

**ADMINISTRATIVE TRIBUNAL OF THE
INTERNATIONAL MONETARY FUND**

JUDGMENT No. 2012-2

Mr. S. Negrete, Applicant v. International Monetary Fund, Respondent

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Introduction

1. On March 7 and September 10 and 11, 2012, the Administrative Tribunal of the International Monetary Fund, composed for this case¹ of Judge Catherine M. O'Regan, President, and Judges Edith Brown Weiss and Francisco Orrego Vicuña, met to adjudge the Application brought against the International Monetary Fund by Mr. S. Negrete, a former staff member of the Fund. Applicant represented himself in the proceedings. Respondent was represented by Ms. Diana Benoit, Senior Counsel, IMF Legal Department.
2. Applicant contests the Fund's decision to refuse his request for voluntary separation under the terms of the Fund's 2008 downsizing exercise. Applicant contends that both his Department and the Institutional Panel (IP or Panel) constituted under the downsizing program violated the rules that were to govern that exercise, as set out in Staff Bulletin No. 08/03 and its Annexes and Supplements, resulting in an abuse of discretion by Fund Management in taking the decision to refuse Applicant's request.
3. In particular, Applicant alleges that his Department violated the governing rules by (a) failing to recommend the "necessary number" of volunteers for refusal and instead recommending for acceptance one more volunteer than the number permitted from his intradepartmental fungible group, and (b) referring to the Panel the requests of all of its Grade A9-A15 volunteers, rather than only those requests that it recommended for refusal. In Applicant's view, the alleged errors of his Department were compounded by the IP, which, he maintains, exceeded its authority by reviewing all of the requests and reversing the Department's recommendation that his request be accepted. Applicant additionally contends that the IP improperly assessed his "relative competency" vis-à-vis volunteers Fund-wide, rather than only against volunteers from his own fungible group. Applicant also alleges that the IP abused its discretion by not consulting his Department in formulating a "conditional list" of additional volunteers from across the Fund recommended by the Panel for acceptance under the downsizing program if budgetary resources permitted. In Applicant's view, each of these alleged violations of the rules governing the Fund's exercise of the right of refusal, both independently and together, resulted in the improper denial of his request.

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

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

4. Applicant seeks as relief the value of the separation package that he would have received had his request for separation under the terms of the 2008 downsizing program been accepted.

5. Respondent, for its part, maintains that Applicant has failed to demonstrate that the Fund abused its discretion in refusing his request for voluntary separation under the framework established for the downsizing exercise. In the view of the Fund, the IP properly applied the governing rules and principles in Applicant's case. Although acknowledging that Applicant's Department erred in recommending for acceptance a greater number of volunteers than the number permitted from Applicant's intradepartmental fungible group, the Fund maintains that the IP corrected any error by conferring with the Department to seek a basis on which to distinguish Applicant's request from that of another staff member in Applicant's group who was also recommended for acceptance by the Department and concluding that the documentation did not provide a reasonable basis for the acceptance of Applicant's request. In the view of the Fund, Applicant has presented no evidence that would establish a failure by the IP to assess properly the facts of his case or to apply to those facts the rules and principles underlying the exercise of the right of refusal.

The Procedure

6. On June 6, 2011, Mr. Negrete filed an Application with the Administrative Tribunal. The Application was transmitted to Respondent on June 13, 2011. On June 23, 2011, pursuant to Rule IV, para. (f),² the Registrar circulated within the Fund a notice summarizing the issues raised in the Application.

7. Respondent filed its Answer to the Application on July 28, 2011. On August 31, 2011, Applicant submitted his Reply. The Fund's Rejoinder was filed on October 6, 2011.

Requests for anonymity of other persons

8. In its Answer, the Fund requests, pursuant to Rule XXII,³ para. 2, that the Tribunal not make public the name of a staff member whose request for voluntary separation was closely compared by the IP with that of Applicant.

² Rule IV, para. (f), provides:

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

. . .

(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; . . .

³ Rule XXII provides:

9. In his Reply, Applicant expresses his agreement with the request of the Fund and additionally requests that the names of other volunteers from his Department who are identified in the record of the case not be made public by the Tribunal. Applicant confirms that he does not seek anonymity for himself.

10. As to the requests for anonymity of other persons, the Tribunal, in accordance with its usual practice, will not name persons other than the Applicant in the case. *See Ms. "EE", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2010-4 (December 3, 2010), para. 11; *Mr. "DD", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-8 (November 16, 2007), para. 7; *Mr. M. D'Aoust (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-3 (May 22, 2007), note 1.

Oral proceedings

11. 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." Applicant has not requested oral proceedings.

12. The Tribunal had the benefit of the transcript of oral proceedings held by the Fund's Grievance Committee, at which the following persons testified: Applicant; the Chair of the IP; the Director of Applicant's Department; and the Senior Personnel Manager (SPM) of Applicant's Department. The Tribunal 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.

13. In view of the extensive written record before it and in the absence of any request, the Tribunal decided that oral proceedings would not be useful to its disposition of the case.

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.

The Factual Background of the Case

14. The key facts, some of which are disputed between the parties, may be summarized as follows.

15. Applicant was appointed to the staff of the Fund on a fixed-term appointment effective March 22, 2007. On April 15, 2008, Applicant, then serving in a Grade A12 position in one of the Fund's functional and special services departments, requested voluntary separation pursuant to the 2008 Fund-wide downsizing exercise.

2008 Fund-wide downsizing exercise

16. In early 2008, the IMF initiated a downsizing exercise to trim and reshape its workforce with the purpose of reducing expenditures and refocusing the mission of the organization. *See generally Mr. C. Faulkner-MacDonagh, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2010-2 (February 9, 2010) and *Mr. A. Billmeier, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2010-3 (February 9, 2010). This exercise was unprecedented in the Fund. In the initial phase of the downsizing, the Fund sought to attract volunteers through enhanced separation benefits (also made available to those separating later under the mandatory phase of the process). Staff were given a narrow window from March 1-April 21, 2008 in which to volunteer under the downsizing framework. Some 492 volunteers separated under the beneficial terms of the downsizing exercise. Applicant is one of 99 staff members whose requests were denied as a result of the Fund's exercise of its right of refusal of volunteers.

17. The legal framework for the downsizing was provided by Staff Bulletin No. 08/03 (Refocusing and Modernizing the Fund: The Framework for the Downsizing Exercise) (February 29, 2008) and its Annexes and Supplements. In setting out the overall framework, the Fund expressly reserved the right to refuse volunteers "because of either budgetary constraints or the business needs of the institution." (Staff Bulletin No. 08/03, p. 2.) The right of refusal was elaborated as follows:

Once the voluntary window closes on April 21, the overall number and composition of volunteers will be assessed so that management may determine whether it is necessary to exercise a right of refusal because of budgetary constraints or the business needs of the Fund. In the event that management determines that the right of refusal must be exercised, the factors that will be taken into account will include: (a) whether the volunteers are within a fungible category of staff that is subject to reductions in force, and (b) if so, the extent to which there may be more volunteers in that category than is needed to achieve the reductions called for by the refocusing strategy.

(*Id.*, p. 3.)

Role of the Institutional Panel

18. The initial Staff Bulletin No. 08/03 announced plans for an Institutional Panel, which was to have a role in the mandatory phase and—in the event that it was necessary for the Fund to exercise its right of refusal—in the voluntary phase of the downsizing as well. In either circumstance, the Panel’s mission was to “ensure that the decisions on separations among fungible staff are made in a reasonable, consistent and non-discriminatory fashion and involve assessments of competency that are made on an institution-wide basis.” (Staff Bulletin No. 08/03, Annex I (Composition and Terms of Reference of the Institutional Panel).) In the event that the Fund determined that the right of refusal needed to be exercised, “. . . and the exercise of this right requires an assessment of the relative competency of volunteers, the IP shall make recommendations to the Managing Director regarding the staff with respect to whom the Fund should exercise such right of refusal.” (*Id.*)

19. The Panel’s Terms of Reference also provided: “In carrying out the above roles, [the] IP will apply the criteria and follow the process set forth in the Bulletin. The IP may prescribe procedures to enable it to carry out this process, including specification of the information to be provided to Panel members and the timetables for doing so.” Decisions of the IP were to be made “. . . to the extent possible, on the basis of a consensus reached among relevant Department Directors and the IP. If no consensus is possible, the IP will decide on the recommendation (by a majority of members), and will report dissenting views to management.” (*Id.*)

Framework for the Fund’s exercise of the right of refusal

20. Following the close of the voluntary window, it was apparent that the program was significantly oversubscribed. For both Grade A1-A8 and B-level staff, the Fund determined that the number of requests and the needs of the organization justified the acceptance of all volunteers. In the case of Grade A9-A15 volunteers, however, requests exceeded targeted cuts and the Fund concluded that its right of refusal would be exercised.

21. On May 6, 2008, the Fund issued Staff Bulletin No. 08/03, Supplement 2 (Framework for the Fund’s Exercise of the Right of Refusal in Voluntary Separations), which explained that “[s]ince the budget can only accommodate additional volunteers up to 30 percent more than the required reductions at the A9-A15 level, the A9-A15 volunteers above this threshold will need to be refused.” (Supplement 2, para. 6.) The framework to be used to determine how to allocate the exercise of the right of refusal among Grade A9-A15 staff was to be guided by the principles underlying the downsizing exercise and the design of the mandatory phase: “[T]he primary criterion that the Fund will use to identify individual volunteers for whom the right of refusal must be exercised . . . will be that of relative competency, with the objective of enabling the Fund to retain the most qualified staff with[in] each of the fungible groups.” (*Id.*, para. 9.)

22. Pursuant to Supplement 2, procedures for exercising the right of refusal were to vary depending upon whether the volunteer was a member of: (a) a large group, fungible across departments (e.g., macroeconomists); (b) a small group, fungible across departments (e.g., Office

Managers); or (c) a fungible group within a single department (e.g., Applicant's group). (*Id.*, para. 10.) These procedures are outlined below.

23. In the case of the "large fungible group" of Grade A11-A15 macroeconomists, Supplement 2 provided that these volunteers would be divided into three sub-groups, based upon their MARs⁴ percentiles:

- Automatic acceptance group:

14. All volunteers whose MARs fall below the Assessment Band shall be notified that their application for separation under the voluntary separation framework has been accepted.

- Automatic refusal group:

15. All volunteers whose MARs fall above the Assessment Band and who have not been placed in the Institutional Panel Assessment Group under 13(c) above shall be notified that the Fund will exercise the right of refusal with respect to them.

- Institutional Panel Assessment Group:

13. An Institutional Panel Assessment Group will be established within the Macroeconomist Group and will include the following:

(a) volunteers whose MARs averages place them in the bottom 10-20 percent of the MARs cut-off group, and a group of staff equal in number to 10-20 percent of the MARs cut-off group whose MARs averages are the highest among those below the MARs cut off (the "Assessment Band"). The precise ranges will take into account the distribution among the MARs (including the "bunching" among MARs).

(b) all volunteers within the Macroeconomist Group who do not have a MARs average; and

(c) any volunteers above the Assessment Band whom the relevant Department Director or the Institutional Panel (in consultation with the Director and taking into account the views expressed by staff under paragraph 22 below) represents should be included in the Institutional Panel Assessment Group on the

⁴ The MAR (Merit-to-Allocation Ratio) is the ratio of a staff member's actual merit increase to the amount budgeted for this purpose. (Staff Bulletin No. 08/03, note 4.)

grounds that their MARs percentile does not reflect their relative competence. Such representations by Department Directors should be made on an exceptional basis and must be supported by a detailed written explanation.

(*Id.*, paras. 13-15.) The assessment of volunteers who fell within the Institutional Panel Assessment Group was to be made as follows:

16. The Institutional Panel, together with the relevant Department Directors, will assess all of the volunteers within the Institutional Panel Assessment Group for purposes of identifying those volunteers who, when taken together with the volunteers who will be refused under paragraph 15, constitute a group containing the most competent volunteers within the Macroeconomist Group the size of which equals the number of volunteers for whom the right of refusal must be exercised. The Institutional Panel will recommend to management that: (a) the right of refusal be exercised with respect to those volunteers so identified, and (b) the Fund accept the applications for separation under the voluntary framework with respect to all other volunteers in the Institutional Panel Assessment Group.

17. When making the assessments under paragraph 16 above, consideration will be given to the additional criteria set forth in the attachment, which will be applied by Department Directors in a standardized form and provided to the Institutional Panel in advance.

(*Id.*, paras. 16-17.)

24. In the case of volunteers falling within “small fungible groups” spanning more than one department, Supplement 2 provided as follows:

18. All relevant Department Directors will meet to assess the volunteers within each small fungible group for [the] purpose of recommending to the Institutional Panel the necessary number of volunteers in that group with respect to whom the right of refusal must be exercised. This assessment will be based on: (a) a staff member’s track record of performance, as indicated in his/her 3-year MAR average and (b) the additional criteria set forth in the attachment.

19. Department Directors will seek to reach a consensus on the recommendation to be made under paragraph 18 above. Where a consensus has been reached, the Institutional Panel will confirm the recommendation if it determines that the documentation provides a reasonable basis for the recommendation. Where no

consensus on a recommendation has been reached, the Institutional Panel will make a recommendation on the basis of all relevant factors, including the varying views of the relevant Directors, and taking into account the views expressed in writing by the affected staff as provided in paragraph 22 below.

(*Id.*, paras. 18-19.)

25. In the case of volunteers who were classified as members of “fungible groups within a single department”—Applicant’s category—the following terms governed the exercise of the right of refusal:

Fungible groups within a single department

20. The relevant Department Director will assess the volunteers within the fungible group for purposes of recommending to the Institutional Panel the necessary number of volunteers in that group with respect to whom the right of refusal must be exercised. This assessment will be based on: (a) a staff member’s track record of performance, as indicated in his/her 3-year MAR average and (b) the additional criteria set forth in the attachment.

21. The Institutional Panel will confirm the recommendation made by the Department Director if it determines that the documentation provides a reasonable basis for the recommendation, taking into account the views expressed in writing by the affected staff as provided in paragraph 22 below.

