. “F”, the Tribunal concluded that “[t]here is evidence that conduct in the “Language 1” Section did not meet the standards set forth in the Code of Conduct, and that the Fund’s supervisors did not take effective measures to correct that problem.” At the same time, the Tribunal noted that “Mr. “F”’s conduct during discussion of his mid-year review of performance was recorded as being marked by an “adversarial attitude, aggressive tone, and personal attacks [that] were not inconsistent with his record.” (Para. 98.)

73. It is significant that the Tribunal in Mr. “F”, para. 99, emphasized that there was reason to believe that Mr. “F” was “uniquely vulnerable” on account of his religious affiliation, a vulnerability perhaps magnified by his particular job responsibilities.

74. The Tribunal summarized its conclusions regarding the “hostile work environment” as follows:

“100. Finally, the Tribunal is obliged to address the question of whether Mr. “F” was subjected to a hostile work environment during his career with the Fund, which the Fund did not take adequate measures to rectify. Having reviewed the admittedly contradictory and uneven evidence as to whether Mr. “F” was a victim of religious discrimination and harassment on the part of certain of his colleagues, the Tribunal concludes as follows. As noted above, the decision to abolish the position of Mr. “F” was not motivated by religious discrimination of any of the decision makers. Nevertheless, the evidence predominantly sustains the

conclusion that the Section in which Mr. “F” worked suffered from an atmosphere of religious bigotry and malign personal relations among certain of its members, and that he in particular suffered accordingly. There is no evidence in the record that Fund supervisors took effective action to deal with that unacceptable situation. They did appoint the senior economist who appears to have made some effort to rebuke expressions of religious hostility but the atmosphere of hostility persisted after his departure. Moreover, there is ground to conclude that Applicant suffered from harassment in the workplace, as that concept is defined in the Fund’s Policy on Harassment, though there is also evidence that he may have contributed to the malign atmosphere in the Section by his own behavior.

101. Accordingly, there is evidence in the record that Mr. “F” felt, and had reason to feel, that he was the object of hostility on the part of certain of his colleagues because his religion was different from theirs. The senior economist assigned by the Fund to investigate and resolve the personnel problems plaguing the “Language 1” Section reported religiously intolerant remarks made to him which he refuted and criticized when they were made. But there is no other evidence that the supervisors of the Section concerned moved vigorously, or indeed moved at all, to investigate Mr. “F”’s complaints of religious hostility or to discipline staff members found to be the source of such hostility. The senior economist was appointed to survey, and recommend corrective measures in respect of, the personnel problems of the “Language 1” Section. But that of itself is not enough to absolve the Fund of responsibility for not addressing Mr. “F”’s complaints of religious hostility. Moreover, there is also evidence that an atmosphere of religious animosity was tantamount to harassment that adversely affected the work performance and perhaps health of Mr. “F”. Harassment also appears to have had origins not of a religious kind. The deportment of Mr. “F” himself was at times offensive, combative and excessive but, on the evidence in the record, not such as to excuse the behavior of which he was the victim.”

Mr. “F”, paras. 100-101.

75. The Tribunal awarded Mr. “F” the sum of \$100,000 in “compensation for the Fund’s failures a) to take effective measures in response to the *religious intolerance* and workplace harassment of which Mr. “F” was an object; and b) to give him reasonable notice of the abolition

of his post.” Mr. “F”, Decision, paras. 2 and 3. (Emphasis supplied.) Invoking the Tribunal’s Judgment in Mr. “F”, the Grievance Committee recommended compensating Ms. “BB” in the amount of \$80,000 for workplace harassment.

76. The Tribunal observes that Ms. “BB” has made unsubstantiated allegations of discrimination as to her non-promotion. (*See infra.*) Nonetheless, Applicant has not asserted any link between the allegedly harassing conduct of “Supervisor 1” and Applicant’s gender, race, religion or nationality. When questioned by the Grievance Committee Chair, she clarified: “I felt personally targeted, regardless of gender, nationality or whatever, or because of all of those things put together. I’m not sure what it is, but it seemed very personal.”

77. In the view of the Tribunal, there is ground to distinguish harassment without discriminatory animus as is alleged in the case of Ms. “BB”, from that linked to religious intolerance as the Tribunal found in the case of Mr. “F”, which the Tribunal noted is a form of discrimination prohibited by the Fund’s internal law as well as by universally accepted principles of human rights. Mr. “F”, para. 81.

78. The evidence relating to Applicant’s claim of harassment may be summarized as follows.

79. In some instances, Ms. “BB” disagreed with “Supervisor 1”’s redrafting of her work product, a complaint she additionally voiced in respect of “Office Director 2”. This difference might be characterized as disagreement in professional judgment. In Ms. “BB”’s view, “Supervisor 1” “... basically resented that I was right on a number of things...” Applicant also described “Supervisor 1”’s own work schedule and tendency to overwork and to agonize over details, suggesting that she inflicted these habits on those whom she supervised.

80. Applicant testified that initially she tried to deal with the issues of the work relationship herself and later turned to other resources, including the Fund’s Ombudsperson and a counselor at the Joint Bank-Fund Health Services Department, and that she suffered a deterioration in her health which Ms. “BB” attributed to her work situation.

81. Ms. “BB” testified that in February 2001, she approached “Supervisor 1” to let her know that she was feeling constrained about offering her viewpoints:

“And I think she listened quite genuinely to that.... And we agreed to just try and make things work a little more smoothly than I had been experiencing to that point.

....

They did go more smoothly for a couple of weeks, not for very long.”

Thereafter, testified Applicant, it was “...back to a pattern of hypercriticism, combined with periods of isolation and being completely ignored.”

