

World Bank Administrative Tribunal

2016

Decision No. 546

DO,
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

World Bank Administrative Tribunal
Office of the Executive Secretary

DO,
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. This judgment is rendered by a panel of the Tribunal, established in accordance with Article V(2) of the Tribunal's Statute, and composed of Judges Stephen M. Schwebel (President), Abdul G. Koroma, and Marielle Cohen-Branche.

2. The Application was received on 30 November 2015. The Applicant was represented by Peter C. Hansen of Law Offices of Peter C. Hansen, LLC. The Bank was represented by David R. Rivero, Director (Institutional Administration), Legal Vice Presidency. The Applicant's request for anonymity was granted on 24 October 2016.

3. The Applicant challenges the decision not to appoint him to the Level GG position to which he was selected.

FACTUAL BACKGROUND

4. The Applicant joined the Bank in March 2013 as a Short-Term Consultant (STC) with the unit in question (the unit). He was appointed to a four-year term position at Grade GF in March 2014, the first year of which was probationary. Mr. X was appointed Vice President of the unit in May 2012.

5. In mid-2014, Mr. X and Mr. Y, the Manager of the unit, discussed hiring an officer with "strong leadership" skills to both "steady the unit's transition and train new [officers]." Mr. X deemed it best to hire a senior level officer at Grade GG because professionals of that level would be more qualified to execute these responsibilities.

6. On 9 September 2014, a senior position at Level GG in the unit was advertised. The Applicant applied for the position and was shortlisted.

7. On 17 November 2014, the Applicant was interviewed by a six-member interview panel which included Mr. Y, as the Hiring Manager, and staff members within and outside the unit. The panel interviewed four shortlisted candidates and ranked the Applicant and Ms. AS, another internal candidate, as the top two candidates. The parties disagree as to whether the Applicant was considered the best candidate. The Bank asserts that the interview panel was "unable to identify a single best candidate for the position," and notes that both the Applicant and Ms. AS were recommended for the position. However, the summary of the interview panel's evaluation of the candidates listed "the recommended candidates in the order in which the interview panel ranked their performance beginning with the best candidate." The Applicant's name and summary of his performance followed.

8. On 5 December 2014, Mr. Y, as the Hiring Manager for the position, conducted a second interview with the Applicant. Mr. Y revealed to the Applicant that he was the interview panel's "top candidate" and that he was "ranked slightly ahead" of Ms. AS. Mr. Y also stated that he was selecting the Applicant for the senior position and that Mr. X wanted to meet with the Applicant.

9. Mr. X stated in his Manager's Response to the Peer Review Services (PRS) inquiry that Mr. Y approached him with "two recommended candidates, and asked [him] to interview them," as "[t]his [had] been a very standard practice in [the unit] for all professional hiring." For his part, during his testimony before the PRS Panel, Mr. Y stated that there was no such standard practice in the unit, and he was unaware of any requirement that Mr. X interview the top-ranked candidates. Mr. Y explained that he had suggested that Mr. X should meet with the second recommended candidate about a different position, and not as a second interview for the senior Level GG position which, as Hiring Manager, he had verbally offered to the Applicant.

10. On 9 December 2014, the Applicant and Mr. X met regarding the Level GG position. The Applicant maintains he believed this meeting was a formality. However, the Bank asserts that the meeting was a final interview. After Mr. X met with the Applicant and Ms. AS, he "determined

that the candidates' skills and experience fell short of the demands of the senior officer position, as set forth in the job description." Mr. X communicated his views of the top two candidates to Mr. Y. Mr. Y recommended that Mr. X speak with Mr. AB who was a Level GG senior officer at the unit and a member of the interview panel.