(*Id.*, paras. 20-21.)

26. The “additional criteria” referenced in Supplement 2 were set out as follows:

(i) Whether there are any reasons why a staff member’s MAR may not be indicative of relative performance.

(ii) The number of outstanding ratings from 1998–2007.

(iii) Trends in performance; for this purpose, an assessment of whether the staff member’s performance since May 1, 2007 was consistent with, higher than or lower than the last APR, will be given consideration.

(iv) The extent to which the staff member has the skills, experience required for the future that would be costly or difficult to replace.

(v) The length of time in grade, as a possible indication of the degree to which a staff member may have plateaued.

(vi) The staff member's potential, defined as capacity for growth, either upwards or laterally, to contribute effectively to the organization in the longer term. This may include competencies such as learning agility, ability to resolve and reconcile differences, ability to operate on both strategic and tactical levels, degree of respect of peers, demonstrated behaviors of inclusion and respecting diverse views, etc.

(*Id.*, Attachment.) Supplement 2 additionally advised all volunteers of the opportunity to present to the IP written submissions "as to why their 3-year MARs average is not reflective of their relative competency":

Opportunity to present views

22. Volunteers have the opportunity to present their views in writing to the Institutional Panel as to why their 3-year MARs average is not reflective of their relative competency, including taking into account the feedback they had previously received from their supervisors. Such views must be received by 5:00 p.m., Monday May 12, 2008 in order to be taken into account by the Panel. Such views may be emailed to INSTITUTIONAL PANEL.

(*Id.*, para. 22.)

Identification of intradepartmental fungible groups

27. For each of the relevant Fund departments, including Applicant's, Staff Bulletin No. 08/03, Supplement 1 (The Framework for the Downsizing Exercise: Supplement) (March 21, 2008), pp. 5-7, set out a listing of Fungible Categories of Staff within Single Departments or Offices. These intradepartmental fungible groups were established by the Human Resources Department (HRD) in consultation with departments prior to the voluntary phase. (*Id.*, para. 3.) (*See also* Tr. I, pp. 83-84.)

28. In the case of Applicant's Department, four groups were identified. Group 1 comprised B-level staff and Group 4 comprised staff below Grade A9. Consistent with the framework governing the Fund's right of refusal, all of the volunteers in Groups 1 and 4 were accepted for voluntary separation under the terms of the downsizing. Volunteers in the remaining groups in Applicant's Department, namely, Group 2 (Grade A11–A15 staff), i.e., Applicant's group, and Group 3 (Grade A9/A10 staff), were subject to possible refusal. The record shows that Applicant's Department had sought unsuccessfully to renegotiate with HRD its intradepartmental groupings such that Groups 2 and 3 would be combined into one unit; the Department later made the same request of the IP (*see below*). (Tr. II, pp. 34-35.)

29. Applicant's Department Director testified in the Grievance Committee proceedings that the Fund's Office of Budget and Planning (OBP), through negotiations with the departments, had

prescribed the numbers of staff positions that would need to be cut within each of the intradepartmental fungible groups. (Tr. I, p. 322-325.) Supplement 2, para. 7, noted:

[W]ithin the A9-A15 grade group (and as with the other two grade groups), the reductions in force are differential, reflecting the fact that, under the Fund's medium term strategy, the Fund would not only be changing its organizational structure, but would also be refocusing its activities within that modified structure. Accordingly, the Fund determined different levels of reductions of force for each fungible group of staff within the A9-A15 grades.

During the Grievance proceedings, the Fund's representative explained that departments initially were given the ". . . number of targeted cuts that would have been applicable whether [it] turned into a mandatory exercise or a right of refusal exercise, either way. That was the number of cuts for each group." Thereafter, departments ". . . were told for the right of refusal that . . . they could accept up to 30 percent over for each group." (Tr. II, pp. 60-61.)

Department's written submission to the IP

30. The IP Chair testified that as soon as it had become apparent that the Fund would need to exercise its right of refusal of volunteers, the Panel convened to discuss "how we were going to proceed and what information we would require in order to do our job." (Tr. I, p. 73.) As a result, departments were asked to complete a worksheet with "information about each individual who had applied to leave the organization." (Tr. I, p. 74.) Departments were asked to rate as "High," "Medium" or "Low" the "degree to which [the] staff member should be retained by the Fund." A final column of the chart was reserved for the "Institutional Panel Recommendation" to "Retain/not Retain" the volunteer. (Worksheet to Assess Relative Competence to Determine Staff to be Retained by the Fund.)

31. In the case of Applicant's Department, the maximum number of requests for separation that could be accepted in each of Groups 2 and 3 was three. Applicant's Department had received three requests for separation from volunteers in Group 3 (Grade A9/A10) and six requests in Group 2 (Grade A11-A15). Of the three requests in Group 3, the Department recommended two for acceptance. Of the six requests in Group 2, it recommended four for acceptance, including that of Applicant.⁵ (Tr. I, p. 326.)

32. The Department's written assessment of Applicant stated that with respect to "Performance Since May 1, 2007," he had shown "mixed performance since joining, with stronger performance since January 2008." As to "Skills/Experience Required for Future," the

⁵ The Fund in its pleadings states that the Department had rated four members of Applicant's group as "Low" in respect of the "Departmental recommendation of degree to which staff member should be retained by the Fund." (The redacted worksheet, which is part of the record of the case, shows the Department's assessments of Applicant and the staff member with whom he was closely compared by the IP.)

Department indicated as to Applicant: “Economist skills, excellent writing skills, knowledge of Fund policies, ability to transform complex policy positions and research into understandable communications; diplomatic and organizational skills to interact with key constituencies.” The Department rated Applicant “Low” as to the “extent to which [his] skills would be costly or difficult to replace” and “Medium” as to “potential for future growth.” Applicant’s overall “Departmental recommendation of degree to which staff member should be retained by the Fund” was “Low.” (Worksheet to Assess Relative Competence to Determine Staff to be Retained by the Fund.)

33. In the estimation of the Department, a second staff member in Applicant’s fungible group was considered, like Applicant, to be in the “middle” of the Group 2 volunteers in terms of suitability for acceptance under the terms of the downsizing program. The worksheet reflected that assessment.⁶

34. It is not disputed that the completed worksheet was the only written submission made by Applicant’s Department to the Panel relative to Applicant’s request for voluntary separation under the downsizing. (Tr. I, p. 85.) Nor did Applicant make any written submission of his own to the Panel, as permitted by Supplement 2, para. 22. Applicant testified that he thought such submission unnecessary, given his understanding that his request for separation had been endorsed by his Department and therefore was not to be assessed by the Panel. (Tr. I, p. 168.)

IP’s consideration of Department’s recommendations

35. The IP met during the period May 9-16, 2008 to make recommendations to Fund Management on the exercise of the right of refusal in individual cases. In her testimony before the Grievance Committee, the IP Chair elaborated the process by which the Panel proceeded with its decision making in Applicant’s case and more generally. No written record was maintained of the Panel’s proceedings. (Tr. I, p. 121-122.)

36. The IP Chair explained the Panel’s understanding that, of the six volunteers who comprised Group 2, “there were two individuals where it was very clear that retention . . . was the obvious response” and two others “where it was pretty clear that . . . their departure would be appropriate . . . based on the information.” Perceiving that Applicant and another staff member were “in the middle,” the IP directed its attention to seeking “any particular way to distinguish one from the other that would enable the panel to make a decision on retention or departure or not.” (Tr. I, p. 98-99.)

37. The Department Director testified to a similar view as to the composition of Group 2 as reflecting three groups of two. (Tr. I, pp. 262-263.) With regard to the “middle” group, the Department Director testified that “. . . the department felt that . . . if we had the opportunity, we

⁶ In the interest of protecting the privacy of the other staff member, the Tribunal has not reproduced herein the written statements of the Department regarding that staff member, as submitted on the Worksheet to Assess Relative Competence to Determine Staff to be Retained by the Fund.

would want to accept . . . their desire to leave, but where in both cases it wasn't a business needs driven thing. And you could also see given what their performance was, that if they hadn't volunteered, we wouldn't particularly want them to leave, so that's the category the two were in." (Tr. I, p. 263.)

38. The IP Chair testified that although the Panel initially sought a basis for distinguishing the requests of Applicant and the other staff member in his fungible group with whom he was closely rated, the Panel ultimately coalesced in the view that the two were indistinguishable in respect of their suitability for separation under the terms of the downsizing. (Tr. I, p. 104.) Moreover, the IP concluded that it could find no reasonable basis on which to sustain the Department's recommendation that the application of either staff member be accepted under the downsizing program. (Tr. I, p. 156.)

39. In the course of its consideration of Applicant's request for voluntary separation, the Panel met twice with representatives of his Department, first, with the Department Director and SPM, and on a second occasion with the SPM alone, as the Department Director was traveling.

40. At the first session, the Department representatives proposed to the Panel that Groups 2 and 3 be combined, so as to permit the distribution of the Department's six volunteer slots across both groups. (Tr. I, pp. 86-87, 297-298; Tr. II, p. 34.) (This proposal would have allowed for acceptance of all of the volunteers that the Department had recommended for acceptance, assuming that the Panel confirmed each of those recommendations.) In the Department's view, the differentiation between Grades A9-A10 and A11-A15 as prescribed by Supplement 1 of the Staff Bulletin was a "very artificial construct," which was not suited to the nature of positions within the Department and resulted in "mixing apples and oranges." (Tr. II, p. 34.) The Panel considered the Department's proposal. Following consultation with the legal advisor and HRD, the IP concluded that it would not be appropriate at that stage to change any of the groupings that had been set out in the Staff Bulletin, which had been carefully negotiated prior to the exercise. (Tr. I, p. 87.)

41. Additionally, at the first session, the Panel reviewed with the Department Director and SPM the cases of all of the Department's volunteers. The IP Chair testified: "[W]e discussed each volunteer and the department's view. Panel members were entitled to ask questions. That's how that meeting proceeded. We did that with every department." (Tr. I, p. 89.) The Department Director confirmed that at the meeting ". . . we went through the various people who had volunteered and what was the basis for our recommendation and why we had come to that conclusion." (Tr. I, p. 253.)

42. At the second session, the Panel probed the SPM for additional information on the past performance and future potential of Applicant and the other staff member with whom he was closely compared. The SPM recalled that it was at the second meeting that the specifics of Applicant's case were considered. (Tr. II, p. 10.) At the Grievance Committee hearing, the SPM summarized the views she had presented at the meeting as follows: As to Applicant, ". . . there was something of a mixed picture, but nevertheless, [Applicant was] not rated very well, and that was the message that was given." (Tr. II, p. 11.)

43. According to the IP Chair, in the initial meeting of the IP with the Department representatives, the Department was asked to “present the individuals in roughly the order that they would see as most appropriate.” The Chair testified that it emerged in that discussion that Applicant was regarded by the Department as number three, and his colleague number four, in priority for acceptance of their requests for separation. (Tr. I, pp. 197-198.) Applicant was “sort of third on their list of candidates to leave. And [the other staff member] was fourth, in terms of . . . their initial ordering of priorities. So that a lot of our discussion did focus on . . . what they saw as the rationale for this.” (Tr. I, p. 92.) The Chair recalled that the Department had a clear position on the ranking: “Q: . . . Just to emphasize that [Applicant’s Department] had a clear position on this? A: Oh, yes. Yes.” (Tr. I, pp. 135-136.)

44. Despite these statements by the IP Chair in the Grievance Committee proceedings, it is also clear from the record that the Department representatives at no stage sought to amend their recommendation of the number of Group 2 staff members to be accepted for voluntary separation from four to three such that Applicant would be number three. Nor did the Grievance Committee testimony of the Department representatives confirm that they had ranked Applicant as less favored for retention than the other staff member. The Department Director testified that he did not recall that ranking Applicant and the other staff member was part of the discussion in the meeting in which he participated with the Panel: “. . . I don’t recall a conversation where somebody said to me okay, as a department, of the two, you have one [slot available], who would you recommend?” or that the Department was asked to “go back and revisit [its] recommendation and give [the Panel] . . . a ranking of it.” (Tr. I, pp. 264-265.) The Department Director emphasized that the Department’s “preferred position” was that the requests of both Applicant and the other staff member be accepted. (Tr. I, p. 257.) The testimony of the SPM reflected that she was “. . . asked to compare [Applicant and the other staff member]. I was not asked to rank [Applicant and the other staff member].” (Tr. II, pp. 12-13.) When asked whether in the first meeting Applicant was ranked third for acceptance and the other staff member as fourth, the SPM replied: “I don’t remember, honestly, but it sounds right. But I really don’t remember that first [meeting] very well.” (Tr. II, p. 13.) The SPM was also asked if she thought she had presented the view that the other staff member might be a better candidate to stay; she replied: “. . . I thought that I did. But it may be that I wasn’t forceful enough.” (Tr. II, pp. 50-51.)

45. The conclusion of the Panel was that “. . . we didn’t see a rationale. . . . We did not sense a credible distinction between the two individuals.” (Tr. I, p. 92.) “[T]he skill areas and the skills were extremely similar. The general assessment of potential for future growth was also quite similar.” (Tr. I, p. 93.)

46. The Chair explained the IP’s assessment of Applicant’s record and potential for the future: “What I think struck the panel and what I think was extremely important was the stronger performance since January of 2008.” Notwithstanding a “. . . mixed start, with feedback it would appear that the individual was, in fact, adjusting and starting to come up to the potential which, when you looked at the skills, seemed to the panel to be quite impressive.” (Tr. I, p. 94.) The Panel considered “why would you want someone with these skills to leave the organization.” (Tr. I, p. 95.) The Panel “had a sense that this was an individual who might want to leave, but it was also an individual that the Fund might well want to keep.” (Tr. I, p. 96.)

47. As to both Applicant and the other staff member, in the view of the IP Chair, “what was similar, what was the same, was the conclusion of the panel that the department had not demonstrated a reason why the Fund would be better off if both [Applicant and the other staff member] left. And we thought there were some reasons why the Fund would be better off if [they] stayed.” (Tr. I, pp. 156-157.)