82. Later in 2001, Applicant brought her view of the situation to the attention of “Office Director 2”, who at the time was the Assistant Director and Senior Personnel Manager (“SPM”) of the Office under “Office Director 1”. “Office Director 2” recalled that Ms. “BB” at that time “launched a very personal attack on [“Supervisor 1”],” calling her “not more than a glorified research assistant,” which he regarded as “extraordinarily unfair.” As he described the aftermath of the meeting, “... my issue as SPM was what can I do to try to resolve the situation...after having heard this type of diatribe vis-à-vis her supervisor.” He met with “Supervisor 1”, telling her that

“... there were things that probably [“Supervisor 1”] needed to work on in terms of handling people, in terms of delegating things, in terms of being attentive to people’s feelings and how they’re being handled, et cetera.

... I tried to sensitize [“Supervisor 1”] to the necessity of being a good people’s manager.”

Later, he came to the conclusion that “... there was too much emotion involved from [Ms. “BB”]’s side vis-à-vis [“Supervisor 1”] and therefore, it was not appropriate to have [Ms. “BB”] report any more to [“Supervisor 1”].” At that point, “Office Director 1” agreed to take on the direct supervision of Applicant’s work.

83. “Office Director 2” characterized “Supervisor 1” as “very analytical...very driven... and a perfectionist... taking possibly some short-cuts in terms of people’s management, so more driven by the task at hand and how to do it well, as well as possible, and maybe not as sensitive to how people react in those types of situations.” He also testified that he worked on “people management skills” with her. It was his opinion, however, that he had “... never witnessed personally any form of harassment or lack of courtesy on the part of [“Supervisor 1”].”

84. Applicant also described the working relationship as one of “noncontact” and “distant.” She described “major communications difficulties” and that she felt that whatever she said was contested by “Supervisor 1”. She testified that she believed that “Supervisor 1”’s conduct towards her met the definition of “harassment” under the Fund’s policy, asserting that it “interfere[d] with my mental concentration on the job at hand,” and that she found the alleged conduct to be “intimidating” and “offensive,” and that she was the target of “bullying.”

85. Two co-workers of Ms. “BB” testified to their own difficulties working under the supervision of “Supervisor 1”, as well as to their observations of the interaction between “Supervisor 1” and Applicant. One testified that “Supervisor 1” was “very nit-picking and very critical and very unapproachable,” and that she had observed “an ostracism or a marginalization or just kind of acting as if [Ms. “BB”] wasn’t an integral part of the staff.” In the view of the co-worker, “Supervisor 1” was “... extremely micromanaging...to the point that you started not feeling comfortable taking a step, unless you checked first with her...[S]he wasn’t very forgiving of mistakes...” A second co-worker expressed the view that “... I had never been treated with such a lack of trust and disrespect or had someone try to micromanage and control me the way that [“Supervisor 1”] had.” Additionally, she testified that “Supervisor 1” “... could be quite cold for weeks at a time and very exclusionary.” Both co-workers, when asked,

characterized “Supervisor 1”’s conduct as “harassment” and testified that they had transferred to positions outside of “Office 1” in view of that Office’s atmosphere.

86. For her part, “Supervisor 1” described her working relationship with Applicant as “not very comfortable.” In her view: “I don’t think that I harassed [Ms. “BB”]. I don’t believe that my behavior toward her was different than my behavior toward other people.” “Supervisor 1” acknowledged being a “perfectionist.”

87. The question arises whether the management style described by Applicant (and her colleagues) amounts to “harassment” as defined by the Fund’s internal law, i.e. did it “...unreasonably interfere[] with work or create[] an intimidating, hostile, or offensive work environment?” (Policy on Harassment, para. 3.)

88. The evidence indicates that “Supervisor 1” was lacking in tact and approachability. At the same time, the fact that a supervisor is demanding, even in respect of minor detail, is not to be equated with harassment. Yet, two witnesses in addition to Applicant testified that “Supervisor 1” went beyond the normal bounds of supervision and was unduly critical of Applicant or largely inaccessible to her. In the view of the Tribunal, it is questionable whether such a pattern of behavior can properly be described as harassment that is actionable and justifying of payment of monetary compensation. Difficult relations between a supervisor and a supervisee are widespread in bureaucracies throughout the world. To hold the Fund financially liable for such difficulties is, in the view of the Tribunal, implausible. Certainly the treatment that Applicant sustained cannot be equated with the religious intolerance of which Mr. “F” was a victim. This is not to say that supervisors should not make every effort to get along with those they supervise and to be open to their sensitivities. Everyone is entitled to courtesy and civility. But it does not follow that damages are payable to those who do not invariably enjoy such treatment.

89. At the same time, the Fund has adopted, in the form of Staff Bulletin No. 99/15, a statement of the Fund’s policy on “Harassment - Policy and Guidance to Staff,” which defines harassment as quoted above at para. 67. The Fund has done so with obviously commendable objectives. The Fund and members of its staff accordingly are charged with upholding that policy. The instant case illustrates the difficulties that may arise in applying the Fund’s policy. In any event, the only pertinent question before the Tribunal is whether Applicant shall be granted, in respect of harassment claims, compensation additional to the considerable sum recommended by the Grievance Committee and accepted by the Fund. For the reasons elaborated below, the Tribunal’s answer to this question is in the negative.

If Applicant experienced harassment in contravention of the Fund’s internal law, did the Fund take effective measures in response?

90. The Fund maintains furthermore that Applicant’s claim of harassment was effectively addressed by her supervisors and the HRD Director, first by providing her the opportunity to report to different supervisors within the Office and later through a requested temporary assignment to “Department 2”.

91. “Office Director 1” testified that he became aware of the tension between Ms. “BB” and “Supervisor 1” and spoke with both of them. Moreover, to “avoid any kind of friction,” he took over direct supervision of Applicant. He testified that he did not agree with the view that “Supervisor 1”’s conduct amounted to “harassment.” As described above, “Office Director 2”, as SPM of the Office, worked on “people management skills” with “Supervisor 1” after Applicant brought her concerns to his attention.