11. Following the Applicant's 9 December 2014 meeting with Mr. X, he did not receive an update from either Mr. Y or Mr. X in December 2014 or January 2015. To explain the lack of communication, the Bank states that Mr. X and Mr. Y were "out of office" on roughly a third of the business days that fell during those two months. When the Applicant reached out to Mr. Y for further information on the selection process, Mr. Y stated that he would "inquire with [Mr. X]." The Bank states that during the same time period, Mr. X continued to assess the situation and spoke confidentially with Human Resources and others about his concerns.

12. On 5 February 2015, the Applicant sent an email to Mr. Y stating that he was "a little frustrated" and "[did not] understand why, particularly in light […] of all the other hires in [the unit], [Mr. X] appears to disagree with the panel results." Mr. Y recommended that the Applicant speak with Mr. X directly.

13. On 9 February 2015, the Applicant sent Mr. X an email asking for an update and to meet about any "questions or concerns" there may be regarding his appointment to the senior officer position. The next day the Applicant and Mr. X met. Mr. X informed the Applicant that he would not be selected for the position because Mr. X "did not feel that [the Applicant] was 'fully ready' for the [senior officer] position." According to the Applicant, Mr. X told him that this decision was based on four considerations: the Applicant "(1) remained on probation in his current position […] at Grade GF; (2) had been at the Bank for only two years; (3) allegedly lacked sufficient exposure to 'Bank culture and Bank operations'; and (4) was not a 'recognized leader in other dimensions.'"

14. On 22 February 2015, a short-term consultant in the unit with whom Mr. X had discussed the Level GG interview process, sent Mr. X an email message following their conversation. In the email message she informed him of a perceived lack of transparency in the selection process for

the senior officer position and a perceived lack of trust between him and Mr. Y suggested by Mr. X's non-implementation of Mr. Y's decision. Her email also noted that they had discussed the fact that the Applicant had not been confirmed in his current Level GF position and noted that confirmation was no longer a requirement for promotion.

15. On 24 February 2015, the Applicant filed a Request for Review with the Peer Review Services (PRS) seeking review of the Bank's decision not to select him for the senior officer, Grade Level GG position. Among other assertions, the Applicant claimed that Mr. X discriminated against him based on his race in deciding not to select him for the position. The Applicant requested (i) appointment to the senior officer position; (ii) written acknowledgment that the policies, rules and/or procedures were not followed; (iii) monetary damages for time spent on the matter and "related emotional distress"; and (iv) mandatory training for [Mr. X] on "issues related to ethical leadership, bias and discrimination."

16. On 27 February 2015, the short-term consultant in the unit emailed Mr. X to remind him that no other staff member at Grade Level GG in the unit were "of color."

17. On 10 March 2015, Human Resources (HR) requested an update from both Mr. X and Mr. Y on the vacancy for the senior officer position, asking Mr. X whether he wanted to "cancel the vacancy, repost it, or put it on hold."

18. On the same day, Mr. X decided to cancel the position. That same day, HR notified the Applicant that the senior officer position had been cancelled.

19. On 9 July 2015, the PRS Panel concluded that Mr. X acted within his authority, the non-selection decision "was reasonable and supported by the evidence," and that the decision was not based on discrimination. According to the Panel, Mr. X's decision was a reasonable exercise of his discretion, and though the Panel may have reached a different conclusion as to whether the Applicant met the stated criteria for the position, "[n]othing in their assessment of [the Applicant's] experience or qualifications, or anything else in the record, however, demonstrated that Mr. X

acted outside of his discretion [in] determining that [the Applicant] was not fully ready for the position, or in consequently making the non-selection decision."

20. However, the PRS Panel "identified flaws in Bank management's communications with [the Applicant] regarding the status of [his] candidacy" stating that:

> In examining the Bank's lack of communications with [the Applicant] over this two-month period, the Panel considered [Mr. X's] testimony that he wanted to consider his decision carefully, that he consulted with Human Resources, and that [Mr. Y] was on mission for part of the time. The Panel also considered that [Mr. Y] had prematurely given [the Applicant] the impression that he would be receiving an offer (and in fact believes he had offered [the Applicant] the job), and did not correct this misimpression even after it was clear [Mr. X] might conclude not to make the offer. In this limited regard, the Panel concluded the Bank failed to act in accordance with [the Applicant's] contract of employment and terms of appointment.

