

ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

JUDGMENT No. 2010-1

Ms. C. O'Connor, Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)

Introduction

1. On February 8, 2010, the Administrative Tribunal of the International Monetary Fund, composed of Judge Stephen M. Schwebel, President, and two members designated by him,¹ Judges Nisuke Ando and Michel Gentot, met to adjudge the Motion for Summary Dismissal of the case brought against the International Monetary Fund by Ms. Charmion O'Connor, a staff member of the Fund.
2. Applicant contests the Fund's decision to promote her from Senior Administrative Assistant (Secretary, Division) at Grade A7 to Senior Administrative Assistant (Office Services) at Grade A8, as the result of the reclassification of her position following a job audit. Applicant maintains that the change in job classification was not consistent with the level or nature of her job functions and placed her in a career stream that limits her future career opportunities. Applicant asserts that the outcome of the job audit was unfairly affected by her 2006 and 2007 Annual Performance Reviews (APRs) and Merit-to-Allocation Ratios (MARs), which she alleges did not reflect her actual performance but rather were tainted by a pattern of racial discrimination in the allocation of such ratings by the management of her department.
3. The Fund has responded to the Application with a Motion for Summary Dismissal on the ground that Applicant has not met the requirement of Article V of the Tribunal's Statute that all available channels of administrative review must be exhausted before an application is filed with the Administrative Tribunal.

¹ In 2009, the IMF Board of Governors, as authorized by Article XIX of the Tribunal's Statute, amended Articles VII and VIII, relating to the appointment of the members of the Tribunal. Effective January 1, 2010, these amendments *inter alia* eliminate the former distinction between associate and alternate members of the Tribunal and provide that "[t]he decisions of the Tribunal in a case shall be taken by a panel composed of the President and two other members designated by the President." (Article VII, Sections 1 and 4.)

4. A Motion for Summary Dismissal suspends the period for answering the Application until the Motion is acted on by the Tribunal. Accordingly, at this stage, the case before the Tribunal is limited to the question of the admissibility of the Application.

The Procedure

5. Ms. O'Connor initially submitted an Application to the Administrative Tribunal on July 25, 2009, one day following expiration of the statute of limitations. The Registrar informed her that the Application did not meet the requirements of Article VI, Section 1 of the Statute, which provides that "[a]n application challenging the legality of an individual decision shall not be admissible if filed with the Tribunal more than three months after all available channels of administrative review have been exhausted, or, in the absence of such channels, after the notification of the decision." Subsequently, Ms. O'Connor filed a request for waiver of the statute of limitations pursuant to Article VI, Section 3, which provides that "[i]n exceptional circumstances, the Tribunal may decide at any time, if it considers the delay justified, to waive the time limits prescribed under Section 1 or 2 of this Article in order to receive an application that would otherwise be inadmissible." Applicant sought to file a revised Application on August 3, 2009. Having regard for the fact that Applicant's initial submission had been made only one day following the statutory deadline and that Applicant, who is not represented by counsel, cited illness, along with other factors, as contributing to the delay, the Tribunal concluded that, on balance, "exceptional circumstances" supported the request. Accordingly, the Tribunal exercised its discretion to accept for filing an Application of Ms. O'Connor, as submitted on August 3, 2009.

6. Pursuant to Rule VII, para. 6,² of the Tribunal's Rules of Procedure, the Registrar advised Applicant that the Application did not fulfill all of the requirements of that Rule. Accordingly, Applicant was given a period of time in which to correct the deficiencies. The Application, having been brought into compliance within the indicated period, is considered filed on the original date.

7. The Application was transmitted to Respondent on August 12, 2009. On August 13, 2009, pursuant to Rule IV, para. (f),³ the Registrar circulated within the Fund a notice summarizing the issues raised in the Application.

² Rule VII, para. 6 provides in pertinent part:

"If the application does not fulfill the requirements established in Paragraphs 1 through 5 above, the Registrar shall advise the Applicant of the deficiencies and give him a reasonable period of time in which to make the appropriate corrections or additions. If this is done within the period indicated, the application shall be considered filed on the original date. . . ."

³ Rule IV, para. (f) provides:

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

. . .