92. The HRD Director testified in the Grievance Committee proceedings that the Fund’s Ombudsperson had first brought to her attention difficulties between Ms. “BB” and “Supervisor 1” and that the Ombudsperson requested that Applicant be transferred because, in the words of the HRD Director, the Ombudsperson “felt that it may be affecting [Ms. “BB”]’s health.” The HRD Director accordingly asked “Office Director 1” to “keep an eye on” the situation. In addition, the HRD Director, after unsuccessfully attempting to arrange a swap of staff members between departments, later succeeded in arranging for a Temporary Assignment Period (“TAP”) for Ms. “BB” in “Department 2”. (The TAP was scheduled to begin in September 2003, but was deferred when Applicant was placed on administrative leave pending the outcome of the misconduct proceedings.) The HRD Director noted in her testimony that the TAP was arranged without taking any view in respect of the merits of the charges but “... because if there are problems between staff members, regardless of whose fault it is, if one can do something to keep them apart and give the staff member who says they’re being affected sort of a chance to do something else, we do that.”

93. The actions of the Fund in attempting to meet the difficulties encountered by Applicant contrast favorably with the ineffective action by the Fund in the admittedly much more extreme case of Mr. “F”. At the same time, the fact that the Fund felt it appropriate to take these actions of itself indicates that the Fund recognized that there was a problem requiring a response. It does not necessarily demonstrate a conclusion by the Fund as to the apportionment of responsibility for it. In any event, in the view of the Tribunal, the responsive actions of the Fund mitigate any liability it could be found to have for the inappropriate supervision of Applicant.

Discretionary decisions relating to Applicant’s merit increase, performance rating, and non-promotion to Grade A14

94. In cases involving the review of individual decisions taken in the exercise of managerial discretion, this Tribunal consistently has invoked the following standard set forth in the Commentary on the Statute:

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

(Report of the Executive Board, p. 19.) *See generally* Ms. “J”, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2003-1 (September 30, 2003), para. 106.¹⁵

95. Moreover, decisions that involve weighing a staff member’s performance is the province of the decision-making officials. Accordingly, “[w]hen managers take such a decision ... with deliberation and in the absence of improper motive, it is not for the Tribunal to substitute its judgment for their considered determination.” Ms. “T”, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2006-2 (June 7, 2006), para. 53 (non-conversion of fixed-term appointment); *accord* Ms. “U”, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2006-3 (June 7, 2006), para. 53. *See also* Ms. “J”, 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); Mr. “F”, para. 70 (citing pertinent provision of Statutory Commentary in finding “persuasive” the Fund’s view that Mr. “F” was not qualified for the position that had been redesigned following the abolition of his post). In reviewing such decisions, the Tribunal has often referred to the following observation in the Statutory Commentary:

“This principle [of 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.”

(Report of the Executive Board, p. 19.)

96. Applicant cites the IMFAT’s jurisprudence for the proposition that “... an important factor in determining the standard of review may be the nature of the underlying decision-making process that is subject to the Tribunal’s review,” Ms. “J”, para. 110. Applicant maintains that in the instant case the decision-making process was “severely flawed” because the decisions were taken by “Office Director 2”, who, she alleges, failed to take corrective action to remedy the harassment of which she asserts she was the object. The Tribunal has recognized that in reviewing discretionary decisions, the degree of scrutiny may “... depend[] upon such variables as the nature of the contested decision and the grounds on which the applicant seeks that it be impugned.” Ms. “J”, para. 107.

97. Accordingly, the question arises whether the Fund abused its discretion in: (a) assigning Applicant a performance rating of “2” for 2002; (b) awarding her a merit increase of 3 percent (later retroactively adjusted to 4.58 percent) for 2002; and (c) failing to promote her to Grade A14.

¹⁵ Applicant references a standard of review for discretionary decisions that has been recommended for adoption by the Fund’s Grievance Committee. The Administrative Tribunal is governed by its own Statute.

98. Applicant further contends that a finding of “harassment” establishes her claims as to her merit increase, performance rating and non-promotion, as those claims are based on decisions made by the same two supervisors who allegedly “perpetrated, knew about, and failed to stop the harassment.” The Tribunal has not found that the treatment from which the Applicant suffered rose to the level of actionable harassment. In any event, the Tribunal does not sustain Applicant’s contention because, as appears below, the Fund’s treatment of her merit increase, performance rating and non-promotion was reasonably supported by the evidence.

Performance Rating

99. Applicant contends that “objective” evidence, such as her overtime hours and reviews of her work by persons other than her supervisors, support her own view of the strength of her performance. Applicant also maintains that “slippages” in work schedules were not uncommon in “Office 1.”

100. Respondent, for its part, maintains that the performance rating assigned by “Office Director 1”, who served as Ms. “BB”’s “primary direct supervisor” for 2002, was appropriate, and that his judgment should not be set aside absent a clear showing of abuse of discretion.

101. “Office Director 1” testified that, in his view, Ms. “BB”’s work performance was “okay.” In particular, he noted delays in her completing projects. He also noted that, given the small size of the Office, there were few “1” (“outstanding”) performance ratings to be assigned and that “... there were some others that deserved that more than her.”

102. “Office Director 2” testified that he served as Applicant’s direct supervisor on a project in which he found that the quality of her report had been “quite deficient” and “rather late.” Applicant, for her part, testified that “Office Director 2” disagreed with the conclusions reached in her report and therefore insisted on redrafting it. His observation of her performance overall for the period 1998-2002 was that Ms. “BB” was “a generally satisfactory performer, but not more than that.”

103. During the Grievance Committee proceedings, Applicant conceded that some of the criticism for delays was fair but maintained that some was unfair.

104. Applicant’s Annual Performance Report for 2002, while largely positive, reflects reservations as to “balancing timeliness and scope/precision,” as well as “more frequent, informal progress reporting especially as regards work product schedules.” This assessment was elaborated by Applicant’s supervisors in Grievance Committee testimony.