21. The PRS Panel unanimously recommended that the Bank compensate the Applicant with two weeks' net salary. The recommendation was accepted by the Managing Director and Chief Operating Officer.

22. The Applicant declined the compensation offer and submitted this Application to the Tribunal on 30 November 2015.

23. In November 2015, one out of three Grade GF staff members in the unit was promoted. The promoted staff member had been with the unit for five years and joined the unit as a Grade GF officer. The promoted staff member had been interviewed for the competitive Level GG senior officer position but, unlike the Applicant and Ms. AS, was not recommended by the interview panel.

24. The Applicant seeks: a) rescission of the non-appointment decision; b) appointment to a senior officer position at Grade Level GG, retroactive to 5 December 2014, with the same terms as listed in the senior officer position at issue and raise in salary and benefits; c) additional eighteen months' salary in compensatory, moral and intangible damages; d) other relief the Tribunal deems just and appropriate; and e) legal fees and costs.

SUMMARY OF THE MAIN CONTENTIONS OF THE PARTIES

The Applicant's Contention No. 1

Mr. X wrongfully intervened in the hiring process

25. The Applicant contends that Mr. X's intervention in the hiring decision for the senior officer position was an abuse of discretion as his actions were ultra vires and violated Bank policy. The Applicant argues that Mr. Y, the Hiring Manager for the position and Mr. X's subordinate, was the only individual authorized to make selection decisions regarding the senior officer position. The Applicant further avers that Mr. X's intervention wrongfully usurped Mr. Y's authority in contravention of the Bank's best practices enshrined in the "Non-Managerial Recruitment Guide for Open-ended/Term Staff" (Non-Managerial Recruitment Guide) and the Accountability and Decision-Making Policy (ADM).

The Bank's Response

Mr. X, as Vice President of the unit, was authorized to be involved in the selection process for the senior officer position

26. The Bank asserts that Mr. X's involvement in the Applicant's promotion was not an abuse of discretion because a Vice President "retains the authority to make the final decision in [the unit's] recruitment process, even if one of his subordinates is designated as the hiring manager."

27. The Bank also argues that the Applicant's contentions are based on a mischaracterization of HR recruitment materials as binding "express policy," rather than guiding documents. Specifically the Bank states that the Recruitment Guide "outlines generally applicable practices that may be adapted to suit the needs of particular units," and does not "[provide] the hiring manager with exclusive authority in all non-managerial hiring." According to the Bank, the unit reasonably "adapted the guidance on recruitment to its own unique needs and circumstances," in line with the purpose of these documents. Regarding the ADM, the Bank argues that the "ADM provides a framework of best practices in decision making based upon generally applicable legal concepts, in order to provide clarity on the delegation of authority."

The Applicant's Contention No. 2

Mr. X inappropriately amended the senior officer position's grade level after the Applicant had been selected to justify his non-appointment

28. The Applicant contends that Mr. X elevated the senior officer position from Grade GG to a "de facto" Grade GH after Mr. Y had selected the Applicant by improperly changing the selection criteria. The Applicant argues that Mr. X's modification of the grade level was an improper intervention in the selection process and was done to legitimize the intervention under Bank policy which provides that recruitment at the GH level require approval of the Vice President. The Applicant also contends that Mr. X's application of a "personal selection criteria" violated Bank policy by considering factors such as probationary status. Since one of the reasons Mr. X denied the Applicant's selection for the position was a "lack of readiness", the Applicant argues that the improper elevation of the position's grade level violated his rights as he was "given all necessary seals of approval for the Grade GG position for which he was lawfully selected by the Hiring Manager […]."