(continued)

8. On September 10, 2009, pursuant to Rule XII⁴ of the Tribunal's Rules of Procedure, Respondent filed a Motion for Summary Dismissal of the Application. The Motion was transmitted to Applicant on the following day. On October 13, 2009, pursuant to Rule XII, para. 5, Applicant filed an Objection to the Motion, which was transmitted to the Fund for its information.

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

⁴ Rule XII provides:

“Summary Dismissal

1. Pursuant to Article X, Section 2(d) of the Statute, the Tribunal may, on its own initiative or upon a motion by the Fund, decide summarily to dismiss the application if it is clearly inadmissible.
2. The Fund may file such a motion within thirty days of its receipt of the application. The filing of the motion shall suspend the period of time for answering the application until the motion is acted on by the Tribunal.
3. The complete text of any document referred to in the motion shall be attached in accordance with the rules established for the answer in Rule VIII. The requirements of Rule VIII, Paragraphs 2 and 3, shall apply to the motion. If these requirements have not been met, Rule VII, Paragraph 6 shall apply *mutatis mutandis* to the motion.
4. Upon ascertaining that the motion meets the formal requirements of this Rule, the Registrar shall transmit a copy to the Applicant.
5. The Applicant may file with the Registrar an objection to the motion within thirty days from the date on which the motion is received by him.
6. The complete text of any document referred to in the objection shall be attached in accordance with the rules established for the reply in Rule IX. The requirements of Rule VII, Paragraph 4, shall apply to the objection to the motion.
7. Upon ascertaining that the objection meets the formal requirements of this Rule, the Registrar shall transmit a copy to the Fund.
8. There shall be no further pleadings in respect of a motion for summary dismissal unless the President so requests.”

9. On October 27, 2009, the Administrative Tribunal, pursuant to Rule XVII, para. 3,⁵ issued to Respondent a Request for Information and Views as to several matters that the Tribunal deemed pertinent to the disposition of the Motion for Summary Dismissal. Respondent filed its Response on November 10, 2009. Applicant was afforded the opportunity to submit Comments responsive to the Fund's submission. Applicant's Comments were filed on November 24, 2009 and transmitted to Respondent for its information.

10. In her Application, Ms. O'Connor requested anonymity pursuant to Rule XXII.⁶ Respondent opposed the request on the ground that Applicant had not offered any justification for it and "[i]n respect of any judgment or order disposing of the Motion for Summary Dismissal, as the underlying issues are purely jurisdictional in nature and do not involve sensitive or confidential personal information or otherwise address the merits of Applicant's claims, the Fund sees no compelling reason for anonymity" Applicant later withdrew her request. Accordingly, there is no request for anonymity pending before the Tribunal, and, in any event, the Tribunal finds no ground on which to treat Applicant anonymously, a practice that this and other international administrative tribunals have recognized stands as an exception to the general rule of making public the names of parties to a judicial proceeding. *See generally Mr. S. Ding, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2009-1 (March 17, 2009), paras. 8-9 and cases cited therein.

⁵ Rule XVII, para. 3 provides:

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

⁶ 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."

11. In her Application, Applicant requested production of documents pursuant to Rule XVII.⁷ Respondent has not commented on these requests.⁸ As the requests for production of documents are not pertinent to the disposition of the pending Motion, the Tribunal has not considered them and does not decide them at this stage of the proceedings.

12. The Tribunal decided that oral proceedings, which neither party had requested, would not be held as they were not deemed useful to the disposition of the Motion.⁹

The Factual Background of the Case

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

14. Applicant was first employed by the Fund beginning in 1970 at Grade A and served as a member of the staff until 1983. In 1986, Applicant returned to Fund employment, first on a contractual appointment as a secretary and, beginning in 1987, as a staff member at Grade A4, later Grade A5. At the time of the events giving rise to her Application, Applicant served as a

⁷ Rule XVII provides:

“Production of Documents

1. The Applicant, pursuant to Rule VII, Paragraph 2(h), may request the Tribunal to order the production of documents or other evidence which he has requested and to which he has been denied access by the Fund. The request shall contain a statement of the Applicant’s reasons supporting production accompanied by any documentation that bears upon the request. The Fund shall be given an opportunity to present its views on the matter to the Tribunal, pursuant to Rule VIII, Paragraph 5.