105. Applicant contends that her performance rating for 2002 was adversely and unfairly affected by her working relationship with “Supervisor 1”. In her Grievance Committee testimony, Applicant stated that she believed that the “2” rating was “retaliatory,” “degrading” and “insulting.” She reported that in the 2002 APR meeting she told “Supervisor 1” that she believed that the merit increase was “absolutely insulting proportionate to the work that I had done,” and that she was “substantially overworked.” She testified that she believed that it was a “punishment” for having brought the situation to the attention of the HRD Director via the Ombudsperson.

106. Respondent maintains that it was “Office Director 1” rather than “Supervisor 1” to whom Applicant primarily reported during 2002, and he supported his rating in his Grievance Committee testimony. “Supervisor 1” testified that she played a “minor” role in evaluating Applicant’s performance for 2002, as the majority of Applicant’s work time in 2002 was spent on a project overseen by “Office Director 1”.

107. It is notable that in Applicant’s August 8, 2003 request for administrative review, she did not dispute the performance rating for 2002 as such, but rather contended that the 3 percent merit increase was not consistent with the “2” rating. (Additionally, she sought as relief a performance rating of “1”, not retroactively but for the next rating period “as a means of remedying the inadequate rating given to her work performance in previous years.”)

108. In the absence of clear error or improper motive in the evaluation of performance, the Tribunal will not substitute its judgment for that of supervisors charged with that task. *See generally* Ms. “T”; Ms. “U”. In the view of the Tribunal, Applicant has not established that the evaluation of her performance was tainted by clear error or improper motive, including ill disposition on the part of her supervisors. On the contrary, the evidence reasonably supports the evaluation.

Merit Increase

109. Applicant maintains that the Fund erred in awarding her a merit increase of 3 percent for 2002 in light of “the level of her performance and the treatment she was subject to by [“Supervisor 1”] compared to her peers in [“Office 1”].” As detailed above, on February 25, 2004, prior to the hearing of Applicant’s Grievance, the Director of Human Resources granted Ms. “BB” a retroactive adjustment of her merit award for 2002, raising it from 3 percent to 4.58 percent, which, according to the Fund, was consistent with the Fund-wide average increase for staff receiving a performance rating of “2” in her grade and salary range quartile, i.e. the third quartile of Grade A13. In implementing this retroactive adjustment, the Fund contends it chose as appropriate comparators staff members who were similarly situated.

110. In Applicant’s view, her peers for purposes of the merit increase were other staff in her organizational unit rather than the Fund at large. She maintains that on this basis the increase should have been more than 6 percent. Respondent counters that a 6 percent merit increase could not have been made under the applicable matrix unless her performance had been rated “1” (“outstanding”), a rating that is available to no more than 15 percent of staff in each organizational unit.

111. Moreover, Applicant emphasizes that the original 3 percent increase demonstrates that her performance was unfairly evaluated by her supervisors and the fact that the HRD Director had to “correct” the merit award is “strong evidence” of the unfair appraisal of her work.

112. As to Ms. “BB”’s 2002 APR, “Office Director 2” testified that the rating and increase “had been decided by [“Office Director 1”], upon advice from [“Supervisor 1”].” Although not reflected on the APR itself, “Office Director 1” testified that, for purposes of calculating the merit increase, he assigned Applicant a performance rating of “2C”. In the opinion of “Office Director 2”, the merit matrix, however, had not been well-designed, and, in his view a “2C”

performance rating, signifying “satisfactory” performance, should have correlated closer to 4 or 4.5 percent, i.e. close to the Fund’s “structural increase.” He clarified: “... I’m not suggesting that the 2C was unfair. I’m saying that the linkage between the 2C and the numerical merit increase was badly designed in the matrix.” (According to the testimony of “Office Director 2”, the adjustment of the increase to 4.58 percent placed Applicant within the “2A” performance category for her grade and quartile under the “Office 1” matrix.)

113. The Tribunal finds that, in the circumstances, the merit increase of 4.58 percent for 2002 was a reasonable exercise of managerial discretion. Moreover, the fact that the Fund reconsidered Applicant’s initial merit increase and enlarged it to 4.58 does not demonstrate bias on the part of her supervisors, for the reasons explained by the Fund.

Non-promotion to Grade A14

114. Applicant additionally contests her non-promotion to Grade A14, which she maintains was based on erroneous facts, or disregarded essential facts, was based upon an erroneous assessment of her performance, and was improperly influenced by harassment, bias, and disparate treatment. Respondent emphasizes that promotion decisions are discretionary decisions for which the Tribunal should not substitute its judgment and that Applicant has not demonstrated that the decision not to promote her was inconsistent with her performance as assessed by several supervisors or may be attributed to alleged harassment.

115. Career-progression promotion in the Fund is governed by GAO No. 11, Rev. 4 (Grading of Positions, Assignment of Staff, and Salary Administration) (January 16, 2004), Section 5.08.1, which provides as follows:

*“5.08.1 Career-Progression Promotion. When there is an established range of two or more grades for a position, a staff member may be promoted within that range, without competing with others, if he or she performs the duties and meets the qualifications and promotion requirements for the higher grade.”*¹⁶

116. “Office Director 2” testified that Applicant reached the time-in-grade minimum for promotion as of October 2002 but that, in his view, her performance was “absolutely not” strong enough for promotion to Grade A14. He noted that “Office 1” is a small office with little turnover and that “... the competition to get to A-14 is pretty fierce.”

“The noneconomist[s]... are subject to quotas to get to the A-14 level. ... the noneconomists are supposed to be one grade below the economists. So the gate to go to the A-14 is much harder in the noneconomist stream than it is in the economist stream.

¹⁶ The identical language is found in GAO No. 11, Rev. 3 (January 14, 1999), Section 5.08.1, which governed during the applicable period.

....