The Bank's Response

The Applicant's non-selection for the senior officer position was based on a reasonable assessment of his skills and fitness

29. The Bank asserts that Mr. X's decision not to select the Applicant for the senior officer position was based on an observable and reasonable basis. The Bank argues that Mr. X evaluated the Applicant "against pre-established selection criteria" and that the Applicant was simply not qualified for the position. The Bank contends that Mr. X did not use personal criteria and the Applicant's probationary status to influence the non-selection decision because the consideration of a staff member's probationary period is permissible in the selection process for a vacancy. Nonetheless, the fact that the Applicant was still on probation demonstrated to Mr. X the Applicant's lack of readiness for the position.

30. According to the Bank, the Applicant's allegation that Mr. X sought to recruit candidates for a higher level position than advertised is untrue. Mr. X's statements regarding "the importance

of Grade GG staff members' leadership in light of [the unit's] limited GH roles" does not mean that he "improperly recruit[ed] for a higher level position" to disadvantage the Applicant. The Bank also contends that the non-selection decision was "grounded in a comparison of the job description and Applicant's career history […] as well as an assessment of Applicant's leadership and supervisory skills."

The Applicant's Contention No. 3

Mr. X's decision to cancel the position was improperly motivated

31. The Applicant maintains that Mr. X's rejection of "two qualified black candidates […] by cancelling the [senior officer] position," was motivated by "race-based considerations." The Applicant does not contend that Mr. X is racist; rather he asserts that there was evidence that Mr. X "wrongly [allowed] rumors of racial favoritism to motivate his interference" with the hiring process. The Applicant argues that: (1) Mr. X's admitted concern regarding "pro-black favoritism in hiring"; (2) inappropriate intervention in the selection process by rejecting "two qualified black candidates"; (3) the cancellation of the vacancy; and (4) the subsequent "promotion of a white staff member *in situ*" establishes a *prima facie* case of racial discrimination.

The Bank's Response

Mr. X's decision was not improperly motivated

32. The Bank argues that the Applicant's non-selection for a promotion was the result of merit and business-based considerations, not race. The Bank further argues that the Applicant failed to establish a *prima facie* case for discrimination because he does not provide "'detailed allegations and factual support' for his claim of discrimination." Specifically, the Bank contends that: (1) Mr. X's awareness of concerns within the unit regarding racial favoritism does not have a causal relationship to his decision, and he has maintained that race was not a consideration in the selection; (2) candidates were exclusively evaluated based on their skills and experience vis-à-vis the specified job criteria; (3) he had both the authority and legitimate reasons for not selecting the top two candidates, regardless of the findings of the interview panel and Mr. Y; (4) the timing of the cancellation of the position is a reflection of Human Resource's outreach; and (5) he did not

participate in the *in-situ* promotion of a Caucasian staff member, which was distinct from the "competitive recruitment process" for the senior officer position.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

33. The Tribunal has consistently held that it will not overturn a discretionary managerial decision, unless it is demonstrated that the exercise of discretion was "arbitrary, discriminatory, improperly motivated, carried out in violation of a fair and reasonable procedure, or lack[ed] a reasonable and observable basis, constitute[ed] an abuse of discretion, and therefore a violation of a staff member's contract of employment or terms of appointment." *See AK*, Decision No. 408 [2009], para. 41; *de Raet*, Decision No. 85 [1989], para. 67; *Marshall*, Decision No. 226 [2000], para. 21; and *Desthuis-Francis*, Decision No. 315 [2004], para. 19.

34. This is particularly true in decisions concerning the selection and recruitment of staff members. As was held in *Riddell*, Decision No. 255 [2001], para. 23,

> no staff member has a right to be selected to a particular position or to be included in a list of candidates for a position. The decision to select an applicant for a particular position, or to include him or her in a list of candidates, is discretionary and the Tribunal will not overturn such a decision unless it finds that it is tainted by bias or abuse of discretion.