48. It is not disputed that in reaching its recommendation to Management on Applicant’s request, the IP also took account of requests from volunteers in other fungible groups across the Fund. Because the Panel perceived that “. . . the two were so close, in terms of their situation, that it would be hard to pick one and not justify the other. Then the question became . . . do we recommend going above . . . the maximum number of acceptances or not.” (Tr. I, p. 104.) It was at this point that, in the words of the IP Chair, “I think the idea of looking across the organization [arose] at this point—by now we know what we have out there in all departments.” (Tr. I, pp. 104-105.) The Panel asked itself: “[H]ow do these two individuals fit into this broader context of the organization. Because that’s the institutional panel’s role, which is to really look at it more broadly.” (Tr. I, p. 105.)

49. The IP Chair responded in the affirmative when, during the Grievance Committee proceedings, she was asked whether “in the panel’s mind they were effectively comparing the two middle people in [Applicant’s Department] with people in other departments.” (Tr. I, p. 206.) Similarly, when asked if Applicant’s “competition was not so much [the other staff member from his Department], but all these other people who were poorer performers in the Fund,” the IP Chair replied: “I would say yes, that it was certainly the case, that we wanted to be sure that each department made the case appropriately or made the case that this was in the interest of the Fund. And as we looked through that, we came to the conclusion this was not established here.” (Tr. I, p. 208.)

50. The Chair explained the Panel’s decision as follows: “I think it was the general sense that here were two individuals who had skills the organization needed, who had skills the organization was going to need in the future, and who were both performing at an acceptable level.” (Tr. I, p. 105.) “So put into that context, the panel could not bring itself to recommend that the two individuals leave the organization, which would mean one less of these other people who, in the panel’s view, was much more in the interest of the organization [to separate] We had a number of people [who] were . . . rejected for departure in other areas of this category whose performance was of concern to the organization.” (Tr. I, p. 106.)

51. The Chair of the Panel articulated what she saw as the relationship between the recommendations of Applicant’s Department and the Panel’s decision-making process: “[W]e were trying to elicit the information from the department that would allow the panel to make its own assessment” (Tr. I, p. 91.) In the view of the Chair, the IP was charged with “reviewing all of the applicants . . . and considering the [department] director’s recommendations and making recommendations as to the panel’s view as to who should be refused.” (Tr. I, pp. 159-160.)

52. The IP Chair emphasized that, in her view, although the “department can make a recommendation, . . . it has to support it with facts and with arguments that carry weight and that

carry weight relative to arguments being made by other departments in similar types of cases.” (Tr. I, p. 174.) She recognized that the Panel’s assessment might diverge from that of Applicant’s Department:

[I]n the course of the discussion with the department, the general conclusion was we had two people who were very similar in terms of both their performance and in terms of their skills and potential for the organization. I think that was a clear conclusion that the panel came to as a result of the discussion with the department.

Whether the department intended that we come to that conclusion is another issue. . . .

(Tr. I, pp. 198-199.)

53. At the second session, in which the Panel met with the SPM of Applicant’s Department, the Panel also sought to achieve consensus with the Department as to whether it could “live with” the Panel’s conclusion to recommend refusal of the requests of both Applicant and the other staff member. The IP Chair testified that the SPM “indicated that they could live with it,” which the SPM confirmed in her testimony. (Tr. I, pp. 109, 347; Tr. II, p. 44.) The SPM recalled that she made no attempt to push for the view that one of the two staff members should be accepted for voluntary separation in order to fill the available slot. (Tr. II, pp. 45-46.) The Department Director in his Grievance Committee testimony also confirmed his opinion that “. . . these were two staff members who had the potential. They were doing a job, and it wasn’t like their performance was at that time, unsatisfactory, and so we were happy to live with that outcome.” (Tr. I, p. 259.)

54. The IP Chair summarized the rationale for its recommendation on Applicant’s request as follows:

The institutional panel was there to ensure that departments did this fairly.

. . . .

[I]n the view of the panel, the documentation did not provide a reasonable basis for accepting the department’s recommendation.

. . . .

I think the panel decided in the final analysis that the case—the relative competency case for separation was not made. In the view of the panel, there was not adequate evidence to support a recommendation for separation.

(Tr. I, pp. 163, 166, 174.)

Formulation of “conditional list”

55. Near the conclusion of the Panel’s process, it determined to develop a “conditional list” of volunteers to be recommended to Management for acceptance if budgetary resources permitted. The Panel had noted that “in some fungible groups there were individuals who were going to be retained by the Fund where it was clear from the documentation that these individuals should not be retained . . . if the only criterion was performance and there wasn’t a financial limitation.” (Tr. I, pp. 112.) Accordingly, the IP made a conditional recommendation to Management to accept thirteen additional volunteers from across the Fund. Twelve of the thirteen were from the “large fungible group” of Grade A11-A15 macroeconomists. (Tr. I, p. 113.) In her Grievance Committee testimony, the IP Chair asserted that “[n]either Mr. Negrete nor [the other staff member with whom he was closely compared] . . . would have fallen into that group in the view of the panel.” (Tr. I, pp. 113-114.) “[W]hat put people on the conditional list was a conclusion that there were significant performance problems and no real future potential for these individuals.” (Tr. I, p. 114.) The Panel considered both Applicant and the other staff member to be “on a higher level” than those identified for the conditional list. (Tr. I, p. 115.) It is not disputed that the IP did not consult with Applicant’s Department in the formulation of the conditional list.

IP’s Report and Recommendations

56. On May 16, 2008, the IP issued its Report and Recommendations of the Institutional Panel on the Exercise of the Right of Refusal, which served as the basis for Management’s decisions to accept or refuse individual volunteers. For intradepartmental fungible groups such as Applicant’s, the IP’s Report summarized its decision-making process as follows:

For fungible groups within a single department, volunteers were assessed individually. The IP considered the recommendations made by each Department Director, supported by written documentation and presentations by the Directors regarding each volunteer. As with the other groups, the IP considered whether the assessment of the staff member’s performance record and the additional criteria formed a reasonable basis for the recommendation.

(Report and Recommendations of the Institutional Panel on the Exercise of the Right of Refusal, May 16, 2008.) (Emphasis in original.) Confidential Annex II to the IP’s Report stated, as to Applicant’s Department, that the Panel recommended acceptance of two volunteers from Group 2 and three volunteers from Group 3. As to Group 2, a footnote explained: “IP Recommended one less acceptance than allowed, in consultation with department.” (Report and Recommendations of the Institutional Panel on the Exercise of the Right of Refusal, May 16, 2008, Annex II.)

57. In total, the Panel recommended acceptance of the requests of 153 volunteers in the Grade A9-A15 range, plus the additional thirteen recommended on a conditional basis subject to

the availability of budgetary resources. Management accepted the recommendations of the Panel in their entirety. (Message from the Managing Director [to the staff] on the Completion of the Voluntary Phase, May 19, 2008.) Applicant was among 99 Grade A9-A15 staff members whose requests were refused.

Notification to Applicant

58. On May 21, 2008, Applicant was notified by email that “. . . after careful consideration, your application has been declined.” (Email from Team Leader, HR Team for Support Departments, May 21, 2008.)

59. Applicant continued to serve as a member of the Fund’s staff until his resignation effective July 10, 2009. As his request for voluntary separation pursuant to the downsizing exercise had been denied, Applicant did not receive the separation benefits available under that program.

The Channels of Administrative Review

60. GAO No. 31 (Grievance Committee), Rev. 4 (October 1, 2008), provides at Section 6.06:

Decisions Taken By Managing Director or Director of HRD. With respect to any decision that was taken directly by the Managing Director, or by the Managing Director’s designee, or by the Director of HRD, the staff member may file a grievance with the Committee within six months after the challenged decision was made or communicated to the staff member, whichever is later.

Accordingly, as the contested decision to refuse Applicant’s request for voluntary separation under the downsizing was taken directly by Fund Management, it appears that he could have challenged the decision directly in the Grievance Committee. The record indicates, however, that following notification of the decision Applicant sought explanations through HRD and from his SPM as to the outcome of his request. The SPM initially indicated to Applicant that the IP had recommended refusal of his application for voluntary separation because he held a fixed-term appointment. During the Grievance Committee proceedings, the SPM testified that she had been mistaken in drawing that conclusion and in mis-communicating to Applicant the reasoning of the Panel. (Tr. II, p. 21.)

61. In a series of email exchanges of June and July 2008, Applicant sought a fuller explanation from HRD. In a message of July 17, 2008 to the HRD Director, Applicant asserted: “The processing of my application and the feedback I received have caused me much confusion and puzzlement. . . . I strongly believe that the process and feedback did not meet the requirements of transparency, equal treatment, and a sense of fairness that the Managing Director emphasized would be major points in the restructuring exercise and the work of the IP.”

62. On July 31, 2008, the HRD Director provided Applicant with the following explanation:

. . . I agree that it was unfortunate that you received conflicting accounts from your SPM and from HRD of the basis for the IP's recommendation in your case. . . . In any event, while the miscommunication has been unfortunate, it does not change the fact that the Panel's decision was based on the considerations of relative competence that have been explained to you previously. Since this is the case, I am satisfied that the decision was taken in accordance with proper process and proper criteria.

You have also expressed concern about the Panel's finding of insufficient differentiation between you and another staff member, to justify accepting one of you and refusing the other. In this regard, it is important to recall that the Panel relied heavily on the ratings provided by the department, and your ratings (relating to both performance and potential) and those of the other staff member in question were in fact identical. Thus, in my view, it was reasonable for the Panel to conclude, as it did, that there was no justification for a different result in the two cases. Given that conclusion, both applications had to be refused, as acceptance of both was not an option.

(Email from HRD Director to Applicant, July 31, 2008.)

63. On December 12, 2008, Applicant filed a Grievance with the Fund's Grievance Committee contesting the decision of Fund Management to refuse his request for voluntary separation pursuant to the downsizing program. The Committee considered the case in the usual manner on the basis of oral hearings and the briefs of the parties. On January 19, 2011, the Grievance Committee issued its Recommendation and Report, recommending that the Grievance be denied on the ground that Applicant had not met his burden of showing that the Fund's decision to refuse his request to volunteer under the downsizing was arbitrary, capricious, discriminatory, or procedurally defective. (Grievance Committee Recommendation and Report, January 19, 2011, pp. 27-37.)

64. On March 7, 2011, Applicant received notification from Fund Management that it had accepted the Grievance Committee's recommendation. (Letter from Special Advisor to Managing Director to Applicant, February 22, 2011, and cover email of March 7, 2011.)

65. On June 6, 2011, Mr. Negrete filed his Application with the Administrative Tribunal.

Summary of Parties' Principal Contentions

Applicant's principal contentions

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

1. Applicant's Department violated Staff Bulletin No. 08/03 by failing to recommend the "necessary number" of volunteers for refusal and instead recommending for acceptance one more volunteer than the number permitted from Applicant's intradepartmental fungible group.
2. Applicant's Department violated Staff Bulletin No. 08/03 by referring to the IP the requests of all of its Grade A9-A15 volunteers, rather than only the requests of those volunteers that the Department recommended for refusal, resulting in the improper denial of his request.
3. The IP should have requested the Department to re-submit its recommendations, identifying the "necessary number" of volunteers for refusal. The Panel instead exceeded its authority by reversing the Department's recommendation on Applicant's request, on the ground that a case for acceptance of the request had not been substantiated.
4. Had the IP required the Department to submit the proper number of volunteers for refusal, Applicant's request would not have been among those recommended for refusal. The Department made clear that it ranked Applicant as less favored for retention than the other staff member with whom the Panel compared him.
5. The IP improperly considered Applicant's request for voluntary separation against requests from volunteers outside of his intradepartmental fungible group, including those in the large fungible group of Grade A11-A15 macroeconomists and in small groups fungible across the Fund. Clearly differentiated procedures were to govern each group.
6. The IP improperly failed to consult Applicant's Department in drawing up a "conditional list" of volunteers to be recommended for acceptance in the event that budgetary resources permitted.
7. Applicant seeks as relief the separation package that he would have received had his request for voluntary separation under the downsizing been accepted, i.e., six months' salary.

Respondent's principal contentions

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

1. The IP made its assessment of Applicant's relative competency in accordance with the governing rules. The documentation submitted by Applicant's Department did not provide a reasonable basis for recommending acceptance of his request for voluntary separation.

2. The Department's recommendation of one more acceptance than the number permitted for Applicant's intradepartmental fungible group did not invalidate the subsequent recommendation of the IP and the decision of Fund Management to refuse Applicant's request. The IP fully corrected the error by probing the Department for its views on each of the volunteers.
3. The IP did not exceed its mandate by assessing volunteers recommended by the Department for acceptance, along with those recommended for refusal. The IP was required to assess all of the Department's volunteers to decide whether there was a reasonable basis for accepting the Department's recommendations. In the case of Applicant, the IP did not find a reasonable basis for the Department's recommendation that his request be accepted.
4. The IP properly took an institution-wide perspective in assessing volunteers from Applicant's fungible group.
5. The IP had no obligation to consult departments in connection with drawing up a "conditional list" of volunteers to be recommended for acceptance in the event that budgetary resources permitted. The creation of the list had no bearing on the decision in Applicant's case, as it was designed to accommodate the separation of volunteers with significant performance problems and no real future potential for a career with the Fund.

Relevant Provisions of the Fund's Internal Law

68. For ease of reference, the provisions of the Fund's internal law relevant to the consideration of the issues of the case are set out below.

Staff Bulletin No. 08/03 (Refocusing and Modernizing the Fund: The Framework for the Downsizing Exercise) (February 29, 2008)

69. The overall framework for the downsizing was set out in Staff Bulletin No. 08/03. Following are selected provisions relating to voluntary separations:

B. Framework for Voluntary Separations

The opportunity for all staff (regular; fixed-term; limited-term) [footnote omitted] to state their willingness to separate voluntarily will be available between March 1, 2008 and April 21, 2008. The objective is to maximize the number of voluntary separations. Accordingly, the program has been designed to be flexible, with a number of generous features.