2. The Tribunal may reject the request if it finds that the documents or other evidence requested are irrelevant to the issues of the case, or that compliance with the request would be unduly burdensome or would infringe on the privacy of individuals. For purposes of deciding on the request, the Tribunal may examine *in camera* the documents requested.

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

⁸ Had Respondent filed an Answer on the merits to the Application, it would have been required to respond to the request for production of documents by Rule VIII, para. 5.

⁹ Article XII of the Tribunal’s Statute provides that the Tribunal shall “. . . decide in each case whether oral proceedings are warranted.” Rule XIII, para. 1 of the Rules of Procedure provides that such proceedings shall be held “. . . if . . . the Tribunal deems such proceedings useful.”

Senior Administrative Assistant (Secretary, Division) at Grade A7 in one of the Fund's departments.

15. In November 2007, the Compensation and Benefits Policy Division (CBD) of the Human Resources Department (HRD), at the request of Applicant's Senior Personnel Manager (SPM), undertook a job audit of Ms. O'Connor's position. The outcome of the audit was to reclassify her position to Senior Administrative Assistant (Office Services) at Grade A7/A8. On November 29, 2007, Applicant was promoted to Grade A8 in the reclassified position, with effect from November 1, 2007.

16. The reclassification and promotion decision was communicated to Ms. O'Connor by her SPM at a meeting of December 4, 2007. According to Applicant, she immediately protested the decision to the SPM and to a department Deputy Director.

The Channels of Administrative Review

17. By memorandum of June 3, 2008 to the Director of Human Resources, Applicant initiated formal administrative review pursuant to GAO No. 31. Applicant maintained, as to the audit of her position, that ". . . there were decisions and actions taken by [her department] and HRD that negatively influenced the outcome that were arbitrary, capricious, discriminatory, and inconsistent with the Fund's rules and regulations." Applicant alleged that managers in her department improperly interfered with HRD's audit process. She set out in considerable detail the reasons why she believed that the reclassification decision was inconsistent with her job functions and accomplishments. Additionally, raising a question of racial bias, Applicant asserted that her May 2006 and 2007 APRs "lacked credibility and misinformed [her] November 1, 2007 job audit because the processes through which these documents evolved contravened the Fund's HR policies and resulted in an unfairly biased picture . . ." (Applicant's Request for Administrative Review.)

18. On July 7, 2008, the Director of Human Resources denied Ms. O'Connor's request for administrative review on the following grounds. First, as to Applicant's challenge to the process and results of the job audit, the HRD Director stated that Fund regulations provide that job audit decisions may be challenged only by the affected department. Neither the incumbent nor the incumbent's immediate supervisor may bring such a challenge. Accordingly, the HRD Director concluded that Ms. O'Connor did not have standing to contest the job audit. Second, as to Applicant's challenges to her May 2006 and May 2007 APRs, the HRD Director concluded that Ms. O'Connor had failed to raise these challenges within the six-month period prescribed by GAO No. 31. Accordingly, the request for administrative review was denied. (Memorandum from HRD Director to Applicant, July 7, 2008.)

19. On October 8, 2008, Ms. O'Connor filed a Grievance with the Fund's Grievance Committee, setting out five claims. First, Applicant asserted that managers in her department "purposefully provided misinformation about me, my job functions, and my accomplishments so as to prejudice my chances of receiving appropriate Grade and salary remuneration, career stream, opportunity for further advancement, and the resulting recognition, self-respect, and respect of peers that I need to perform effectively in this job and that are valuable accoutrements of job success." Second, Applicant maintained that "discriminatory decisions substantially

affected the outcome of my position audit,” and that the May 1, 2006 assessment of her performance was part of a larger pattern of racial discrimination in her department. Third, she maintained that HRD, in taking the job audit decision, contravened Fund rules in accepting from her department managers a “distorted view of [her] job content, functions, responsibilities, and achievements” Fourth, Applicant complained of HRD’s handling of her request for administrative review. Fifth, Applicant alleged that she had been subject to retaliation for seeking review of her claims. (Applicant’s Grievance.)

20. The Fund moved to dismiss the Grievance in its entirety, maintaining that the Committee lacked jurisdiction over Ms. O’Connor’s various claims. Following a pre-hearing conference, the Grievance Committee issued an Order granting the Fund’s motion in all but one respect. By its Order of April 24, 2009, the Grievance Committee took the following decisions.