35. Furthermore, in *Jassal*, Decision No. 100 [1991], para. 37, the Tribunal held:

> It is not for the Tribunal, in assessing the validity of the selection or non-selection of a staff member, to undertake its own examination of that staff member's record, or a criterion-by-criterion assessment of his or her qualifications. That is for the Bank to do in the first instance, subject to review by the Tribunal only for abuse of discretion. But the Tribunal is charged with determining whether the Bank's decision was the product of bias, prejudice, arbitrariness, manifest unreasonableness, or unfair or improper procedure. Thus, if the Bank's conclusion regarding the Applicant's qualifications for selection as […] altogether lacks support in factual evidence or reasonable inference, that conclusion must be found to be an abuse of discretion.

36. The Applicant contends that Mr. X's non-selection decision was carried out in violation of a fair and reasonable procedure. In particular, he contends that Mr. X contravened the Non-

Managerial Guide for Open-ended/Term Staff by "usurping" the responsibility of the Hiring Manager, Mr. Y, and cancelling the senior officer position. The Applicant further contends that Mr. X's decision lacked a reasonable and observable basis and was motivated by "race-based considerations." The Tribunal will assess each contention separately.

Whether Mr. X's decision was carried out in violation of a fair and reasonable procedure

37. The question of whether Mr. X's decision violated procedure centers on who bore the ultimate decision to select the Applicant for the senior officer position. The Applicant does not deny that the Bank's organizational structure provides that, as a designee of authority from the World Bank President, the Vice President is ultimately responsible and accountable for the units within his Vice Presidency. This includes accountability for the recruitment of staff within his units. Rather, the Applicant avers that the Vice President wrongfully usurped authority which he delegated to the Hiring Manager in violation of the Non-Managerial Recruitment Guide for Open-ended/Term Staff (Non-Managerial Recruitment Guide). According to the Bank Policy and Procedure Framework of 31 July 2013, policy, directives and procedures require mandatory adherence, while compliance with "guidance" such as the Non-Managerial Recruitment Guide is "recommended." However, the Applicant further asserts that Mr. X's actions contravened the 2012 Accountability and Decision-Making Policy (ADM).

38. According to the ADM, when delegating, "a manager assigns responsibility, establishes accountability, and transfers authority to a direct-report for functions and decisions." However, "[b]oth the manager and the direct-report remain accountable for quality, risk management and results to their respective managers." The ADM provides for the delegation of certain roles in the decision-making process which includes a "decision role," and clarifies that "[a] person performing this role is responsible for considering the entire proposal and making a decision." The ADM further clarifies that corporate units such as Human Resources have the authority to issue rules and procedures that "prescribe roles in business decisions." In delegating roles and functions, managers are required to "adhere to such rules and procedures." Finally, the ADM provides that "a manager who has delegated authority is not divested of that authority and has the right to exercise it concurrently, or withdraw it at any time." Of importance, the ADM further adds that

"to maintain predictability, a manager shall endeavor to maintain established delegations and exercise this right only in exceptional circumstances."

39. The 2013 Guidance on the Accountability and Decision-Making Framework "describes the Accountability and Decision-Making (ADM) framework and provides guidance on its application." It notes that a staff member performing the role of a "decider" is responsible for "considering the entire proposal and making a decision. The "'decider' has the authority and responsibility for all aspects of the decision and commits the organization to action." It further notes that a manager who assigns responsibility for a functional area or a decision to a "direct-report" is "no longer required to perform specific tasks with regard to that […] [d]ecision. However, the Manager retains Accountability for actions of the Direct-Report […]." The 2013 Guidance enumerates certain "decision-making behaviors" which "should be followed by staff members and managers to facilitate effective decision-making." The 2013 Guidance also provides that each participant in the decision-making process should:

i. Help implement the decision even if not in full agreement with the final outcome.
ii. Not reopen the decision unless significant factors have changed.
iii. If significant factors have changed, provide input directly to the Recommender and raise issues with the Concurrer or the Decider only in exceptional circumstances.
iv. Escalate issues above the Decider only in exceptional circumstances.