So any decision to move somebody to an A-14 is a very important decision in a noneconomic department because it gives access to potential for B level and then it bars others who are in queue from getting that access....”

In the view of “Office Director 2”, Applicant lacked versatility to perform the entire range of functions, which “... is actually enshrined in the job standards for A-14....” Although completing a particular professional certification was not a “requirement” for promotion to A-14, he testified that there had been strong encouragement for all of the professionals in the Office to achieve that certification.

117. “Office Director 1” likewise testified that he did not think that Applicant’s performance was strong enough to warrant promotion. He also noted that Ms. “BB” had agreed at the time of her appointment as a regular staff member to obtain the professional certification, but later raised doubts about it. In his view also, the professional certification would have helped Applicant to attain a promotion in the future, although it was not a “requirement.”

118. In addition, Applicant’s supervisors testified that, in their view, the scope of assignments that Applicant could undertake was limited by lack of knowledge in some core areas of responsibility of the Office.

119. The Tribunal observes that Applicant has made allegations of discrimination as to her non-promotion. Applicant maintained in her August 8, 2003 request for administrative review that she had been in “Office 1” longer than a male European staff member who was promoted to A14 following the 2002 performance review, and that promotions in prior years had gone to females who were United States nationals, asserting that “[t]his is inconsistent with the Fund’s policies on discrimination.” Additionally, Applicant testified in the Grievance Committee that she believed that “Office Director 2” supported for promotion males with professional backgrounds similar to his own. Applicant also asserted:

“[“Office Director 2”] can cover his tracks a little bit by bowing in the direction of promoting a female or two. He knows he has to do something on diversity.

... I’m from a G-7 country. He really doesn’t have to acknowledge my existence at all.... [I]t’s easy to try and suppress my actual capabilities and not have to be accountable for it.”

Later, Applicant acknowledged that the male European staff member had taken the professional certification that she lacked. *See Ms. “W”*, para. 98 (concluding that non-promotion is not evidence of discrimination but of competition; non-promotion of economist to Grade A15). *See also Ms. V. Shinberg, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-2 (March 5, 2007), para. 57 (“... meeting some or all of the minimum eligibility criteria for consideration for promotion does not entitle a staff member to a promotion.”) *Cf. In re Ochani*, ILOAT Judgment No. 1827 (1999), Consideration 6 (“The selection of candidates for

promotion is necessarily based on merit and requires a high degree of judgment on the part of those involved in the selection process. Those who would have the Tribunal interfere must demonstrate a serious defect in it A good performance record and satisfactory appraisals are almost always a necessary precondition to promotion but the fact that a candidate has them is obviously not a guarantee that he or she is the most qualified candidate.”)

120. In view of the foregoing evidence, the Tribunal concludes that the complaint of the Applicant in respect of non-promotion to Grade A14 is unfounded.

Alleged Misconduct

Was Applicant improperly disciplined for alleged misconduct?

121. Applicant contests the disciplinary decision as “invalid.” She maintains that the HRD Director violated the legal doctrines of “separation of functions,” fair investigation, and due process. In addition, she contends that the disciplinary decision violated GAO No. 33 by imposing discipline for “conduct which did not constitute misconduct.” In determining the penalty, Applicant alleges, the HRD Director took into account factors not specified in GAO No. 33, Section 8.02 and imposed a penalty disproportionate to the alleged misconduct.

122. Respondent, for its part, maintains that the conduct for which Applicant was disciplined constituted misconduct under the Fund’s regulations and that she was properly disciplined for this offence pursuant to the provisions of GAO No. 33. In Respondent’s view, there was no substantive or procedural error in the disciplinary decision challenged by Applicant.

What standard of review applies to the Tribunal’s review of misconduct decisions?

123. The case of Ms. “BB” is the first in which the Administrative Tribunal has been called upon to review a disciplinary decision taken pursuant to GAO No. 33 (Conduct of Staff Members) (May 1, 1989). This Tribunal has recognized that “... an important factor in determining the standard of review may be the nature of the underlying decision-making process that is subject to the Tribunal’s review.” Ms. “J”, para. 10. Moreover, the Tribunal has held that in reviewing “quasi-judicial” decision-making processes its scrutiny may be heightened. Id., para. 121.

124. The United Nations Administrative Tribunal has suggested that while the imposition of disciplinary sanctions involves the exercise of discretionary authority, this authority is distinctively quasi-judicial in nature:

“With respect to the review of disciplinary decisions, the UNAT in Kiwanuka [v. Secretary General of the United Nations], UNAT Judgement No. 941 (1999)] has described its review process as follows:

‘III. ... In reviewing this kind of quasi-judicial decision and in keeping with the relevant general principles of law, in disciplinary cases the Tribunal

generally examines (i) whether the facts on which the disciplinary measures were based have been established; (ii) whether the established facts legally amount to misconduct or serious misconduct; (iii) whether there has been any substantive irregularity (e.g. omission of facts or consideration of irrelevant facts); (iv) whether there has been any procedural irregularity; (v) whether there was an improper motive or abuse of purpose; (vi) whether the sanction is legal; (vii) whether the sanction imposed was disproportionate to the offence; (viii) and, as in the case of discretionary powers in general, whether there has been arbitrariness. ...

...

V. In regard to (i) in paragraph III above, the Tribunal makes a judgement based on its examination of the facts. In regard to (ii) in paragraph III above, the Tribunal judges whether the characterization of misconduct or serious misconduct is, in its opinion, appropriate, which is a matter of law.”

Quoted in Ms. “J”, para. 123. Similarly, the World Bank Administrative Tribunal has observed:

“The Tribunal has on a number of occasions set forth its powers in reviewing disciplinary decisions by the Bank. It stated in *Cissé*, Decision No. 242 [2001], para. 26:

The Tribunal has held that in disciplinary cases, it may examine: (i) the existence of the facts; (ii) whether they legally amount to misconduct; (iii) whether the sanction imposed is provided for in the law of the Bank; (iv) whether the sanction is not significantly disproportionate to the offence; and (v) whether the requirements of due process were observed. . . . The Tribunal has also held that in disciplinary matters, its review is not limited to determining whether there has been an abuse of discretion but encompasses a fuller examination of the issues and circumstances.”