21. As to Ms. O’Connor’s challenge to the outcome and the process of the job audit, the Committee noted at the outset, consistent with GAO No. 31 and the jurisprudence of the Administrative Tribunal:¹⁰

“The Grievance Committee lacks authority to hear a challenge to the validity of a staff regulation itself, as opposed to its application in a particular situation. Such challenge may, however, be made to the Administrative Tribunal, if in accord with its rules. The Grievance Committee’s jurisdiction is confined to the application of rules to staff members and is precluded from hearing challenges to the validity of the Fund’s rules themselves.”

(Grievance Committee Order, p. 4.) As the Fund’s rules governing job audits provide that “[n]either incumbents of positions, nor their immediate supervisor(s) are entitled to request a review of a job grading decision made by CBD,” the Grievance Committee concluded that the Grievant could not challenge the job grading “decision.” “The Grievance Committee has no jurisdiction to change the Fund’s policy that only a Department may challenge a CBD decision. Only the Administrative Tribunal may have jurisdiction to find such a rule invalid.” (*Id.*, pp. 5-6.)

22. Nonetheless, the Grievance Committee decided that because Ms. O’Connor also alleged that the management of her department had purposefully provided false and misleading information to the job auditors to obtain the result of which she complained, her Grievance challenged the “integrity of the audit process rather than the audit itself.” Moreover, stated the Grievance Committee:

¹⁰ The jurisdiction of the Fund’s Grievance Committee, in contrast to that of the Administrative Tribunal, is limited to complaints alleging that a staff member has been “adversely affected by a decision that was inconsistent with Fund regulations governing personnel and their conditions of service,” and specifically excludes “challenge[s] to . . . staff regulations as approved by the Managing Director.” See GAO No. 31, Rev. 4, Section 4. See also *Ding*, para. 17 and note 6; *Mr. “R”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-1 (March 5, 2002), para. 17.

“The Committee recognizes there is a fine line between an allegation of corruption in the process versus a challenge to the audit under its procedures. The former constitutes a complaint within the [purview] of the Grievance Committee whose jurisdiction is broad and extends to any complaint brought by a staff member adversely affected by a decision. Nonetheless, such an inquiry cannot infringe upon the Fund’s legitimate interest in precluding individual staff members from challenging an audit.”

(*Id.*, p. 6.) Accordingly, the Committee concluded that “. . . in hearing the matter on the merits only specific evidence of corruption and lack of integrity in the process will be heard.” (*Id.*)

23. In the same Order, the Grievance Committee dismissed Ms. O’Connor’s challenges to her 2006 and 2007 APRs and MARs, on the ground that she had not initiated administrative review within six months of the contested decisions, pursuant to GAO No. 31. The Committee concluded that the evidence showed that Ms. O’Connor had believed that her ratings were inappropriate at the time she was given them. The fact that additional motivations for challenging them, namely that she allegedly acquired evidence in or after December 2007 that these ratings may have been impermissibly affected by racial bias or that her rankings might affect her future at the Fund as a result of the 2008 downsizing exercise, did not, in the view of the Committee, justify extending the time limits. The Committee also rejected Grievant’s theory that the time limits might be tolled on the basis that she had availed herself of the process of informal dispute resolution provided by the Fund’s Ombudsperson during the period. (*Id.*, pp. 10-12.)

24. The Grievance Committee additionally dismissed as outside of its jurisdiction Ms. O’Connor’s complaints relating to the handling of the administrative review process by HRD prior to the filing of her Grievance. Finally, the Committee dismissed Ms. O’Connor’s claim that her 2008 APR and MAR ratings had been affected by retaliation for having contested earlier decisions, on the ground that she had not taken the prerequisite steps of administrative review prior to raising the claim in her Grievance. (*Id.*, pp. 13-14.)

25. The Grievance Committee scheduled a merits hearing for November 30 and December 1, 2009 on that portion of the Grievance that remained pending before the Committee. The Fund, in its Response to Request for Information and Views, has informed the Tribunal that following post-hearing briefs and the Report and Recommendation of the Grievance Committee on the matter, a final decision by Fund Management is not expected to be rendered before mid-March, 2010, at the earliest.