40. Read in this institutional context, the Non-Managerial Recruitment Guide was designed by Human Resources to "guide Hiring Managers and those who are involved in staffing through the competitive recruitment process for open-ended/term staff." It describes "the major roles and responsibilities of Hiring Managers, Recruiters/HRDTA, HR Business Partners, the Selection Advisory Committee (SAC) and others involved in the recruitment process." In particular, it assists in ensuring "that the process is carried out efficiently, objectively, and fairly," and provides "checklists, guidelines, templates/forms, toolkits and references."

41. With respect to the recruitment of Non-Managerial Level GG positions, such as that of the senior officer position for which the Applicant applied, the Guidelines provide that:

> After completing interviews/assessment of all shortlisted candidates, the Hiring Manager reviews and analyses all pertinent information, rates and ranks the candidates based on best fit for position and organization in order to select a candidate.
>
> Hiring Manager selects whom s/he determines to be the best candidate for the position. In cases where the Hiring Manager decides not to accept the SAC recommendation, s/he should explain to the SAC the reason behind his/her final choice.

42. The Guidelines make the distinction for Level GH – GI technical positions, noting that in this case the "Hiring Manager recommends his/her selection decision to his/her next in line." In the present case, the Hiring Manager was Mr. Y. His manager, or "next in line" was Mr. X, the Vice President of the unit. The position to which the Applicant applied was a non-managerial Level GG senior officer position, not a Level GH-GI position. The Non-Managerial Guidelines unequivocally state that it is the Hiring Manager who "selects whom s/he determines to be the best candidate for the position." Such a provision is consonant with both the 2012 ADM and the 2013 Guidance on the ADM Framework since Mr. Y, as Hiring Manager, was the decision maker or "decider" on the issue of recruitment for that Level GG position, rather than a "recommender."

43. The Tribunal takes note of the Bank's statement that the ADM, though a policy, was not binding on the unit since the unit is not an operational unit. According to the Bank, the ADM has not yet been adopted by corporate functions such as the unit in question, and is currently applied only in Bank operations. The Bank asserts that nevertheless, Mr. X's actions conformed to the ADM standards since, as the Vice President of the unit, he retained accountability and was not divested of his authority. In principle, he could exercise the right to be involved in the hiring process concurrently with Mr. Y or withdraw the delegated authority altogether.

44. Furthermore, the Bank states that the Non-Managerial Guidelines, as guidelines, were not binding on Mr. X. To emphasize its limited authority, the Bank submitted a statement by a Lead Human Resources Specialist at the World Bank who said:

> The Guide is not a binding HR Policy or Directive, but rather is HR guidance. HR issues such guidance to managers and staff to inform them of best practices in recruitment. HR guidance is non-binding and is intended to guide recruitment

> practices without limiting the ability of managers to adapt the recruitment process to suit the business needs of their vice presidency or unit. Although the Guide empowers the hiring manager, it does not provide the hiring manager with exclusive authority in all non-managerial hiring.

45. Having reviewed the totality of the record, the Tribunal acknowledges the Bank's depiction of these documents in relation to the unit which, being a small Vice Presidential Unit (VPU), retained some flexibility to adapt the ADM and the Non-Managerial Recruitment Guidelines to suit its particular needs and circumstances. However, the Tribunal notes with interest the careful description of the Non-Managerial Recruitment Guidelines as being based on "principles of recruitment as well as good practices." Both the Lead Human Resources Specialist and the Human Resources Manager for the unit attested to the fact that the guidelines were based on a "collection of best practices." The Bank itself acknowledges that outside Bank operations, the ADM "provides a framework of best practices in decision making based upon generally applicable legal concepts, in order to provide clarity on the delegation of authority." Moreover, both the ADM and the Non-Managerial Recruitment Guidelines emphasize that complying with the policy and guidelines ensure efficient decision-making and certainty, while avoiding the risk of insufficient predictability in the staff recruitment process.