A staff member's offer to separate will become irrevocable once the voluntary phase has closed. The acceptance of these offers by the Fund will be subject to a number of conditions. First,

departments may require a volunteer to defer his/her departure from active service for up to one year based on the business needs of the institution. Second, and consistent with current practice regarding the separation of staff who receive separation payments on a discretionary basis, volunteers will be required to release the Fund from any claims arising to date. Finally, it may be necessary to refuse volunteers because of either budgetary constraints or the business needs of the institution. However, to the maximum extent possible, the Fund will accept all volunteers. The process for voluntary separations is described more fully below.

Process for voluntary applications

All staff will be able to volunteer to leave the Fund with a separation package described in the *Exploring Your Options* website on the Fund's Intranet (Exploring Your Options>Separation Process and Packages>Separation Packages). From March 1 through April 21, 2008 staff will be able to submit an application to volunteer on-line through the *ESS Kiosk* or by using a form that will be available in the *Exploring Your Options* website. When they apply, staff will be required to indicate a preferred last day of active duty falling within a 12- month period between May 14, 2008 and May 13, 2009. If staff members leave the Fund before their chosen last day of active service, they will still receive the separation package. However, staff members will be required to provide the normal 30 calendar days notice of separation.

....

Refusal by the Fund

Once the voluntary window closes on April 21, the overall number and composition of volunteers will be assessed so that management may determine whether it is necessary to exercise a right of refusal because of budgetary constraints or the business needs of the Fund. In the event that management determines that the right of refusal must be exercised, the factors that will be taken into account will include: (a) whether the volunteers are within a fungible category of staff that is subject to reductions in force, and (b) if so, the extent to which there may be more volunteers in that category than is needed to achieve the reductions called for by the refocusing strategy. To the extent that exercising the right of refusal requires an assessment of the relative competency of individual staff (so as to enable the Fund to retain the most qualified staff), the Institutional Panel, whose composition and

terms of reference are described in Annex I, will meet with relevant Department Directors to make recommendations to Management as to which volunteers should be refused.

.....

ANNEX I

COMPOSITION AND TERMS OF REFERENCE OF INSTITUTIONAL PANEL

A. Purpose

The restructuring exercise will include the need to reduce the number of positions in groups of staff who are considered broadly fungible. The purpose of the Institutional Panel (“IP”) is to ensure that the decisions on separations among fungible staff are made in a reasonable, consistent and non-discriminatory fashion and involve assessments of competency that are made on an institution-wide basis. In order to perform this function, the IP will review and make recommendations to the Managing Director as to the selection among fungible staff: (a) as to who will be separated or (b) as to who the Fund will exercise the right of refusal at the end of the voluntary phase, in the event that the Managing Director determines that such right of refusal needs to be exercised.

B. Composition

The IP shall consist of six members, including the Chair, all of whom shall be appointed by the Managing Director. These members shall [be] either former staff members or other external appointees with broad knowledge of the institution. In addition, the Managing Director shall appoint: (a) a person proposed by the Diversity Council, who shall advise the IP on diversity issues; and (b) a person proposed by the Staff Association Committee, who shall act as an Observer. HRD shall serve as a secretariat to the Panel, and LEG shall provide legal advice. The Chair may designate subpanels to advise the Panel in carrying out its functions.

C. Role of the Institutional Panel in Voluntary and Mandatory Separations

(i) Voluntary Phase

With respect to voluntary separations, in the event that the Managing Director[] determines that it is necessary to exercise the right of refusal as provided under Staff Bulletin 08/03 (the

“Bulletin”) and the exercise of this right requires an assessment of the relative competency of volunteers, the IP shall make recommendations to the Managing Director regarding the staff with respect to whom the Fund should exercise such right of refusal.

....

D. Process

In carrying out the above roles, [the] IP will apply the criteria and follow the process set forth in the Bulletin. The IP may prescribe procedures to enable it to carry out this process, including specification of the information to be provided to Panel members and the timetables for doing so. Decisions of the IP will be made, to the extent possible, on the basis of a consensus reached among relevant Department Directors and the IP. If no consensus is possible, the IP will decide on the recommendation (by a majority of members), and will report dissenting views to management.

Staff Bulletin No. 08/03, Supplement 1 (The Framework for the Downsizing Exercise: Supplement) (March 21, 2008)

70. The framework for the downsizing was supplemented in relevant part as follows:

3. Intradepartmental fungibility

As indicated in Annex II to the Staff Bulletin, HRD, in consultation with departments and offices, has prepared a list of the fungible groups that exist entirely within one department and that may be subject to reduction in force as part of this exercise. A revised Annex II that includes this list is attached. For reductions in strength that involve staff in one department only, there will be no MARs cut-off or Initial List, given that decisions will involve one department only. However, that department is expected to use the same information—MARs averages and other appropriate criteria—in deciding which of their staff in the category to retain or separate, taking into account diversity considerations for those who are considered equivalent in terms of relative competence.

....

Fungible Categories of Staff within Single Departments or Offices

Dept.	Groups	Job titles	Grade Bands
[Applicant's]

Group 2	...	A14/A15
	...	A13/A14/A15
	...	A13/A14
	...	A11/A12
Group 3	...	A9/A10
...

Staff Bulletin No. 08/03, Supplement 2 (Framework for the Fund’s Exercise of the Right of Refusal in Voluntary Separations) (May 6, 2008)

71. Following the close of the voluntary phase of the downsizing, Staff Bulletin No. 08/03 was further supplemented to prescribe procedures for the exercise of the Fund’s right of refusal:

Introduction

1. As set forth in Staff Bulletin 08/03 “Refocusing and Modernizing the Fund: The Framework for the Downsizing Exercise” dated February 29, 2008 (the “February Staff Bulletin”), the Fund reserves the right to refuse applications for voluntary separations on the basis of: (i) budgetary constraints; or (ii) business needs of the Fund.

2. After reviewing the overall number (591 staff) and profile of volunteers for the downsizing exercise, the Fund has determined that the cost of accepting all applications will exceed the resources available under the restructuring budget, and on this basis the Fund will exercise the right of refusal. The Executive Board provided \$185 million as a multi-year restructuring budget in support of a framework targeting a reduction of 380 budgeted staff positions. An examination of the structure of volunteers reveals that more staff than originally planned can be accommodated. [footnote omitted] Nevertheless, if all volunteers were accepted, restructuring costs would be \$45–50 million in excess of the approved amounts.

3. In determining how to exercise the right of refusal in a manner that addresses this excess, the Fund will be guided by fairness and the institutional considerations that shaped the design of the downsizing exercise. Moreover, the process that will be relied on for purposes of assessing relative competency—so as to enable the Fund to retain the most qualified staff—will be guided by a number of principles that were identified in the Framework for Mandatory Separations. The voluntary framework set forth below has been designed in consultation with the Institutional Panel, which will be relied upon to ensure that the process is implemented

fairly and takes into account an institution-wide perspective regarding relative competency.

Institutional considerations and fairness

4. For budgetary purposes, staff fall into three categories: (i) B1–B5 grades staff; (ii) A9–A15 grades staff; and (iii) A1–A8 grades staff. The level of reductions required under the downsizing is different for each of these categories and are shown below.

	FY2008	MTB Target		Volunteers		Overage over Target	
		Level	%	Level	%	Level	%
B1-B5	468	88	19%	110	24%	22	25%
A9-A15	1,699	131	8%	275	16%	144	110%
A1-A8	734	162	22%	206	28%	44	27%
Total	2,901	380	13%	591	20%	211	56%

Specifically, the budget requires (i) a reduction of 19 percent for B1–B5 staff; (ii) a reduction of 8 percent for A9–A15 staff; and (iii) a reduction of 22 percent for A1–A8 staff. These differential reductions reflected a key institutional consideration that was central to the Managing Director’s strategic vision. Taking into account the Fund’s organizational structure with industry standards, it was considered necessary to both increase the size of divisions and reduce the size of front offices. [footnote omitted]

5. The original targeted reductions may be exceeded by up to 30 percent while remaining within the restructuring budget because the profile of volunteers is somewhat different than what had been assumed in the construction of that budget—in particular, the average time that volunteers wish to delay their departure is shorter than the maximum allowed for, and average payments are lower than budgeted. As a general matter, it should be emphasized that accommodating volunteers beyond the number actually needed to achieve the required reductions in each of the three grade groups identified above is also consistent with institutional needs. For example, accommodating the excess number of volunteers within the B1–B5 grades will enable the Fund to facilitate an increased number of promotions to the B-level, thus relieving a bottleneck that has been considered to be a serious problem for the institution.

6. Accordingly, when determining how to exercise the right of refusal, the Fund will take into account these differential reductions. Specifically, in determining the number of voluntary separations that will be permitted to take place under the framework, the excess of the targeted reduction will correspond, to

the extent possible, to a uniform percentage of the total reductions required under each of the grade groups, taking into account the available budgetary envelope. Applying this approach, all volunteers in the B1–B5 grades (where the excess was 25 percent of the required reductions) will be accepted, and all volunteers in the A1–A8 grades (where the excess was 27 percent of the required reductions) will also be accepted. With respect to A9–A15 grades, however, the total number of volunteers in excess of the targeted amount represents 110 percent of the reductions envisaged in that category of staff. Since the budget can only accommodate additional volunteers up to 30 percent more than the required reductions at the A9–A15 level, the A9–A15 volunteers above this threshold will need to be refused.

7. The framework that will be used to determine how to allocate the exercise of the right of refusal among A9–A15 staff is to be guided by the principles underlying the downsizing exercise and the design of the mandatory framework. Specifically, within the A9–A15 grade group (and as with the other two grade groups), the reductions in force are differential, reflecting the fact that, under the Fund’s medium term strategy, the Fund would not only be changing its organizational structure, but would also be refocusing its activities within that modified structure. Accordingly, the Fund determined different levels of reductions of force for each fungible group of staff within the A9–A15 grades. For large fungible groups, for example, these differential reductions determined the MARs “cut-off” under the mandatory framework, reflecting the Fund’s refocusing agenda.

8. Taking into account these differential reductions in force, the general approach to be used when allocating the exercise [of] the right of refusal with the A9–A15 budgetary grade group will be as follows. For each fungible group where reductions were required, the number of volunteers to be accommodated will normally be no more than 30 percent higher than the reductions required in the relevant groups. Accordingly, in fungible groups where the number of volunteers did not meet the targeted reductions or where the reduction was exceeded by 30 percent or less, all volunteers will be accommodated. With respect to volunteers within groups where no reductions in force were envisaged, the number of volunteers accepted will normally not exceed 30 percent of the total number of volunteers in these groups.[footnote omitted]

9. Finally, the primary criterion that the Fund will use to identify individual volunteers for whom the right of refusal must be exercised to meet the quantitative parameters identified above will be that of relative competency, with the objective of enabling the Fund to retain the most qualified staff with[in] each of the fungible

groups. As is described below, the procedure to be used when applying this criterion will draw on the one that is applicable to the mandatory separation framework.

Procedure for exercising the right of refusal

10. Consistent with the framework for mandatory separation, the procedure will vary depending on whether the fungible group in question is (a) a large fungible group, (b) a small fungible group or (c) a fungible group within a single department.

....

[The procedures governing each category have been set out at paras. 23-26 above.]

Consideration of the Issues of the Case

72. The instant case is the third to be considered by the Tribunal in which a former staff member has challenged the refusal of his request for voluntary separation pursuant to the 2008 Fund-wide downsizing exercise. In each case, the staff member resigned from the Fund but did not receive the special separation benefits associated with the downsizing program.

73. In *Faulkner-MacDonagh* and *Billmeier*, the Tribunal sustained the Fund's regulatory decision to exercise the right of refusal only as to Grade A9-A15 staff members and not in respect of other categories of Fund staff. In the view of the Tribunal, the Fund had established a "rational nexus" between the objective of the policy to offer incentives to voluntary separation and the allocation of those benefits differentially among the broad categories of the Fund's staff. *Faulkner-MacDonagh*, paras. 75-84; *Billmeier*, paras. 80-88. In those Judgments, the Tribunal also denied the applicants' challenges to the refusal of their individual requests for voluntary separation. Both of the applicants were members of the "large fungible group" of Grade A11-A15 macroeconomists for purposes of the exercise of the right of refusal. The Tribunal upheld the Fund's method for differentiating among volunteers within that particular fungible group, as well as the application of the methodology in the individual cases of the two applicants. The requests of both applicants had been automatically refused based upon their MARs percentiles. The Tribunal sustained the application of the MARs cut-offs in the circumstances of their cases and held that a more individualized consideration of the applicants' requests for voluntary separation was not required. *Faulkner-MacDonagh*, paras. 85-98; *Billmeier*, paras. 89-101.

74. The present Application, brought by a former staff member who was a member of a "fungible group within a single department," presents different issues. In contending that the Fund abused its discretion in refusing his request for voluntary separation under the terms of the 2008 Fund-wide downsizing, Mr. Negrete raises the following questions for the consideration of the Administrative Tribunal. Did Applicant's Department fail to follow the governing regulations (a) by not recommending the "necessary number" of volunteers for refusal and instead recommending for acceptance one more volunteer than the number permitted from Applicant's intradepartmental fungible group, and (b) by referring to the Panel the requests of all of its Grade

A9-A15 volunteers, rather than only those requests that it recommended for refusal? Did the IP fail to follow the governing regulations by deciding to undertake its own assessment of Applicant's request after his Department failed to recommend the "necessary number" of volunteers for refusal, and in considering whether a case for acceptance, rather than for refusal, of the request had been substantiated? In considering Applicant's request, did the IP fail to follow the governing regulations by comparing Applicant's "relative competency" with that of volunteers outside of his fungible group? In formulating a "conditional list" of additional volunteers from across the Fund recommended for acceptance if budgetary resources permitted, did the IP improperly fail to consult Applicant's Department?