D v. International Finance Corporation, WBAT Decision No. 304 (2003), para. 23.

125. Mindful of the jurisprudence quoted above, the Tribunal now turns to the following questions: Did Applicant engage in misconduct in contravention of the Fund’s internal law? Was

Applicant accorded due process in the misconduct proceedings? If Applicant was properly found to have engaged in misconduct, was the penalty imposed proportionate to the offence and determined in accordance with the applicable Fund regulations?

Did Applicant engage in misconduct in contravention of the Fund's internal law?

126. Applicant maintains that she was disciplined for “conduct that did not constitute misconduct.” It is not disputed that in preparing her August 8, 2003 request for administrative review, Applicant used access to the Fund’s confidential personnel database to retrieve information relating to the salaries and merit increases of other Fund staff members. According to the Report of Investigation of the Fund’s Ethics Officer, Applicant made more than 100 downloads of salary and merit increase information for all Fund staff, Grades A2-B5. Applicant accessed additional data, i.e. chrons and timesheets, relating to other staff members in her organizational unit. Examples of these downloads of information are included in the record before the Tribunal.

127. Respondent maintains that Applicant’s access to Fund databases was granted solely for the purpose of enabling her to carry out her job functions. In Respondent’s view, the data that Ms. “BB” accessed and downloaded for purposes of preparing her request for administrative review was not required to carry out her particular assignments. The testimony of the Office Directors supported this view. Moreover, contends the Fund, Rule N-6 prohibits staff from using confidential information “for private advantage, directly or indirectly.”

Did Applicant’s use of confidential personnel information in pursuance of her right to request administrative review constitute use for “private advantage”?

128. Rule N-6 provides:

“Persons on the staff of the Fund, and persons formerly on the staff of the Fund, shall not, at any time, without the express authorization of the Managing Director: (i) reveal any unpublished information known to them by reason of their service with the Fund to a person not authorized by the Fund to receive the information; or (ii) use, or allow the use of, unpublished information known to them by reason of their service with the Fund for private advantage, directly or indirectly, or for any interest contrary to that of the Fund as determined by the Managing Director.

Adopted as part of N-5 September 25, 1946, amended June 22, 1979.”

(Emphasis supplied.)

129. Rule N-11 provides:

“Upon appointment, each person on the staff will subscribe in writing to the following affirmation:

—I solemnly affirm:

—That, to the best of my ability, I will carry out my responsibilities in a manner that will further the purposes of the International Monetary Fund;

—That, I will refrain from communicating confidential information to persons outside the Fund;

—*That, I will not use to private advantage information known to me by reason of my official position;* and

—That I will accept no instruction in regard to the performance of my duties from any government or authority external to the Fund.

Adopted as N-10 September 25, 1946.”

(Emphasis supplied.)

130. Moreover, GAO No. 33 (Conduct of Staff Members) (May 1, 1989), Section 7.01(vi), provides that disciplinary measures may be imposed for “unauthorized use or disclosure of information.”

131. Additionally, the Fund’s Code of Conduct provides in relevant part:

“Discretion

11. ... You must respect and safeguard the confidentiality of information which is available or known to you by reason of your official functions.”

132. The Tribunal also notes that staff members are expressly protected under the Fund’s internal law from reprisal for “pursuing a grievance through administrative channels,” as well as for “filing a grievance or complaint with the Grievance Committee, presenting any testimony to the Committee or assisting a grievant.”¹⁷ GAO No. 31, Section 6.01.2 requires that the staff member provide information pertaining to his grievance.

¹⁷ GAO No. 31, Rev. 3 provides:

“Section 9. Protection

9.01 Protection of Staff Members. No individual shall be subject to adverse action of any kind because of pursuing a grievance through

(continued)

133. The question that the Tribunal must address is whether Applicant's use of confidential personnel data for the purpose of preparing her request for administrative review of her performance rating, merit increase and lack of promotion to Grade A14 fell within the prohibitions of the Fund's internal law or whether, as Ms. "BB" maintains, she had a right to make use of this data in preparing her request for administrative review. In the view of the Tribunal, Ms. "BB" erred in believing that she was entitled to use the data in question in preparing her request for administrative review. While the administrative review process is one contemplated by the Fund, the use of material that a staff member otherwise is not entitled to use for private purposes is not justified. The Tribunal accepts that while the Applicant may have acted in good faith in supposing otherwise, it does not follow that the Fund was wrong in denominating her conduct as misconduct.

134. The Tribunal so concludes because the downloading of large amounts of information as to individual salary and merit increases of Applicant's co-workers, both in her own Office and throughout the Fund, was, as noted in the disciplinary decision, a serious violation of the privacy of Fund staff in contravention of the Fund's internal law. The record reflects that while Applicant's job responsibilities permitted her to gain access to such information for the purpose of carrying out particular assignments, downloads of the magnitude in which she engaged were not part of her work assignments.

Was Applicant accorded due process in the misconduct proceedings?

135. Applicant contends that the HRD Director violated a rule of "separation of functions" in the misconduct proceedings, citing Gyamfi v. International Bank for Reconstruction and Development, WBAT Decision No. 28 (1986) and King v. International Bank for Reconstruction and Development, WBAT Decision No. 131 (1993).

136. Respondent maintains that the HRD Director did not violate any legal doctrine of "separation of functions" by meeting with Applicant before imposing the disciplinary sanction. In Respondent's view, the fact-finding investigation of the activities that were held to constitute misconduct had been completed by the Fund's Ethics Officer. The meeting about which Applicant complains, maintains the Fund, was not part of the investigatory process but rather provided Applicant the opportunity to respond to the charges. The Fund cites GAO No. 33, Section 10.03, which provides:

administrative channels, filing a grievance or complaint with the Grievance Committee, presenting any testimony to the Committee, or assisting a grievant.