46. While it is clear that Mr. X was not obliged to apply the guidelines and could overrule the Hiring Manager's recruitment decision, the Tribunal finds that any decision to deviate from established best practices, which are recommended for the efficient and fair recruitment of staff, must not be arbitrary or lack a reasonable and observable basis. The importance of flexibility in decision-making is recognized; yet, established guidelines cannot be rendered purposeless by awarding managers unfettered discretion to stray from them as they see fit. While Mr. X, as Vice President of the unit, retained the discretion to overrule the Hiring Manager and decline to recruit the Applicant to the Level GG position, such a decision, like any exercise of discretion, will be subject to scrutiny.

Whether there was a reasonable and observable basis for the non-selection decision

47. The record shows that the Applicant was one of two candidates recommended by the interview panel and was marginally ranked as the most qualified candidate. The interview panel's summary of candidate evaluations stated that the Applicant

> was very articulate in all his answers and appeared knowledgeable about the [the unit's] process. He gave direct and pointed answers with relevant examples. The panel felt that he demonstrated that he was experienced in managing and mentoring junior staff in a variety of similar settings. The panel felt that he demonstrated that he could mentor and obtain staff engagement. His answers displayed good judgment in terms of his approach to both the completion of the […] work as well as setting realistic expectations for stakeholders. The panel felt that he had sufficient experience in designing and delivering training. Additionally, [the Applicant] demonstrated team leadership skills and a seasoned approach to handling difficult situations. His responses to the panel's questions were thoughtful and exhibited a level of maturity that will be beneficial to both the [unit] team and to clients.

48. According to the Bank, Mr. X had a reasonable and observable basis for not selecting the Applicant to the position. In Mr. X's judgment, the Applicant did not meet the requirements for a Level GG position as measured against the requirements of the post, including the Applicant's "(i) number of relevant years of experience, (ii) ability to operate within an international organization, (iii) coaching and mentoring, (iv) leadership skills, and (v) consideration of diverse approaches." During the PRS Panel hearing, Mr. X emphasized his perception that the Applicant lacked both the leadership skills required and detailed knowledge of Bank policy and operations. According to Mr. X, there were two primary reasons for the non-selection decision. He stated that:

> [The Applicant's] experience in the Bank [was] still relatively short without understanding adequately the Bank's context in order to do a job at GG level. That probably not in the areas of technical skills, but rather more broadly, and the leadership, and the culture etcetera, etcetera. So that's one area.
>
> The other side is that even though [the Applicant] did some […] work before he joined the Bank, I didn't see that this is primarily his legal experience focusing on. He probably did a wide range of things, but as [a senior officer] I expected probably that more focused exclusive experience in […]. That's probably two areas of my concern.

49. The PRS Panel pointed out to Mr. X that the position was advertised as an "international hire" and, in principle, external candidates could have applied. These external candidates would presumably not have knowledge of Bank operations. Mr. X then explained that what he had in his mind was not necessarily Bank experience; similar experience working in an international organization "with a diverse culture" would have been sufficient. Thus someone with a "similar exposure" would have been, in Mr. X's opinion, the ideal candidate.

50. When asked for specific examples of the Applicant's lack of knowledge of the Bank's operations, Mr. X could not provide any. Mr. X acknowledged that he had limited interactions with the Applicant; however, he did interact with the Applicant on certain high profile cases. When asked whether he had any evidence that the Applicant did not have the required background which would have been helpful to the tasks in those cases, Mr. X stated that when he interacted with the Applicant on those cases he was not assessing the Applicant's competence at Level GG. Yet, on the specific assignments the Applicant performed on high profile cases, Mr. X stated that he did not see any issues with the Applicant's performance.