Standard of review

75. It is not disputed that the contested decision to refuse Applicant's request for voluntary separation under the 2008 downsizing program was an individual decision taken in the exercise of managerial discretion. In reviewing such decisions, this Tribunal consistently has invoked the following standard set forth in the Commentary⁷ on the Statute:

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

(Commentary on the Statute, p. 19.) *See generally Ms. "J", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-1 (September 30, 2003), para. 106. At the same time, the Tribunal has observed that ". . . the standard articulated in the Commentary for review of individual decisions involving managerial discretion comprehends a number of different factors. . . . Hence, its operation in a particular case may emphasize one factor over others or it may involve multiple factors" *Id.*, para. 107. "The degree of deference—or depth of scrutiny—may vary according to the nature of the decision under review, the grounds upon which it is contested, and the authority or expertise that has been vested in the original decision maker." *Id.*, para. 99. For example, "[w]hen an applicant's claim implicates a fundamental human right, the Tribunal has held that '[t]he very nature of this grave complaint requires a greater degree of scrutiny over the Fund's exercise of its discretion.'" *Mr. M. D'Aoust (No. 3), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2008-1 (January 7, 2008), para. 65, quoting *Ms. "M" and Dr. "M", Applicants v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2006-6 (November 29, 2006), para. 117. Accordingly, the

⁷ The consolidated Commentary on the Statute comprises the Report of the Executive Board to the Board of Governors on the Establishment of an Administrative Tribunal for the International Monetary Fund (1992) and 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).

abuse of discretion standard is a flexible one that this Tribunal has tailored in a manner appropriate to the nature of the case presented.⁸

76. The question arises of what considerations shall properly shape the Tribunal's review of a decision to refuse a staff member's request for the special benefits of voluntary separation under the terms of the 2008 downsizing program.

77. It is essential to keep in mind what is at stake in the instant case. As this Tribunal commented in the cases of *Faulkner-MacDonagh*, para. 71, and *Billmeier*, para. 76: "Applicant has not been required to leave the Fund. Nor has he been denied the opportunity to do so. What is at issue in this case is the value of the separation package that Applicant would have received had his request for voluntary separation been accepted under the terms of the downsizing exercise and his allegation that he was unfairly denied this benefit."

78. At the same time, it must be borne in mind that Applicant was entitled to fair treatment in the consideration of his request and that he had an expectation that the refusal decision would be taken in accordance with the governing rules. It is recalled that the claims asserted in the two earlier challenges to the Fund's exercise of the right of refusal were directed principally against the governing regulations. The Tribunal's deference to the Fund's decision making is ". . . at its height when the Tribunal reviews regulatory decisions (as contrasted with individual decisions) . . ." *Ms. "J"*, para. 105. In contrast, the Applicant in this case does not challenge the underlying regulations. Rather, he asserts that the regulations were misapplied in his case.

79. The issues presented by the voluntary separation of Mr. Negrete may be further contrasted with those considered in *Ms. N. Sachdev, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2012-1 (March 6, 2012), in which the applicant challenged *inter alia* the abolition of her position and resultant separation from the Fund as part of the mandatory phase of the downsizing. In the view of the Tribunal, the organization is properly held to a higher standard of scrutiny when a staff member challenges the fairness of an involuntary separation from employment as contrasted with an allegation that he has been improperly denied enhanced separation benefits upon his voluntary separation.⁹ This is so because "[t]he standard of review is designed to set limits on the improper exercise of power and represents a legal presumption about where the risk of an erroneous judgment should lie." *Ms. "J"*, para. 99.

Did the Fund abuse its discretion in refusing Applicant's request for voluntary separation under the terms of the 2008 Fund-wide downsizing program? Did Applicant's

⁸ See, e.g., *Ms. "EE"*, paras. 89-91 (review of decision to place staff member on paid administrative leave pending investigation of alleged misconduct).

⁹ Cf. *Ms. "T"*, *Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2006- 2 (June 7, 2006), para. 37 and note 11 (contrasting discretion at issue in non-conversion of fixed-term appointment with that exercised in the separation of a staff member for unsatisfactory performance); *Ms. "U"* *Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2006- 3 (June 7, 2006), para. 37 and note 13 (same).

Department and the Institutional Panel carry out their respective responsibilities consistently with the rules governing the Fund's exercise of its right of refusal?

80. It is recalled that the regulations governing the exercise of the right of refusal in Applicant's case, as set out in Staff Bulletin No. 08/03, Supplement 2, provided as follows:

Fungible groups within a single department

20. The relevant Department Director will assess the volunteers within the fungible group for purposes of recommending to the Institutional Panel the necessary number of volunteers in that group with respect to whom the right of refusal must be exercised. This assessment will be based on: (a) a staff member's track record of performance, as indicated in his/her 3-year MAR average and (b) the additional criteria set forth in the attachment.

21. The Institutional Panel will confirm the recommendation made by the Department Director if it determines that the documentation provides a reasonable basis for the recommendation, taking into account the views expressed in writing by the affected staff as provided in paragraph 22 below.

81. The text emphasizes that it was the responsibility of the Department Director to "assess the volunteers" within a given intradepartmental fungible group and then to "recommend[] to the Institutional Panel the necessary number of volunteers in that group with respect to whom the right of refusal must be exercised." The IP's role, in turn, was to "confirm the recommendation" if it determined that the "documentation provide[d] a reasonable basis" for it. The essence of Applicant's complaint is that neither his Department nor the Institutional Panel carried out its respective responsibilities consistently with these governing rules.

Did Applicant's Department fail to follow the governing regulations by not recommending the "necessary number" of volunteers for refusal and instead recommending for acceptance one more volunteer than the number permitted from Applicant's intradepartmental fungible group?

82. Paragraph 20 provides that for each intradepartmental fungible group the Department Director was to recommend to the Panel the "necessary number of volunteers in that group with respect to whom the right of refusal must be exercised." That number had been established for each group based on budgetary constraints and the perceived differential needs of the Fund. The record shows that, as to Applicant's fungible group, the Department rated four of the six volunteers as "Low" in respect of the "Departmental recommendation of degree to which staff member should be retained by the Fund." These ratings were understood to mean that the Department recommended acceptance of the separation requests of those four volunteers, including Applicant's. It is not disputed that this number exceeded by one the number of volunteers from Group 2 that could be accepted for voluntary separation, based upon the numbers that had been prescribed by OBP at the outset of the exercise.

83. The Grievance Committee record shows that Applicant's Department deliberately sought to override the prescribed number of acceptances permitted for Group 2, disputing—initially with HRD and then with the Panel—the appropriateness of the delineation of the fungible groups within the Department. In answer to questioning by Applicant, the SPM testified as follows:

Q: [M]y question then is why [Applicant's Department] did not follow this paragraph, but why it presented a different number for group two than the maximum that it was allowed

. . . .

A: Because the grade differentiation didn't make any sense for our department. . . . And so, it was a very artificial construct, because you were constantly mixing apples and oranges, and this is why we came back to the panel and asked that it could be looked at in a different way.

. . . .

I consulted myself with HR prior to all of this being finalized. And I spoke with a couple of individuals there, and presumably they felt that that was not an appropriate determination. And so, they—the grade group determination is the one that remained. That's why we came back to the Panel because it just didn't make sense for [Applicant's Department].

(Tr. II, pp. 33-35.)

84. Applicant contends that his Department, in recommending acceptance of four volunteers from Group 2 when the maximum permitted was three, was “. . . not diligent in following clearly established procedures, . . . hoping that the IP would endorse the erroneous submission.” The crux of Applicant's complaint is that “[t]his lack of due diligence, i.e., the ignoring by senior staff of the carefully crafted procedures designed to protect the interests of affected staff, together with the clear order of preference regarding staff recommended for separation which [Applicant's Department] presented to the IP . . . led to a series of interventions by the IP that materially affected the outcome” of his request for voluntary separation.

85. Respondent, for its part, accepts that Applicant's Department, “. . . in its written submission to the IP and at the initial meeting between [the Department] and the IP, recommended more volunteers for acceptance from Applicant's small fungible group than there were available slots.” “Consequently,” concedes the Fund, Applicant's Department “. . . did not recommend the ‘necessary number’ for refusal, as departments were supposed to do under Staff Bulletin 08/03.” Respondent maintains, however, that the Department's action had no “material impact on Applicant's case.” This is so, asserts the Fund, because the “IP fully corrected any error during its meeting with [Applicant's Department], by probing the Director and SPM for

their views on each of the volunteers. . . . ensur[ing] that it received all necessary information and viewpoints from Applicant’s managers before the Panel decided upon its own recommendation to Management.” Applicant responds that, rather than correcting the error, the IP introduced further error into the process of considering his request.

86. Accordingly, it is not disputed that the Department failed to recommend for refusal the “necessary number” of volunteers from Applicant’s intradepartmental fungible group. In the view of the Tribunal, this was the first of a series of failures of the Fund to follow the governing regulations in considering Applicant’s request to receive the benefits of voluntary separation pursuant to the 2008 Fund-wide downsizing program.

Did Applicant’s Department fail to follow the governing regulations by referring to the IP the requests of all of its Grade A9-A15 volunteers, rather than only those requests that it recommended for refusal?

87. Applicant also contends that his Department erred in referring to the Panel the requests of all of its Grade A9-A15 volunteers, rather than only those requests that the Department recommended for refusal. It is not disputed that, in completing the Worksheet to Assess Relative Competence to Determine Staff to be Retained by the Fund, Applicant’s Department supplied information to the IP pertaining to all of its Grade A9-A15 volunteers.

88. Although Applicant seeks to ascribe to his Department responsibility for the alleged error of referring to the Panel the requests of all volunteers, rather than only those that the Department recommended for refusal, it appears that it was the Panel itself, in setting out procedures for discharging its responsibilities under the Staff Bulletin, that determined that departments should provide information about all volunteers by completing the worksheet.

89. The Tribunal additionally observes that the worksheet did not ask departments to make a binary choice between recommending acceptance or refusal of requests. Rather, departments were asked to rate on a three-tier scale of “High,” “Medium” or “Low” the “Departmental recommendation of degree to which staff member should be retained by the Fund.” The question of whether to “Retain/not Retain” the volunteer was reserved for the subsequent “Institutional Panel Recommendation.” (Worksheet to Assess Relative Competence to Determine Staff to be Retained by the Fund.) Accordingly, from the start, the IP did not appear to distinguish the procedures set out by Supplement 2 for the exercise of the right of refusal in respect of volunteers from “fungible groups within a single department” from those applicable to other categories of Fund staff. (*See below.*) In the case of Applicant’s category, that process was to begin with an assessment and recommendation by the Department as to the disposition of each request such that the “necessary number” of refusals was identified. (Supplement 2, para. 20.)

90. Nonetheless, in the view of the Tribunal, there was no error in the Panel’s instruction, or the Department’s compliance with it, to supply information to the Panel pertaining to all volunteers. It was only by comparing information about all of the volunteers within a given fungible group that the Panel could apply the standard of “relative competency” to decide whether to “confirm the recommendation made by the Department Director.” (Supplement 2, para. 21.) It was a reasonable interpretation by the IP of its “confirmation” responsibility

pursuant to Paragraph 21 to request such information from the Department and for the Department to comply with that request.

91. Accordingly, the Tribunal concludes that while Applicant's Department failed to follow the governing regulations in not recommending the "necessary number" of volunteers for refusal, it did not err in referring to the Panel the requests of all of its Grade A9-A15 volunteers. The Tribunal now turns to the question of the Panel's response to the Department's initial error.

Did the IP fail to follow the governing regulations by undertaking its own assessment of Applicant's request after his Department failed to recommend the "necessary number" of volunteers for refusal?

92. The gravamen of Applicant's complaint that the Department improperly referred the requests of all volunteers—rather than only those that it recommended for refusal—is that this action led the IP to assess *ab initio* the merits of his request. Although the Tribunal has concluded above that the Department did not err in providing the IP with the requests of all of its volunteers so that the Panel could carry out its responsibility to confirm requests for refusal, for the reasons set out below, it holds that the IP did not act consistently with the governing regulations when it responded to the Department's failure to recommend the "necessary number" for refusal by undertaking its own assessment of Applicant's request.

93. In the view of the Tribunal, a distinction is to be drawn between the referral of all of the requests to the IP for the purpose of providing comparative information by which the IP could "confirm" or not the recommendations of the Department for refusal, and the IP's own assessment of a request, as the record reveals was done in the case of Applicant. The first was necessary to fulfill the IP's responsibility to assure that there was a reasonable basis for the decision to refuse a request. The second, by contrast, exceeded the grant of the IP's authority in respect of "fungible groups within a single department." In those cases, "assessment" was to be performed by the Department itself (*see* Supplement 2, para. 20), which was best positioned to compare the volunteers within the fungible group.

94. The IP's authority in considering requests of volunteers who, like Applicant, fell within a fungible group that was confined to a single department differed from the role it was to play in respect of both large and small groups that were fungible across various Fund departments. For the latter staff categories, the IP was granted a broader discretion to make its own assessments either "together with" the relevant Department Directors (e.g., in the case of Grade A11-A15 macroeconomist volunteers falling within the Institutional Panel Assessment Group) or "on the basis of all relevant factors" if there were no consensus among the relevant Department Directors (e.g., in the case of "small fungible groups" spanning more than one Fund department). (*See* Supplement 2, paras. 16, 19.)

95. Applicant asserts that the IP should have required his Department to "revise and re-present its list with the required (necessary) number of staff recommended for refusal." In Applicant's view, "[i]nstead, disregarding the procedures laid out by the Staff Bulletin 08/03, the IP took away—perhaps even usurped—the role and responsibility of [Applicant's Department] by taking it upon **itself** to **evaluate** my application for voluntary separation." (Emphasis in

original.) “Instead of requesting [Applicant’s Department] to submit the ‘necessary numbers,’ it opted to continue along an unmapped course that was not contemplated in, nor sanctioned by the Staff Bulletin.” Applicant further contends that had his Department recommended the “necessary number” of volunteers for refusal and referred to the Panel only the requests of those volunteers, his request never would have been considered by the Panel and his Department’s recommendation to accept it would have been confirmed.