....

9.04 *Protection Against Reprisal*. Any adverse action taken against an individual in retaliation for his or her pursuit of, or participation in, a grievance may be grounds for a finding of misconduct and the imposition of disciplinary measures under General Administrative Order No. 33."

“10.03 *Response of Staff Member*. The staff member shall be given adequate opportunity to respond to the charge against him. In any personal appearance, the staff member shall have the right to be accompanied by another employee of the Fund, who may make submissions on his behalf. If the staff member so requests, the responsible official may permit the staff member to be accompanied by a person who is not an employee of the Fund.”

137. The respective roles of the Ethics Officer and the HRD Director in cases of alleged misconduct are set out in the Fund’s internal law. The Fund’s Procedural Guidelines for Conducting Inquiries Related to Allegations of Misconduct (“Guidelines”) provide: “Based on the findings of the Ethics Officer, the Director of HRD – or the Managing Director, in the case of B-level staff – decides, in accordance with General Administrative Order No. 33, on the disciplinary action, if any, to be taken.” (Guidelines, para. 14; *see also* Ethics Officer’s Terms of Reference, para. 10.)

138. This guidance must be read together with GAO No. 33, Section 10, which sets out in detail the procedural steps required in considering a case of alleged misconduct:

“*Section 10. Procedures*

10.01 *Responsible Official*. For purposes of this Section, the term ‘responsible official’ means the Director of Administration, Head of department or other Fund official to whom authority has been delegated pursuant to Section 10.07 below.

10.02 *Charge*. If, after such preliminary investigation as he deems necessary in the circumstances, the responsible official determines that there are material grounds for charging a staff member with misconduct, he shall inform the staff member in writing of the substance of the charge.

10.03 *Response of Staff Member*. The staff member shall be given adequate opportunity to respond to the charge against him. In any personal appearance, the staff member shall have the right to be accompanied by another employee of the Fund, who may make submissions on his behalf. If the staff member so requests, the responsible official may permit the staff member to be accompanied by a person who is not an employee of the Fund.

10.04 *Inquiry*. If the staff member denies the charge, the responsible official shall conduct an inquiry into the matter, in order to determine whether or not the staff member has committed misconduct substantially as charged.

10.05 *Decision*. If, on the basis of the staff member's response and the information obtained as the result of any inquiry referred to in Section 10.04, above, the responsible official concludes that the charge of misconduct is valid, he shall notify the staff member in writing of his conclusions, and the reasons thereof, and of the disciplinary measure(s) to be imposed. If he concludes that the charge should be dismissed or that no disciplinary action should be taken he shall also notify the staff member of this conclusion in writing.

....”

139. The procedural requirements set out in GAO No. 33 contemplate only one “responsible official,” who makes an “inquiry” into the alleged misconduct and thereafter takes a “decision.” As the HRD Director observed in her testimony, GAO No. 33 accordingly does not incorporate the role of the Fund’s Ethics Officer, an office that was not established until some ten years after the implementation of GAO No. 33.¹⁸ In cases such as that of Ms. “BB”, it may be said that the “responsible official,” in this case the HRD Director, delegated the “inquiry” function of GAO No. 33, Section 10.04 to the Ethics Officer who produced a Report of Investigation. The “responsible official” then took her decision based on that Report and her meeting with Applicant, as well as Applicant’s written responses to the charge.¹⁹ This procedure was consistent with the decision-maker’s responsibility to decide “... on the basis of the staff member’s response and the information obtained as a result of any inquiry....” (GAO No. 33, Section 10.05.) As the HRD Director testified, “... the decision maker, at the end of the day, has to make sure they have all of the information.”

140. The HRD Director characterized her meeting with Ms. “BB” as “final information gathering before I made the decision,” and testified that sometimes she would “want to hear from the person in their words ... what was sort of going on in their mind when they got involved in the misconduct.”

141. In Applicant’s view, however, the following testimony suggested inappropriate action on the part of the HRD Director:

“I hadn’t really heard anything from Ms. [“BB”] that suggested that she realized that this was incredibly serious, that it was a violation of the confidence that the Fund places in people in those positions.

¹⁸ The Ethics Office was established in 2000. The Ethics Officer’s First Annual Report to Fund Staff (2001), p. 1. For a general discussion of the investigatory process conducted by the Ethics Officer, see *id.* at pp. 4-8.

¹⁹ See *supra* The Factual Background of the Case; Applicant’s Request for Administrative Review and the Charge of Misconduct.

And I really was hoping that I would hear from Ms. [“BB”] that she understood that this was - - that she shouldn’t have done it, this was a serious matter, a serious violation of Fund rules and the trust that the Fund had placed in her.”

142. The question arises whether the HRD Director violated “separation of functions” or whether the meeting represented an appropriate consideration of “the nature of the misconduct and the circumstances in which it occurred.” (GAO No. 33, Section 8.02.) In the view of the Tribunal, Applicant was accorded full opportunity to present her views and defend herself against the charge of misconduct. The Tribunal finds no irregularity in the procedures by which the charge of misconduct was handled.

Was the penalty imposed for Applicant’s misconduct proportionate to the offence and determined in accordance with the applicable Fund regulations?

143. Applicant contends that in imposing disciplinary sanctions as a result of Ms. “BB”’s alleged misconduct the HRD Director improperly took account of impermissible factors, in particular, Applicant’s Declaration of January 13, 2004.

144. Respondent, for its part, maintains that in determining the disciplinary sanctions the HRD Director did not take account of impermissible factors in contravention of GAO No. 33. In particular, in the Fund’s view, it was appropriate for the Fund to consider Ms. “BB”’s explanation of her actions.