26. On August 3, 2009, Ms. O’Connor filed her Application with the Administrative Tribunal.

Summary of Parties’ Principal Contentions

27. The parties’ principal arguments as presented by Applicant in her Application, her Objection to the Motion, and her Comments on Respondent’s Response to Request for

Information and Views, and by Respondent in its Motion for Summary Dismissal and Response to Request for Information and Views may be summarized as follows.

Applicant's contentions on the merits¹¹

1. Applicant's job functions and work performance are consistent with a position classification of Grade A11/A12, in a more pertinent career stream, with opportunities for career advancement.
2. While Applicant's 2006 and 2007 APRs were the most significant documents required by HRD in support of the job audit, these documents provided misleading information to the auditors and tainted the proceedings with impermissible racial bias.
3. Applicant experienced an aggressive reduction in her competency ratings and MAR, without regard to her performance or the performance standards of her position. Applicant's MAR was not consistent with her performance rating.
4. In light of Applicant's supervisor's preparation of her 2006 APR, his recommendation to the job audit panel was not reliable.
5. The management of Applicant's department, in exercising discretion granted through a revised performance review system, subjected its staff to differential treatment based on race in the allocation of the May 2006 MARs, in violation of the Fund's rules against discrimination.
6. Applicant seeks as relief:
 - a. rescission of the promotion decision of November 29, 2007;
 - b. promotion to the uppermost level of Grade A11 of the Information ladder, retroactive to November 1, 2007;
 - c. compensation for "stress, aggravation, insults, and lack of professional courtesies"; and
 - d. punitive damages.

¹¹ An additional claim, that Applicant's May 2008 APR and MAR were impermissibly affected by retaliation for challenging the job promotion/reclassification decision through administrative review, was asserted by Applicant in the Application but withdrawn in her Objection to the Motion for Summary Dismissal. Respondent had contended in its Motion for Summary Dismissal that the claim should be dismissed because it had not been subject to administrative review according to the prior steps of GAO No. 31, but rather it had been raised for the first time in Ms. O'Connor's Grievance.

Respondent's contentions on admissibility

1. The Application should be dismissed in its entirety because Applicant has not yet exhausted all available channels of administrative review as required by Article V of the Tribunal's Statute. Management has not had an opportunity to render a final decision on the case, and therefore it is not ripe for review.
2. Applicant's challenge to the job audit and promotion decision is currently pending before the Grievance Committee, which will hold a merits hearing on the "integrity of the job audit process." Accordingly, the job audit/promotion claim should be dismissed by the Tribunal, without prejudice to Applicant's right to submit a new application on this claim following the Grievance Committee process and the final decision of Management on the matter, assuming Applicant is dissatisfied with the outcome.
3. The Tribunal's Statute does not authorize the Tribunal to render advisory opinions or to retain jurisdiction over an application if the applicant has not fulfilled the exhaustion of remedies requirement of Article V. If Applicant returns to the Tribunal, the issues may be framed and pleadings informed by the record of the administrative review proceedings.
4. For the Tribunal to retain jurisdiction over the Application would be inconsistent with its jurisprudence and might encourage future grievants to file simultaneous applications with the Tribunal.
5. To the extent that Applicant is attempting to adjudicate the legality of her May 2006 and May 2007 APRs and merit ratings as separate, additional claims, such claims should be dismissed with prejudice, as they were not initiated in a timely manner pursuant to GAO No. 31.

Applicant's contentions on admissibility

1. Applicant's Application before the Tribunal addresses a matter separate from the claim accepted for review by the Grievance Committee.
2. Applicant's claim before the Tribunal is that racial discrimination, specifically practices carried out during the May 2006 and May 2007 APR processes, impermissibly affected the job reclassification/promotion decision of November 2007. Applicant challenges the "discrimination model" in practice in her department since 2006.
3. Applicant has never requested review of the individual Annual Performance Reviews (APRs).
4. Use of Applicant's May 2006 and May 2007 APRs in the November 2007 job audit process gives rise to a new claim with its own limitations period. Applicant's May 2006 and May 2007 APRs and MARs are instruments of recurring violations of the

Fund's rules against discrimination. Each use of these documents, including in the job audit and promotion decision, is tainted by racial discrimination.