96. Respondent, for its part, maintains that the governing rules did not require the IP to instruct the Department to re-submit the necessary numbers. In Respondent’s view, “there was no need for a separate procedural step to enable the IP to learn more about [the Department]’s views on the volunteers, as Applicant suggests, because that was in fact the purpose of the meetings that the IP held with [Applicant’s Department] and with all of the departments.” According to the Fund, those meetings provided “ample opportunity” for Applicant’s Department to “tell the Panel which of the two volunteers ‘in the middle’—Applicant or [the other staff member]—it preferred for acceptance, if indeed it had had such a preference,” and that the IP thereby “fully corrected” for the Department’s error.

97. The IP’s understanding of the respective roles of the Department and the Panel is captured in the interchange below, in which Applicant questioned the IP Chair:

Q: In this discussion of the department that you mentioned, it was then when it emerged that I was number three and [my colleague] was number four?

A: It was in the initial discussions with the department, when they came through. We asked them to present the individuals in roughly the order that they would see as most appropriate. But not after this discussion.

. . . .

Q: Did the department indicate at any moment that it was retracting, you know, deleting, saying, certainly not anymore number three; now it’s number four, when it was number three, but now we both are equal?

A: *They weren’t asked that question.* This was part of the input that the panel was requesting from the directors, wanting the directors’ view, but they were not be[ing] asked to reorder.

Q: And the department didn’t offer it on its own?

A: Not to my recollection. But I do think that in the course of the discussion with the department, the general conclusion was we had two people who were very similar in terms of both their performance and in terms of their skills and potential for the

organization. I think that was a clear conclusion that the panel came to as a result of the discussion with the department.

Whether the department intended that we come to that conclusion is another issue. And you would have to discuss [that] with the department. But certainly the panel’s conclusion on the basis of the discussion was we were dealing with two cases that were very, very, very similar in terms of the factors that we were looking at as a panel.

(Tr. I, pp. 197-199.) (Emphasis added.) The IP Chair also confirmed her view that the Department had a clear position on its initial ranking of the volunteers. (Tr. I, pp. 135-136.) That assertion was not, however, confirmed in the testimony of the Departmental representatives;¹⁰ accordingly, the evidence is ambiguous as to whether the Department at any time expressed a preference for the departure of Applicant over that of the other staff member. The Panel made no request for any additional written recommendation from the Department: “We did not operate on a written basis, beyond the initial submission.” (Tr. I, pp. 137-138.)

98. The Chair summed up the Panel’s approach as follows: “[W]e were trying to elicit the information from the department *that would allow the panel to make its own assessment . . .*” (Tr. I, p. 91.) (Emphasis added.) Accordingly, although Respondent maintains that the meetings provided “ample opportunity” for the Department to assert its preferences, the IP Chair’s testimony indicates that the Panel appeared to disregard any preferences that it understood the Department to have had. “I think the department has a legitimate opinion, and their view on performance of the individual is extremely important,” testified the IP Chair. “However, the department is not the IMF, and its view is limited to its staff, and it does not have the broader view of the organization. I think that was the rationale behind having the Panel review.” (Tr. I, p. 343.) The testimony of the Departmental representatives indicates that the Panel did not, in the course of the meetings, ask the Department to “rank” the volunteers or to “revisit” its recommendation. (Tr. I, pp. 264-265; Tr. II, pp. 12-13.) At the same time, the Department Director and SPM appeared to acknowledge that the IP sought from the Department some basis on which to distinguish the suitability of the two candidates for separation under the program, a distinction that their Grievance Committee testimony indicates the Department was reluctant to draw. (Tr. I, p. 254; Tr. II, pp. 12-13.)

99. In the view of the Tribunal, it was the Panel’s misapprehension of the reach of its responsibility to provide an “institution-wide perspective” (Supplement 2, para. 3) that led it to undertake its own assessment of Applicant’s request. Such assessment was not the role specified

¹⁰ See *supra* The Factual Background of the Case, paras. 43 and 44.

for the IP in the case of “fungible groups within a single department.”¹¹ (A similar misapprehension appears to have propelled the Panel to compare Applicant’s “relative competency” against volunteers from across the Fund. That issue is considered in a subsequent section.¹²)

100. While the IP was tasked under Paragraph 21 with “confirming” the recommendation of the Department, the process of confirmation did not extend to re-assessing *ab initio* the Department’s recommendations. The Tribunal observes that the process undertaken by the IP with respect to Applicant’s request resembles that prescribed for other categories under Supplement 2, most notably for the Institutional Panel Assessment Group, which was comprised of members of the “large fungible group” of Grade A11-A15 macroeconomists. (*See* Supplement 2, para. 16.) Accordingly, the Tribunal does not agree that the IP “corrected” for the Department’s failure to recommend for refusal the “necessary number” of volunteers or that the meetings between the IP and the Department representatives provided “ample opportunity” for the Department to assert its preferences. Rather, in these meetings, the Panel appears to have asserted as its own responsibility the task of assessing Applicant’s request.

101. As described above, Supplement 2 of the Staff Bulletin advised that the “procedure will vary” depending upon which of three categories of fungible groups was at issue. (*See* Supplement 2, para. 10.) The role of a department was necessarily more prominent where only volunteers from within the department were to be compared. This difference in process for “fungible groups within a single department” reflected the recognition that the department was best positioned to assess the relative strengths of its own staff members in terms of their past performance and potential contribution going forward. The department knew the individuals closely and over an extended period. By contrast, as the IP Chair emphasized, the Panel was “. . . working on a very short-term basis. If you’ll recall, the meetings started on Friday the 9th, and we completed our report on the 16th.” (Tr. I, p. 137.)

102. In applying the rules, the IP failed to adhere to the tripartite structure that had been carefully crafted to reflect the differing considerations applicable to different categories of Fund staff. The reasons underlying these differentiated procedures are self-evident and the IP’s departure from them on the basis that Applicant’s Department failed to provide the IP with the “necessary number” of recommended refusals was, in the view of the Tribunal, unwarranted.

¹¹ Respondent in its pleadings also mis-states the applicable rule, stating in its Answer: “Specifically, *the IP is called upon, when assessing volunteers from small fungible groups within a single department, to ‘assess the volunteers within the fungible group,’* and to confirm the recommendation of the Department only ‘if it determines that the documentation provides a reasonable basis for the recommendation.’” (Emphasis added.) Contrary to Respondent’s statement of the governing regulation, it is the Department Director—rather than the IP—who is to “assess the volunteers within the fungible group,” for purposes of making a recommendation to the IP. (Supplement 2, para. 20.)

¹² *See infra* In making its recommendation as to the disposition of Applicant’s request, did the IP fail to follow the governing regulations by considering Applicant’s “relative competency” vis-à-vis volunteers outside of his fungible group?

103. Accordingly, the Tribunal concludes that the IP failed in the case of Applicant to observe the distinction between “confirmation” and “assessment” that was essential to the consideration of the requests of volunteers from “fungible groups within a single department.” Following its decision to deny the Department’s request to merge Groups 2 and 3, the Panel should have required the Department to revise its recommendations—based upon the Department’s own assessment—such that it identified the “necessary number” of volunteers for refusal from Group 2. Only on the basis of such a recommendation would the IP have been properly positioned under the applicable rules to decide whether or not to “confirm” the Department’s recommendation.

104. The question arises whether it was within the ambit of the IP’s discretion, when presented with a recommendation from Applicant’s Department that was inconsistent with the numbers prescribed for Applicant’s fungible group, to proceed with its own assessment of the volunteers rather than to require the Department to make a recommendation of the “necessary number” of volunteers for refusal. In the view of the Tribunal, the IP was not authorized by Staff Bulletin No. 08/03 and its associated Annexes and Supplements to proceed with its own assessment. Accordingly, in failing to require from Applicant’s Department a ranking of the volunteers and instead undertaking its own assessment of Applicant’s request, the IP did not follow the governing procedures in considering Applicant’s request for voluntary separation pursuant to the 2008 downsizing program.

Did the IP fail to apply the prescribed standard by focusing its assessment upon whether a case had been substantiated for acceptance, rather than for refusal, of Applicant’s request?

105. A further question arises. Did the Department’s failure to recommend for refusal the “necessary number” of volunteers from Group 2, and the IP’s subsequent failure to require the Department to revise its recommendation consistent with the prescribed numbers, have the further consequence that the Panel improperly focused its assessment of Applicant’s request upon whether a case had been substantiated for acceptance, rather than for refusal, of the request?

106. Applicant emphasizes that the Panel never properly considered whether his request should be refused because the Department recommended that it be accepted. Applicant contends that while the IP “has the mandate to confirm those recommended for refusal, not those for acceptance,” a consequence of the Department’s failure to submit the “necessary number” of requests for refusal was that the IP improperly sought from Applicant’s Department a basis to “substantiate its request for the acceptance” of Applicant’s request.

107. The record supports Applicant’s assertion that what the IP sought from his Department—and concluded that it did not have—was substantiation that Applicant’s request should be accepted, not that it should be refused. Had the Department properly submitted its recommendations, the IP necessarily would have focused on whether a recommendation for refusal was to be sustained. Here too the IP failed to apply the governing standards in considering Applicant’s request.

108. The IP Chair was clear in her testimony that the basis for the Panel’s recommendation on the disposition of Applicant’s request was that the “department had not demonstrated a reason why the Fund *would be better off if both [Applicant and the other staff member] left.*” (Tr. I, p. 156.) (Emphasis added.) “What we were looking at,” testified the IP Chair, “was whether or not the evidence which we had before us supported a conclusion that [Applicant] . . . should be accepted for departure from the organization. And the conclusion of the panel was that on the basis of the evidence provided, this was not the case.” (Tr. I, pp. 152-153.)

109. That the IP understood its role in Applicant’s case to be to confirm a recommendation for acceptance—rather than for refusal—of his request for voluntary separation was further underscored by the IP Chair as follows: “I think the panel decided in the final analysis that the case—the *relative competency case for separation was not made.* In the view of the panel, *there was not adequate evidence to support a recommendation for separation.*” (Tr. I, p. 174.) (Emphasis added.)

110. Respondent, in its pleadings before the Tribunal, appears to endorse the IP’s understanding that its task was to confirm the recommendation for *acceptance* of Applicant’s request for voluntary separation, noting that “. . . the IP concluded that . . . the documentation submitted by the department did not provide a ‘reasonable basis’ for the recommendation of acceptance.” Asserting that the reasons for that conclusion were “well-supported and linked to the criteria established in the Staff Bulletin,” the Fund maintains that the decision on Applicant’s request should be sustained by the Tribunal. In the view of the Fund, “notwithstanding the desire of these two volunteers to leave, the IP did not see a clear business rationale for an acceptance in either case, and they saw no rationale for choosing one of these volunteers over the other.” (Citing Department Director’s testimony that accepting Applicant’s and his colleague’s desire to leave “wasn’t a business needs driven thing,” Tr. I, p. 263.) In so contending, the Fund disregards the Department’s prescribed role to recommend which of its volunteers was to be refused in accordance with the stipulated numbers.

111. The Tribunal observes that the Department’s obligation to recommend to the Panel the “necessary number” of volunteers “with respect to whom the right of refusal must be exercised” (Supplement 2, para. 20) mirrored the IP’s own mandate to “make recommendations to the Managing Director regarding the staff *with respect to whom the Fund should exercise such right of refusal.*” (Staff Bulletin No. 08/03, Annex I (Composition and Terms of Reference of the Institutional Panel).) (Emphasis added.) It was not necessary to establish a “business need” to accept a request, only to refuse one. *See* Staff Bulletin No. 08/03, p. 2 (“[I]t may be necessary to refuse volunteers because of either budgetary constraints or the business needs of the institution. However, to the maximum extent possible, the Fund will accept all volunteers.”)

112. In the view of the Tribunal, by requiring that a case be made for acceptance—rather than for refusal—of Applicant’s request, the IP mischaracterized its role in relation to “fungible groups within a single department.” Under the governing regulations, requests for voluntary separation under the downsizing were to be accepted unless the Fund exercised a right of refusal taken in accordance with Supplement 2 of the Staff Bulletin. In the case of volunteers from “fungible groups within a single department,” this meant that volunteers were to be accepted for

separation *unless the IP confirmed a departmental recommendation in favor of refusal.* (See Supplement 2, paras. 20-21.) As Applicant observes, the “reasonable basis for the recommendation” (*Id.*, para. 21) that the IP was to confirm refers to the Department Director’s “recommending . . . the necessary number of volunteers . . . with respect to whom the right of refusal must be exercised” (*Id.*, para. 20).

113. The Tribunal recognizes the difficulty faced by the Panel when confronted by the Department’s error in recommending more volunteers than the number permitted for acceptance from Group 2 and, further, in seeking to merge the previously established intradepartmental groups. Nonetheless, in the process of purportedly “correcting the error” of the Department, the IP improvised a role for itself more far-reaching than that contemplated by Staff Bulletin No. 08/03 and its associated Annexes and Supplements. In so doing, it misapplied the regulations and improperly required that a case be substantiated for the acceptance of Applicant’s request.

In making its recommendation as to the disposition of Applicant’s request, did the IP fail to follow the governing regulations by considering Applicant’s “relative competency” vis-à-vis volunteers outside of his fungible group?

114. Applicant asserts that the IP “compared my Application to those presented by volunteers in other Departments, categories, and fungible groups and, **based on that comparison**, decided that my Application should be recommended for refusal.” (Emphasis in original.) This approach, contends Applicant, violated the governing rules because “[t]he guiding principle for the exercise of the right of refusal was that to the extent that there was an oversubscription of volunteers *within any given fungible group*, the decision on acceptance or refusal was to be based on an *assessment of the relative competency of the volunteers within that group.*” (Emphasis in original.) Applicant maintains that the governing regulations are clear that “[t]he relative competency of volunteers could be compared, but only against the other volunteers in the same fungible group.”

115. Respondent appears to acknowledge that an essential principle governing the exercise of the right of refusal was that determinations of the “relative competency” of volunteers were to be made within—but not across—fungible groups. Respondent states in its pleadings: “As set out in the governing Staff Bulletin, the guiding principle for the exercise of the right of refusal was that *to the extent that there was an oversubscription of volunteers within any given fungible group*, the decision on acceptance or refusal was to be based on an assessment of the relative competency of the volunteers *within that group.*” (Emphasis added.) The Fund emphasizes that “[i]n selecting between volunteers in the same fungible group, the decision to accept or refuse would be taken on the basis of the staff member’s relative competency vis-à-vis others in that fungible group.”