145. Section 8 of GAO No. 33 governs the imposition of disciplinary measures upon a finding of misconduct. Section 8.01 provides for possible penalties, ranging from a written warning to termination of the staff member’s employment:

“8.01 Disciplinary measures may take one or more of the following forms:

- (i) written warning;
- (ii) formal, written, reprimand;
- (iii) reassignment;
- (iv) ineligibility for specific salary increases;
- (v) forfeiture of specific benefits or allowances;
- (vi) reduction in salary;
- (vii) demotion; and
- (viii) termination of employment.”

146. Section 8.02 provides for proportionality between the severity of the offence and the disciplinary measures imposed and sets out particular factors to be taken into account in determining the penalty:

“8.02 The severity of the disciplinary measures imposed shall be commensurate with the seriousness of the misconduct. In determining the seriousness of the misconduct and in deciding upon the disciplinary measure(s) to be imposed, the nature of the misconduct and the circumstances in which it occurred shall be taken into account; in particular, account shall be taken of:

(i) the extent to which the misconduct adversely reflects upon the integrity, reputation or interests of the Fund;

(ii) the extent to which the misconduct involves intentional actions or negligence;

(iii) whether the misconduct involves repeated actions or behavior; and

(iv) the prior conduct of the staff member.”

147. It is recalled that the disciplinary sanction imposed on Ms. “BB” was a “formal written reprimand.” This was, apart from a “written warning,” the least severe sanction possible. In addition, she was put on official notice that “any future access to or acquisition or use of confidential Fund information or data by you for any purpose other than carrying out your assigned Fund duties” would be grounds for the immediate termination of her Fund employment. Additionally, she was informed that her access to and use of confidential Fund data would be subject to monitoring for a period of two years. Finally, she was required to undertake ethics training.

148. Applicant maintains that the discipline was disproportionate to the alleged misconduct in light of the Ethics Officer’s finding of “considerable good faith” and of Applicant’s seeking guidance from other Fund officers on what information to include in her request for administrative review.

149. While accepting that Applicant may have been genuinely uncertain and proceeded in good faith, the Tribunal concludes that the disciplinary measures imposed were proportionate to the severity of the offence. It is not of the view that the HRD Director, in deciding upon disciplinary measures in the case of Ms. “BB”, improperly took account of Applicant’s Declaration in considering “the nature of the misconduct and the circumstances in which it occurred” (GAO No. 33, Section 8.02).

150. The Declaration, by its terms, is not an admission of misconduct. Indeed, if it were such an admission, this sworn statement of Ms. “BB” would appear to have precluded her from contesting the misconduct decision in the Grievance Committee and now in this Tribunal.

Instead, the Declaration appears to have been carefully tailored to achieving Ms. “BB”’s twin goals of keeping open the opportunity to contest the misconduct decision through the Fund’s dispute resolution system and returning to work at the Fund in a capacity that permitted access to confidential information, consistent with her training and experience.

151. Accordingly, paragraphs 2 and 3 of the Declaration state:

“2. I now know that the Fund considers the use of confidential personnel data and information by a staff member in seeking the remedies available under the Fund’s internal employment dispute resolution mechanisms to be a private use.

3. I now know that the Fund considers seeking remedies under the Fund’s internal employment dispute resolution mechanisms to not be part of a staff member’s job function.”

(Emphasis supplied.)

152. The highlighted language suggests that Applicant may claim that, at the time she accessed confidential data in pursuit of her administrative remedies, she did not understand that this conduct was considered by the Fund to be misconduct under its internal regulations. This statement, suggesting that the alleged violation was not a knowing violation, could reasonably be regarded as a mitigating factor in imposing disciplinary measures. (See GAO No. 33, Section 8.02 (ii), which provides that account may be taken of “the extent to which the misconduct involves intentional actions or negligence.”)

153. Moreover, paragraphs 2 and 3 of the Declaration differ from paras. 1, 4 and 5, which begin with the words “I agree.” The highlighted language above emphasized that a difference remained between the parties as to whether use of confidential personnel data in pursuit of remedies under the Fund’s employment dispute resolution system is a “private use” and “not ... part of a staff member’s job function.” That question accordingly remained open for the Tribunal’s resolution in this Judgment and has been resolved above.

154. At the same time, the Declaration, as the HRD Director indicated in her testimony, served the function of returning Ms. “BB” to work at the Fund, terminating her administrative leave with pay, by declaring that she agreed with the principle that confidential personnel data is not to be used for “private” purposes or outside of the staff member’s “job function.” Additionally, by the Declaration, Applicant gave assurances that she would not violate this principle in the future.

155. The HRD Director’s testimony indicates that she took the Declaration into account as a mitigating factor in imposing discipline, noting that “... because ... I had this assurance that this wouldn’t occur in the future, I decided to go with a written reprimand....” As to the question of proportionality, the HRD Director testified that the disciplinary action “if anything ... was too lenient,” in light of what she regarded as “serious misconduct.”

156. In view of the Tribunal's conclusion above that the Declaration was not an admission, Applicant's contention that the Fund breached a non-disclosure agreement pertaining to settlement negotiations is without merit.

157. Having regard to the facts of the matter recounted above, the Tribunal finds the disciplinary decisions of the Fund to be appropriate.

Allegations relating to the Grievance Committee process

158. Applicant also challenges actions relating to the Grievance Committee process in respect of her case. (See paragraph 56 above, subparagraph 7 and paragraph 57, subparagraph 11.) The Administrative Tribunal does not find it necessary or appropriate to pass upon these complaints. See D'Aoust (No. 2), paras. 170-176.

Decision

FOR THESE REASONS

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

The Application of Ms. “BB” is denied.

Stephen M. Schwebel, President

Nisuke Ando, Associate Judge

Michel Gentot, Associate Judge

Stephen M. Schwebel, President

Celia Goldman, Registrar

Washington, D.C.
May 23, 2007