Consideration of the Admissibility of the Application

28. The Application brought by Ms. O'Connor, and the resulting Motion for Summary Dismissal, present the question of whether an applicant has met the exhaustion of remedies requirement of Article V of the Statute in respect of a claim dismissed by the Grievance Committee as outside of its subject matter jurisdiction but closely related to a claim that remains pending before that Committee.

29. Article V, Section 1 of the Tribunal's Statute provides: "When the Fund has established channels of administrative review for the settlement of disputes, an application may be filed with the Tribunal only after the applicant has exhausted all available channels of administrative review." Citing the statutory Commentary, the Tribunal has recognized that the exhaustion requirement is imposed by the statutes of international administrative tribunals for the reason that the judicial remedy provided by the Tribunal is designed as a forum of last resort for the resolution of employment disputes after the administration of the organization has had a full opportunity to assess a complaint to determine if corrective measures are appropriate. *See Commentary on the Statute*,¹² p. 23; *Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2001-1 (March 30, 2001), para. 66.

30. With respect to most "individual decisions" that are challenged in the Administrative Tribunal, the effect of Article V of the IMFAT's Statute is to require that an applicant's claims and the Fund's defenses are first heard by the Grievance Committee, a forum that is advisory to the Fund's Management. In cases in which the Committee concludes that it has jurisdiction, it renders a Report and Recommendation on the merits of the grievance to the Fund's Managing Director who then takes a final decision on the matter. *Ms. "BB", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-4 (May 23, 2007), para. 64; *Ms. "J", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-1 (September 30, 2003), para. 97. A complainant who remains dissatisfied with the result may file an application with the Administrative Tribunal within three months of this final determination by Fund Management. (Article VI.)

31. In cases in which a grievance is dismissed by the Grievance Committee for lack of jurisdiction (and hence no Report and Recommendation is made by the Committee to the Fund's Management), the Tribunal's practice is to apply the three month statute of limitations prescribed

¹² Report of the Executive Board to the Board of Governors on the Establishment of an Administrative Tribunal for the International Monetary Fund (1992), reprinted in 2009 to incorporate the Report of the Executive Board to the Board of Governors on Amendments to the Statute of the Administrative Tribunal for the International Monetary Fund (2009). Page references are to the consolidated Commentary (2009 edition).

by Article VI as running from the Committee's dismissal of the grievance. See *Estate of Mr. "D"*, note 18.¹³

32. A more difficult problem arises when a grievant raises multiple claims before the Grievance Committee and the Committee decides that it may exercise jurisdiction over some, but not all, of those claims. In the case of *Ms. V. Shinberg, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-2 (March 5, 2007), the Fund had filed a motion in the Grievance Committee to dismiss that portion of Ms. Shinberg's Grievance that challenged the Fund's "policies and rules" governing promotion and mobility, on the ground that the Committee lacked jurisdiction to review the legality of rules and regulations governing the employment of staff. The Grievant filed an opposition in the Grievance Committee, contending that she was challenging not only policies but their application in her individual case. The Tribunal's Judgment reflects that it was "stipulated by and between counsel that Grievant may proceed directly to the Fund's Tribunal having agreed that the administrative remedies were exhausted with respect to Grievant's career progression claim." *Shinberg*, paras. 36-37.

33. In the case of Ms. O'Connor, the Grievance Committee's Order made clear that the Committee expressly abstained from hearing on the merits that part of Applicant's complaint over which only the Tribunal would have jurisdiction, namely, the challenge to the outcome of the job classification decision. A dilemma posed by the case of Ms. O'Connor is that had she failed to file an application with the Tribunal within three months of the dismissal by the Grievance Committee on jurisdictional grounds of her challenge to the outcome of the job audit decision, she risked being confronted in the Tribunal by a motion for summary dismissal on the ground that she had failed to meet the Tribunal's statute of limitations.