116. Nonetheless, Respondent asserts that it was “entirely proper for the IP to compare volunteers Fund-wide.” In the case of Applicant’s fungible group, maintains the Fund, the “broader perspective of the Panel was particularly helpful, since as the [Department] Director himself testified, the department did not have a real ‘business need’ for recommending acceptance in the case of Applicant” In the Fund’s view, Applicant’s case demonstrates the “value that the IP brought to the process, by keeping its focus on the broader institutional

business needs, while individual departments were likely to place more weight on the preferences and circumstances of the individual volunteers.” Respondent emphasizes that the discussions by the IP of volunteers Fund-wide in formulating its recommendation on Applicant’s request were “not only appropriate; they demonstrated that the IP took seriously its mandate to provide an ‘institution-wide perspective,’ where individual departments may be unable to do so.”

117. Supplement 2, para. 3, stated that the Panel would be “. . . relied upon to ensure that the process is implemented fairly and takes into account an *institution-wide perspective* regarding relative competency.” (Emphasis added.) Applicant observes that the Panel’s “institution-wide perspective” was necessary in considering both large and small fungible groups that spanned a number of Departments, but that in respect of “fungible groups within a single department” that perspective was to be subordinated to the specific rules governing that category of volunteers. Staff Bulletin No. 08/03, p. 4, emphasized: “***A key challenge in designing and implementing a framework that provides for a reduction in force is that a number of the large fungible groups of staff that are being reduced (e.g. macroeconomists and staff assistants) cut across departments.*** For these categories, it would not be equitable to make selections on a purely department-by-department basis.” (Emphasis in original.) Applicant notes that “[f]or fungible groups within a single Department, the difficulty of comparing staff across different Departments . . . simply did not exist.”

118. The Fund responds that “[w]hile the ‘institution-wide perspective’ of the IP may indeed have been most critical in assessing volunteers from fungible groups that spanned more than one department, Management decided, as reflected in Staff Bulletin 08/03, Supplement 2, that the IP should also make recommendations on acceptance or refusal of volunteers from small fungible groups within a single department.” In the view of the Fund, “[n]othing in the Staff Bulletin places constraints on the IP’s right—or indeed, its duty—to use all the insights and experience gained through the Fund-wide exercise to inform its assessment of relative competency in every case, in all fungible groups, and to ensure that comparable standards were applied Fund-wide.” The Fund notes that the Panel “considered all of the available information—including the views of [Applicant’s Department] on the relative competency of their volunteers, and the IP’s broader experience in assessing relative competency throughout the Fund”

119. In the view of the Tribunal, although the IP was to apply an “institution-wide perspective” to the process of making recommendations to Management as to the disposition of requests, that general directive was necessarily subordinated to the specific language¹³ that governed the exercise of the right of refusal with respect to “fungible groups within a single department” and, moreover, which limited comparisons of staff competency to those volunteers within the same fungible group. As considered above, the other two staff categories were, by definition and design, fungible across the Fund and necessarily required the application of an institution-wide perspective. In contrast, the approach to the exercise of the right of refusal in

¹³ Cf. *Ms. “S”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1995-1 (May 5, 1995), para. 22 (specific governs the general; interpreting provisions of Tribunal’s Statute, “general proviso [of Article VI, Section 2] is subject to the *lex specialis* of Article XX”).

respect of Applicant’s category—fungible groups within a single department—was distinctive in that an individual department assessed its own volunteers in order to make recommendations directly to the Panel for its confirmation.

120. A cornerstone of the framework for the exercise of the right of refusal was that the “relative competency” of a volunteer was to be assessed only against that of other volunteers within his or her own fungible group. The IP’s Terms of Reference (Staff Bulletin No. 08/03, Annex I) (February 29, 2008), which were established prior to the issuance of the tripartite framework for the exercise of the right of refusal (Staff Bulletin No. 08/03, Supplement 2) (May 6, 2008), stated that the Panel’s responsibility was to “ensure that the decisions on separations *among fungible staff* are made in a reasonable, consistent and non-discriminatory fashion and involve assessments of competency that are *made on an institution-wide basis*.” (Emphasis added.) The subsequent Supplement 2, para. 9, confirmed that “the primary criterion that the Fund will use to identify individual volunteers for whom the right of refusal must be exercised . . . will be that of relative competency, with the objective of enabling the Fund *to retain the most qualified staff with[in] each of the fungible groups*.” (Emphasis added.)

121. Despite the clarity of this rule, it is not disputed that the IP sought to resolve the problem it perceived of distinguishing Applicant’s suitability for separation from that of the other staff member in his fungible group with whom he was closely rated by comparing their performance and potential against volunteers Fund-wide. The Panel asked itself: “[H]ow do these two individuals fit into this broader context of the organization. Because that’s the institutional panel’s role, which is to really look at it more broadly.” (Tr. I, p. 105.) Applying this Fund-wide perspective, the IP concluded that “. . . here were two individuals who had skills the organization needed, who had skills the organization was going to need in the future, and who were both performing at an acceptable level.” (*Id.*) “So put into that context, the panel could not bring itself to recommend that the two individuals leave the organization We had a number of people [who] were . . . rejected for departure in other areas of this category whose performance was of concern to the organization.” (Tr. I, p. 106.)

122. In the view of the Tribunal, the IP misapprehended the authority conferred upon it when it compared Applicant with volunteers outside of his fungible group. When Applicant’s Department requested the IP to combine Groups 2 and 3, “the panel came to the conclusion that we would not accept any proposal from departments to change the fungible groupings that had been established in the staff bulletin. . . . [W]e did not feel that manipulation of the system, once you see the results coming in if you think you can manipulate it and change it, that this would be a fair or appropriate precedent to set.” (Tr. I, p. 87.) The IP Chair emphasized: “[T]hese groups were very, very carefully negotiated, because *how a group was established and who was in it might make the difference as to who would be told to leave or not*.” (Tr. I, pp. 83-84.) (Emphasis added.)

123. Nonetheless, following its denial of the Department’s request to merge intradepartmental Groups 2 and 3, the IP proceeded to compare Applicant with volunteers from across the Fund. The Panel appeared to believe that it had discretion both to recommend the acceptance of more than the number of volunteers prescribed for Group 2 and to assess Applicant’s “relative competency” against volunteers from other fungible groups—thereby effectively merging Group

2 volunteers with volunteers throughout the Fund. The IP Chair explained: “[T]he two were so close, in terms of their situation, that it would be hard to pick one and not justify the other. *Then the question became . . . do we recommend going above . . . the maximum number of acceptances or not.*” (Tr. I, p. 104.) (Emphasis added.) It was at this point that, in the words of the IP Chair, “I think the idea of looking across the organization [arose] at this point—by now we know what we have out there in all departments.” (Tr. I, pp. 104-105.)

124. When the Fund took the decision in early 2008 to downsize its workforce, it determined that the “restructuring exercise [would] include the need to reduce the number of positions in groups of staff who are considered broadly fungible.” (Staff Bulletin No. 08/03, Annex I (Composition and Terms of Reference of the Institutional Panel).) Such reductions would be “. . . differential, reflecting the fact that, under the Fund’s medium term strategy, the Fund would not only be changing its organizational structure, but would also be refocusing its activities within that modified structure. Accordingly, the Fund determined different levels of reductions of force for each fungible group of staff within the A9-A15 grades.” (Supplement 2, para. 7.) This approach was to govern whether the reductions were made on a mandatory basis or, in the event of the oversubscription of the voluntary phase, in the exercise of the right of refusal of volunteers.

125. Respecting the integrity of the fungible groups was essential to effectuating the underlying purpose of the downsizing to achieve staff reductions differentially among various elements of the Fund’s workforce. In Applicant’s words: “The whole procedural edifice of differentiated procedures had as one of its coherent pillars that, in no instance were those groups to be pooled in the process of the considerations in making a decision.” Applicant asserts: “Had the Fund intended for all volunteers to be put together and from there pick the best in order to refuse their applications, it would have drafted SB 08/03 accordingly and in a radically different way.” (Emphasis in original.)

126. In deciding the two earlier challenges to the refusals of requests for voluntary separation under the 2008 downsizing, the Tribunal sustained the Fund’s group-based approach to the exercise of the right of refusal. In *Faulkner-MacDonagh* and *Billmeier*, the Tribunal considered whether the Fund discriminated impermissibly among categories of staff by permitting all volunteers who occupied positions in the A1-A8 and B-level grade ranges to separate under the beneficial terms of the downsizing, while staff members who held positions in the A9-A15 range were subject to possible refusal. The issue presented by the applicants in those cases was articulated by the Tribunal as follows:

. . . Applicant objects to the categorical acceptance of the A1-A8 and B-level volunteers as follows: “the Fund cannot plausibly maintain that *all* of the rejected volunteers in the A9-A15 category were more essential to the business needs of the Fund than were *all* of the volunteers in the B level group (all of whom were accepted).” (Emphasis in original.) Applicant additionally maintains that had the Fund applied a “reverse merit” criteria across all grade levels, it would have had greater reason to deny some of the applications from the groups that received categorical

acceptances. In particular, he asserts that many of the rejected A9-A15 level staff were less valuable to the Fund than B-level staff who had acquired specialized knowledge that was difficult to replace.

Faulkner-MacDonagh, para. 80; *Billmeier*, para. 85.

127. The Tribunal answered the applicants' contention by sustaining the group-based approach to the exercise of the right of refusal:

The Tribunal's jurisprudence . . . embraces the position that the existence of a rational nexus between the goals of a policy and the method for allocating its benefits "does not require that there be a perfect fit between the objectives of the policy and the classification scheme established, and . . . may rest upon generalizations." *Daseking-Frank et al.*, para. 52, quoting *Ms. "G,"* para. 79. *It may be that some B-level or A1-A8 volunteers, all of whose requests were accepted, were [more] "competent" than some volunteers at the A9-A15 grade levels whose requests were refused. That fact, if it is true, does not in itself invalidate the exercise.* The Fund has advanced tenable reasons why it was important to the institution to retain Grade A9-A15 staff at a greater rate than staff members in other job groups and, accordingly, has established a rational nexus between the objective of the policy to offer incentives to voluntary separation and the allocation of those benefits differentially across different staff groups. [footnote omitted]

Faulkner-MacDonagh, para. 81; *Billmeier*, para. 86. (Emphasis added.) The Tribunal additionally noted that ". . . in reserving its right to refuse volunteers in Staff Bulletin No. 08/03, the Fund envisaged that the right of refusal would be exercised in relation to categories of staff," and that the Fund thereby ". . . place[d] staff on notice that the disposition of applications would be influenced by the category of staff in which an applicant found himself and the number of volunteers in that category." *Faulkner-MacDonagh*, para. 83; *Billmeier*, para. 87.¹⁴

128. Accordingly, the Tribunal held in *Faulkner-MacDonagh* and *Billmeier* that a refused volunteer in the Grade A9-A15 grade range could not complain that his request should have been accepted because he may have been less "competent" than volunteers who were retained in the

¹⁴ *Citing* Staff Bulletin No. 08/03, p. 3 ("In the event that management determines that the right of refusal must be exercised, the factors that will be taken into account will include: (a) whether the volunteers are within a fungible category of staff that is subject to reductions in force, and (b) if so, the extent to which there may be more volunteers in that category than is needed to achieve the reductions called for by the refocusing strategy.")

A1-A8 and B-level categories. It follows that the Fund cannot justify its exercise of the right of refusal in the instant case on the basis that Applicant may have been more “competent” than volunteers in fungible groups other than his own.

129. It is uncontroverted that, in taking its decision to recommend to Management the refusal of Applicant’s request for voluntary separation, the IP assessed Applicant’s “relative competency” against volunteers from outside of his fungible group, including those from other categories of Fund staff. The IP Chair responded in the affirmative when, during the Grievance Committee proceedings, she was asked whether “in the panel’s mind they were effectively comparing the two middle people in [Applicant’s Department] with people in other departments.” (Tr. I, p. 206.) Similarly, when asked if Applicant’s “competition was not so much [the other staff member from his Department], but all these other people who were poorer performers in the Fund,” the IP Chair replied: “I would say yes, that it was certainly the case, that we wanted to be sure that each department made the case appropriately or made the case that this was in the interest of the Fund. And as we looked through that, we came to the conclusion this was not established here.” (Tr. I, p. 208.)

130. It is understandable that the IP may have been troubled by its perception that other volunteers were “rejected for departure in other areas of this category whose performance was of concern to the organization” (Tr. I, p. 106) while Applicant’s performance and potential were—in the opinion of the Panel—on a higher par. But however understandable this concern, the rules governing the exercise of the right of refusal provided for no exception to the principle of comparing only volunteers within the same fungible group. Accordingly, the IP acted in contravention of the framework for the exercise of the right of refusal when it considered Applicant’s “relative competency” against volunteers from other fungible groups Fund-wide.

In formulating a “conditional list” of additional volunteers from across the Fund recommended for acceptance if budgetary resources permitted, did the IP improperly fail to consult Applicant’s Department?

131. It is recalled that, near the conclusion of its process, the Panel decided to formulate a “conditional list” of volunteers recommended to Management for acceptance if budgetary resources permitted. The basis for that decision was the Panel’s view that “in some fungible groups there were individuals who were going to be retained by the Fund where it was clear from the documentation that these individuals should not be retained . . . if the only criterion was performance and there wasn’t a financial limitation.” (Tr. I, pp. 112.) The IP made a conditional recommendation to Management to accept thirteen additional volunteers from across the Fund, of which twelve were members of the “large fungible group” of Grade A11-A15 macroeconomists. (Tr. I, p. 113.) The IP Chair explained that the Panel “. . . knew that we were exceeding our mandate by . . . making a recommendation to go beyond the staff bulletin. So we put this forward as a conditional recommendation to management.” (Tr. I, p. 113.) Management later accepted that recommendation. (Message from the Managing Director [to the staff] on the Completion of the Voluntary Phase, May 19, 2008.)

132. The record shows that the IP devised the “conditional list” in response to issues that had arisen primarily in respect of volunteers within the Institutional Panel Assessment Group (a sub-

group of the “large fungible group” of Grade A11-A15 macroeconomists, spanning a number of Fund departments). Some Department Directors had expressed concerns about volunteers in that group who would have to be refused because of budgetary constraints “but who nonetheless may have very limited career prospects” at the Fund. (Report and Recommendations of the Institutional Panel on the Exercise of the Right of Refusal, p. 5, May 16, 2008.) The Panel “. . . accordingly apprised Directors of its intention to make further recommendations to management regarding individuals in this situation, in the event that there are resources in the restructuring budget to accommodate their separation.” (*Id.*) The IP Chair testified that “. . . directors were very, very aggressive and strong in identifying a number of these cases.” (Tr. I, p. 112.)

133. Applicant complains that while other departments reportedly were “aggressive” in advocating for exceptional treatment of their volunteers through the “conditional list,” his Department was not even consulted in the matter. Applicant contends that “. . . all Directors should have been apprised about the ‘conditional list,’ and allowed to react to it—in particular to have the opportunity to propose the volunteers from their respective Departments to be included in it” Applicant asserts that it is possible that his Department would have “opted to push for the successful acceptance of my Application as other Departments did.”

134. Respondent, for its part, maintains that the IP had no obligation to consult Applicant’s Department in connection with the “conditional list,” and, in any event, Applicant would not have been included because the list was of staff with performance problems.

135. In her Grievance Committee testimony, the IP Chair made clear her view that “[n]either Mr. Negrete nor [the other staff member with whom he was closely compared] . . . would have fallen into that group in the view of the panel.” (Tr. I, pp. 113-114.) “[W]hat put people on the conditional list was a conclusion that there were significant performance problems and no real future potential for these individuals.” (Tr. I, p. 114.) The Panel considered both Applicant and the other staff member to be “on a higher level” than those identified for the “conditional list.” (Tr. I, p. 115.) It is not disputed that the IP did not consult with Applicant’s Department in the formulation of the list.

136. In the view of the Tribunal, given that those consultations that the IP did hold with Applicant’s Department did not result in a conclusion by the Panel that he should have been accepted for voluntary separation under the downsizing program from his fungible group based on his performance and potential for the future, it cannot be said that Applicant suffered any harm from the Panel’s not discussing with his Department specifically the concept of the “conditional list,” which the record shows the Panel reserved for volunteers with significant performance problems and no real potential with the Fund. (Tr. I, p. 114.) Accordingly, the Tribunal cannot sustain Applicant’s complaint on this ground.

Conclusions of the Tribunal

137. The Tribunal concludes that in deciding to refuse Applicant’s request, the Fund failed to follow the provisions of Staff Bulletin No. 08/03 and its associated Annexes and Supplements, which were to govern the Fund’s exercise of its right of refusal, especially as they related to volunteers from “fungible groups within a single department.” In particular, the Tribunal

concludes: (i) Applicant's Department failed to recommend for refusal the "necessary number" of volunteers from Applicant's intradepartmental fungible group; (ii) the IP, in response, failed to require the Department to revise its recommendation consistent with the prescribed numbers, instead undertaking its own assessment of Applicant's request; (iii) in making its assessment, the IP mischaracterized its role in relation to volunteers in "fungible groups within a single department" by considering whether a case had been substantiated for the acceptance of Applicant's request, rather than for its refusal; and (iv) the IP considered Applicant's "relative competency" vis-à-vis volunteers outside of his fungible group, in contravention of the fundamental framework that was to govern the separation of staff under the downsizing.

138. The Tribunal observes that the IP's discretion was a limited one, expressly constrained by its Terms of Reference. Those Terms of Reference required that it ". . . apply the criteria and follow the process set forth in the [Staff] Bulletin." (Staff Bulletin No. 08/03, Annex I (Composition and Terms of Reference of the Institutional Panel).) Staff Bulletin No. 08/03, in turn, created expectations on the part of the staff as to how the right of refusal was to be exercised. As the International Labor Organization Administrative Tribunal has observed: "An international organisation has a duty to comply with its own internal rules and to conduct its affairs in a way that allows its employees to rely on the fact that these will be followed." *Mrs. A.E.L.*, ILOAT Judgment No. 2170, Consideration 14 (2003). In considering Applicant's request, the Fund failed in several respects to follow the rules it had established to govern the downsizing process.

Remedies

139. The Statute's remedial provision asks the Tribunal to decide whether an application challenging the legality of an individual decision is "well-founded." If the Tribunal concludes that it is, the Tribunal ". . . shall prescribe the rescission of such decision and all other measures, whether involving the payment of money or otherwise, required to correct the effects of that decision." (Statute, Article XIV, Section 1.¹⁵) Applicant seeks as relief the value of the separation package that he would have received had his request for voluntary separation under the downsizing program not been refused, i.e., six months' salary. Applicant effectively seeks rescission of the contested decision.

140. When the Tribunal considers a challenge to an individual decision taken in the exercise of managerial discretion, it decides whether the applicant has carried the burden of showing that the contested decision was ". . . arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or carried out in violation of fair and reasonable procedures." (Commentary on the Statute, p. 19.) Although in some circumstances a violation of fair and

¹⁵Article XIV, Section 1, of the Statute provides:

1. If the Tribunal concludes that an application challenging the legality of an individual decision is well-founded, it shall prescribe the rescission of such decision and all other measures, whether involving the payment of money or otherwise, required to correct the effects of that decision.

reasonable procedures may result in the rescission of an individual decision, this Tribunal has held that its remedial powers also encompass the “. . . authority to reject an Application challenging the legality of an individual decision while finding the Fund nevertheless to be liable in part, as by procedural irregularity in reaching an otherwise sustainable decision.” *Ms. “C”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1997-1 (August 22, 1997), para. 44. *See also Mr. “F”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005), paras. 121-122; *Ms. “EE”, para. 266; Sachdev*, paras. 255-256. In each of the Judgments in which this principle has been applied, the Tribunal awarded compensation to the applicant for procedural failure or breach of the Fund’s rules while not rescinding the principal decision that the applicant sought to impugn. By fashioning such a remedy, which is consonant with the approach of other international administrative tribunals,¹⁶ this Tribunal has underscored the importance of procedural fairness in the exercise of discretionary authority even in circumstances in which the lapse of fair process does not result in the rescission of the challenged administrative act.

141. In each of the Judgments cited above, the Tribunal concluded that the applicant had failed to establish on the facts of the case that the procedural irregularities warranted the rescission of the contested decision. In *Ms. “C”*, the Tribunal sustained the decision not to convert the applicant’s fixed-term to an appointment of indefinite duration. The Tribunal held that “. . . Applicant has not met the burden of showing an abuse of discretion by the Fund in not giving her a permanent contract.” *Id.*, para. 41. The Tribunal rejected as “unfounded” *Ms. “C”*’s allegation that the challenged decision was taken in reprisal for a complaint of sexual harassment. Nonetheless, it concluded that “. . . imperfections and irregularities did mark the process of the Fund’s decision and permit the Tribunal to find against the Fund not wholly, but in part.” *Id.* The Tribunal accordingly awarded monetary compensation.

142. In *Mr. “F”*, the Tribunal sustained the Fund’s decision to abolish the applicant’s position as based upon institutional needs, finding “credible and sufficient” the reasons advanced by the Fund in justification of the restructuring of *Mr. “F”*’s work unit. *Id.*, para. 62. The Tribunal rejected the applicant’s allegation that the decision was improperly motivated by religious discrimination. *Id.*, para. 90. At the same time, the Tribunal reaffirmed that “relief may be awarded for intangible injury” and compensated *Mr. “F”* for the Fund’s failures to take effective measures in response to religious intolerance and workplace harassment of which he was an object, as well as to follow “fair and transparent procedures” in failing to afford him reasonable notice of the abolition of his post. *Id.*, paras. 106, 121-122.

143. In *Sachdev*, the Tribunal also sustained the principal decisions that the applicant sought to impugn: (a) her non-selection for a promotion for which she had applied; and (b) the abolition of the position of which she was the incumbent. As to the non-selection decision, the Tribunal dismissed the applicant’s chief contention that she had a “legitimate expectation” of appointment to the position. *Id.*, paras. 97, 150, 251. As to the abolition decision, the Tribunal concluded that the Fund had established “sound business reasons, in the context of the 2008 downsizing exercise” for the decision and that it was “not arbitrary, capricious or discriminatory, nor based

¹⁶ *See Ms. “C”*, para. 44 and cases cited therein.

on an error of law or fact.” *Id.*, paras. 164, 177, 251. The Tribunal held, nonetheless, that the non-selection decision was “marked by a series of failures of fair process,” which were “compounded in the ensuing year, after Applicant’s own position was abolished, by a serious breach by the Fund of its obligations under [the governing rules] to assist Applicant in seeking reassignment to a suitable position.” *Id.*, paras. 150, 250, 252. For these failures of fair process and breach of the Fund’s rules, the Tribunal granted the applicant monetary compensation. *Id.*, para. 256.

144. In *Ms. “EE”*, the Tribunal sustained the decision contested by the applicant to place her on paid administrative leave pending investigation of alleged misconduct. The Tribunal concluded that “. . . the Fund had, at the time of that decision, prima facie evidence warranting an ongoing investigation into alleged misconduct by Applicant and a tenable basis to decide that her continued presence in the workplace during the pendency of the misconduct proceedings posed a risk of future harm.” *Id.*, para. 141. At the same time, the Tribunal awarded the applicant compensation on the ground that the decision was marked by “significant procedural irregularity,” in violation of the principle of *audi alteram partem*, because the Fund had failed to seek from Ms. “EE” any account of her version of the facts relevant to the accusations of misconduct made against her before taking the administrative leave decision. *Id.*, paras. 184-199, 266.

145. Ms. “EE” had contended that the administrative leave decision “. . . lacked an adequate evidentiary basis because it was taken in the absence of Applicant’s ‘potential countervailing evidence.’” *Id.*, para. 199. The Tribunal answered that contention as follows:

The Tribunal has concluded above that the Fund did have prima facie evidence to support an ongoing misconduct investigation. That the Fund failed to interview Applicant about the accusations against her until after taking the decision to place her on paid administrative leave does not negate the evidentiary basis upon which the Fund grounded that decision.

Id. “Accordingly,” stated the Tribunal, the “. . . conclusion that the contested decision was ‘carried out in violation of fair and reasonable procedures,’ Commentary on the Statute, p. 19, does not provide ground for the Tribunal to overturn the administrative leave decision in this case.” *Id.*¹⁷ In the circumstances, the Tribunal held that “[w]hile the Tribunal considers that this procedural error is not sufficient to overturn the contested decision, it does merit relief in the form of monetary compensation.” *Id.*, para. 198.

¹⁷ The Tribunal explained that this was so because “(a) the Tribunal has held that the Fund had the requisite prima facie evidence of alleged misconduct to take the administrative leave decision, and (b) Applicant has not challenged the ultimate decision finding that she committed misconduct, a decision taken following a full opportunity for Applicant’s written and oral response at a later stage of the misconduct proceedings.” *Ms. “EE”*, para. 199.

146. The question arises whether the same approach of awarding compensation for procedural irregularities but not rescinding the decision should be applied in the instant case or, alternatively, whether the Tribunal should rescind the Fund's decision to refuse Applicant's request for voluntary separation pursuant to the 2008 downsizing program.

147. In the instant case, both Applicant and Respondent have sought to persuade the Tribunal that the record indicates what the outcome of Applicant's request would have been had there been no procedural irregularities. Each suggests a different outcome. The Tribunal is not convinced, on the evidence before it, what the outcome for the Applicant would have been in the absence of procedural irregularities. Were it to be clear on the record what the outcome would have been, that may well have been relevant in determining the appropriate remedy, but that is not the case here.

148. What is clear is that Applicant has identified procedural failures in breach of the Fund's rules that cast doubt on the reliability of the decision-making process. The question is, given that doubt and given the Tribunal's conclusion that there have been procedural irregularities, whether the challenged decision must be rescinded.

149. The Tribunal concludes, on balance, that the threshold for rescission has not been met in this case. In the view of the Tribunal, neither the procedural failures nor the consequence of a possibly mistaken decision is sufficiently grave as to warrant such relief. In reaching this conclusion, the Tribunal takes into account that the material consequence of the procedural lapses is a limited one. Applicant has been denied a special separation benefit associated with voluntary separation from employment. The Tribunal also takes into account that there is no indication (or even allegation) that the Fund acted with malice, bad faith or discrimination toward Applicant in taking the decision that it took. Although it is clear that the Fund failed to follow key elements of the rules in the unique circumstances of the 2008 downsizing exercise, the record indicates as well that the IP acted deliberately and in what it believed was the best interests of the Fund and its staff.

150. In these circumstances, the Tribunal concludes that the Fund's error does not justify rescission of the contested decision. The Tribunal observes that there may be times when a procedural error is so material or malicious as to warrant the rescission of the decision. The Commentary on the Statute, p. 19, envisions this possibility.

151. For the foregoing reasons, the Tribunal will not compensate Applicant for the material injury he claims in not receiving a separation payment of six months' salary pursuant to the downsizing program. It will, however, compensate him for the intangible injury he has incurred by the Fund's failure to uphold his legitimate expectation of having his request considered in a manner that fully accorded with the prescribed rules, irrespective of the outcome of said consideration. The Tribunal assesses that compensation in the sum of \$30,000.

Decision

FOR THESE REASONS

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

1. The Fund's decision to refuse the request of Mr. Negrete for voluntary separation under the beneficial terms of the 2008 Fund-wide downsizing exercise is not rescinded.
2. Nevertheless, Mr. Negrete is entitled to compensation for the Fund's failure to consider his request in full compliance with the governing rules.
3. For the Fund's non-compliance with the governing rules, Mr. Negrete is awarded the sum of \$30,000.

Catherine M. O'Regan, President

Edith Brown Weiss, Judge

Francisco Orrego Vicuña, Judge

Catherine M. O'Regan, President

Celia Goldman, Registrar

Washington, D.C.
September 11, 2012