34. The Tribunal's jurisprudence strongly favors recourse to the Grievance Committee when that channel is available because such recourse has the "advantage of producing a detailed factual and legal record which is of great assistance to consideration of a case by the Administrative Tribunal." *Ms. "Y", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1998-1 (December 18, 1998), paras. 42-43 (resolving ambiguity as to availability of channels of review for case arising through an alternative dispute resolution procedure (Discrimination Review Exercise) in favor of Grievance Committee review if Committee deemed recourse to it to be available, while not precluding a further application to the Administrative Tribunal if the Committee were to decline to exercise jurisdiction). Although the Tribunal makes its own findings of fact and conclusions of law, it is "... authorized to weigh the record generated by the Grievance Committee as an element of the evidence before it," *Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1996-1 (April 2, 1996), para. 17, *Ms. "Z", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-4 (December 30, 2005), para. 121, and routinely "draws upon the record assembled through the review procedures" *Ms. "J"*, para. 96.

¹³ In an exceptional case, in which, subsequent to dismissal of the grievance on jurisdictional grounds by the Grievance Committee, the applicant brought the merits of her complaint to the attention of Fund Management, the Tribunal concluded that the statute of limitations ran from Management's denial of the complaint. *Estate of Mr. "D"*, note 18.

35. The Tribunal also has held that the Grievance Committee decides for itself whether it has jurisdiction for purposes of proceeding with a grievance, and that the Committee's determination is "relevant to but not necessarily dispositive of" the Tribunal's decision as to whether an applicant has exhausted channels of administrative review for purposes of meeting the requirement of Article V of the Statute. *Estate of Mr. "D"*, paras. 85, 91. In the case of Ms. O'Connor, the Fund maintains that Management has not had an opportunity to render a final decision on the case and therefore it is not ripe for review by the Tribunal.

Does the complaint raised in the Application before the Administrative Tribunal differ from the claim pending in the Fund's Grievance Committee?

36. While the Grievance Committee decided that it would not consider Applicant's challenge to the outcome of the job audit decision, it did decide to consider whether the process by which that assessment had been undertaken was tainted in a way that violated Fund regulations. In so deciding, the Grievance Committee observed that there was a "fine line" between a challenge to the job audit decision itself and an allegation of corruption in the process. The Committee decided that it would hear only "specific evidence of corruption and lack of integrity in the process." (Grievance Committee Order, p. 6.)

37. To the extent that Applicant is challenging before the Administrative Tribunal what she could not challenge before the Grievance Committee, i.e., the outcome of the job audit, resulting in her promotion into a reclassified position, Applicant implicitly challenges a "regulatory" decision of the Fund.

38. The Fund cites the portion of the Commentary on the Statute that provides as follows:

"There could, of course, be cases where an applicant sought to overturn an individual decision on several grounds, e.g., that the decision is either an incorrect application of the underlying regulatory decision, or, alternatively, that the underlying regulatory decision itself is illegal. The Grievance Committee would be competent to consider challenges based on the former grounds but not the latter grounds, insofar as the legality of a regulatory decision was at issue.

In cases involving both types of grounds, the requirements of the tribunal statute regarding exhaustion of remedies and the statute of limitations should be understood as follows. The Grievance Committee would first hear the case and dispose of the issues over which it had jurisdiction (i.e., whether the decision at issue involved a correct interpretation or application of the Fund's rules). If the Grievance Committee rejected his case, the staff member could then proceed to the tribunal. *At that time, it would be open to him to raise, as grounds for review, not only the issues that were before the Grievance Committee but also, if appropriate, the legality of the underlying regulatory decision, regardless of whether more than three months had passed since the individual*

decision at issue had been taken. In essence, the pursuit of administrative remedies as to the issue of interpretation or application would suspend the time period for seeking review of the decision on grounds for which no administrative review is available.”

Commentary on the Statute, pp. 25-26. (Emphasis supplied.) However, this section of the Commentary contemplates a challenge to an *underlying* regulatory decision. Ms. O’Connor is not challenging an individual decision on the ground that it was taken on the basis of an invalid regulatory decision. Rather, she implicitly challenges the regulatory decision precluding staff members from challenging job audit decisions so that she may contest the individual reclassification decision in her case. Accordingly, the circumstance presented by Ms. O’Connor’s case is one not contemplated by the statutory Commentary.

39. The Tribunal observes that the Grievance Committee, mindful of the limitations set on its own jurisdictional mandate, may have created a somewhat artificial distinction between Applicant’s challenge to the results of the job audit and her allegations that the process itself was impermissibly tainted. While the Grievance Committee decides its own jurisdiction for purposes of proceeding with a Grievance, the Tribunal likewise must determine independently whether an applicant has fulfilled the exhaustion requirement of Article V of the Tribunal’s Statute.

40. The two claims of Ms. O’Connor, (a) that her job functions deserved to be classified at a higher grade level and in a different career stream, and (b) that the process by which the audit of her position was carried out was improper, are closely allied. The Tribunal’s decision making would benefit from the record developed in the Grievance Committee in considering the former claim. As to the latter claim—in view of the Grievance Committee’s assertion of jurisdiction to decide it—the Grievance Committee’s hearing on the matter, the Committee’s recommendation to Fund Management, and Management’s final decision, must be permitted to take their course.

41. For the Tribunal to decide otherwise, so as to consider Ms. O’Connor’s challenge to the outcome of the job audit before she has exhausted channels of administrative review in respect of her challenge to the audit process, would fail to serve what the Tribunal has identified as the “twin goals” of the Article V’s exhaustion of remedies requirement, i.e., of “providing opportunities for resolution of the dispute and for building a detailed record in the event of subsequent adjudication.” *Estate of Mr. “D”*, para. 66.

42. While the Tribunal dismisses the Application in its entirety for failing to meet the requirement of Article V of the Statute, it is prepared to consider a new application of Ms. O’Connor, raising either or both of the claims discussed above, following the conclusion of the administrative review process that is already underway, in the event that the Applicant remains dissatisfied with the Fund’s disposition of her complaints.

The issue of possible challenge to the 2006 and 2007 APRs

43. Finally, the Tribunal observes that Respondent in its Motion for Summary Dismissal maintains that “to the extent that” Applicant is attempting to adjudicate the legality of her 2006 and 2007 APRs as separate claims, such claims should be dismissed “with prejudice,” on the

ground that they were not initiated in a timely manner pursuant to GAO No. 31. Applicant devotes considerable attention in her Objection to the Motion to seeking to rebut the suggestion that the Tribunal might preclude her use of the 2006 and 2007 APRs and MARs as evidence of discriminatory animus in the job reclassification decision, maintaining that these performance assessments have had continuing adverse effects on her career.

44. The Tribunal observes that Applicant does not squarely raise in her Application before the Tribunal a challenge to her performance ratings, and indeed asserts in her pleadings that she has “never ever requested a review of my individual APR report in the Fund,” maintaining that Respondent has attempted to “reframe” her complaint as seeking a request for review of the 2006 and 2007 APRs. Accordingly, it is not clear whether there is any challenge pending in the Tribunal as to the lawfulness of Ms. O’Connor’s 2006 and 2007 APRs. If the Tribunal were to grant the Fund’s request to dismiss “with prejudice” any challenge that Applicant may make to the legality of the APR ratings, it would be rendering an “advisory opinion” as to its jurisdiction, something it is not authorized to do.¹⁴ As the Respondent itself points out, if Applicant returns to the Tribunal with a new application, the issues may be framed and the pleadings informed by the record of the review proceedings. Likewise, any decision as to the significance of Applicant’s 2006 and 2007 APRs in respect of a challenge to the job reclassification decision would be better informed by a full exchange of pleadings on the merits of the case.

¹⁴ See Commentary on the Statute, p. 13 (“[T]he Tribunal would not be authorized to resolve hypothetical questions or to issue advisory opinions”). See also *Mr. “F”, Applicant v. International Monetary Fund, Respondent (Interpretation of Judgment No. 2005-1)*, IMFAT Order No. 2005-2 (December 6, 2005), paras. 16-18 (denying request for interpretation of Judgment on ground that Fund sought “advice rather than interpretation” and that the Tribunal’s “powers do not go beyond the resolution of the cases brought before it by applicants”).

Decision

FOR THESE REASONS

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

The Application is dismissed in its entirety, without prejudice to Applicant's right to bring a new Application following the exhaustion of all available channels of administrative review pursuant to Article V of the Statute.

Stephen M. Schwebel, President

Nisuke Ando, Associate Judge

Michel Gentot, Associate Judge

Stephen M. Schwebel, President

Celia Goldman, Registrar

Washington, D.C.
February 8, 2010