51. Specifically asked whether, in his interactions with the Applicant, Mr. X observed any concerns regarding a lack of knowledge of how the Bank operates, Mr. X responded in general terms, noting that in his general interaction with officers in the unit who were hired externally, he observed that they needed time to adapt to the Bank's operations. He stated that though the Applicant was a quick learner, the Applicant was nevertheless, in his view, not at the GG level. Mr. X elaborated that he expected the successful candidate to be one who was at the higher end of the spectrum in terms of years of experience as a Level GG senior officer. He reiterated the need for someone who had a "deep understanding of Bank culture" rather than someone who would take a "technical or legalistic approach." He stated that since there were no GH level positions available in the unit, he expected a Level GG staff member to be able to operate at such a high level. Once again asked by the Panel for specific examples of how the Applicant demonstrated a lack of the requisite knowledge of Bank operations or culture which Mr. X would expect from a Level GG officer in the unit, Mr. X could not recall any specific examples or incidents, but stated that "in general," this was a challenge faced in the unit.

52. The Tribunal has reviewed the Level GG senior officer vacancy announcement in light of Mr. X's comments, and makes the following observations. First, the selection criteria enumerated in the announcement do not include a requirement that candidates must possess knowledge of Bank operations. Rather the announcement stated that a candidate should have "experience working within a multilateral organization and/or a private or public sector global environment." This experience is not qualified by terms such as "extensive." In particular, there is no provision that a candidate must have spent a particular length of time accumulating such experience in order to be considered a successful candidate. The Applicant, as an internal candidate, had experience working within a multilateral organization. In addition, his work experience included four years' employment in an international law firm with secondment to one of its European offices. Absent any concerns about the Applicant's ability to adapt to a multicultural organization or understand the Bank's culture, there was no basis for Mr. X to assume that the Applicant's short period of employment at the World Bank indicated unsuitability for the position.

53. Second, the announcement states that candidates should have a "minimum of 8 years substantial relevant and progressively responsible professional […] experience." There is no requirement that candidates should have performed such tasks exclusively. In addition, with respect to the technical skills requirement, the job description notes that candidates should possess certain experience and expertise which the record shows that the Applicant possesses. In addition, upon joining the unit the Applicant designed and facilitated training sessions on the core tasks of the unit, mentored and coached less experienced staff and "periodically serv[ed] as Acting Manager for [the unit]." As part of his duties, the Applicant collaborates with Human Resources and other units to successfully conclude tasks. The Applicant was also assigned the role of "Task Team Leader" for a prominent campaign conducted by the unit. According to the Hiring Manager in his testimony before the PRS Panel, the Applicant spearheaded that campaign. In 2013 the Applicant was awarded a "Spot Award" for his performance in a complex case.

54. The Tribunal observes that the interview panel found that the Applicant successfully met the criteria set in the vacancy announcement. In particular, the Applicant was praised for his leadership skills and his ability to mentor other staff, specific requirements noted in the vacancy announcement. The Hiring Manager and Mr. AB, both members of the interview panel, testified

before the PRS Panel and expressed surprise that the Applicant was not ultimately appointed to the position. They affirmed that in their view the Applicant demonstrated leadership skills. Mr. AB in particular noted that the Applicant's leadership skills were at Level GG, and the interview panel was composed of individuals who were competent to make that assessment. The Hiring Manager also expressed surprise at Mr. X's decision and rationale.

55. While the "identification and definition of specializations is a matter that comes within the managerial discretion of the Bank as does the evaluation of the corresponding skills to perform these tasks," *Garcia-Mujica*, Decision No. 192 [1998], para. 13, the Tribunal has previously emphasized the importance of a transparent and fair assessment of candidates against the advertised criteria. *See Perea*, Decision No. 326 [2004], para. 74. The Tribunal takes into account the testimony of the Human Resources Manager for the unit before the PRS Panel. She stated that though the recommendation of the interview panel is purely a recommendation, there has to be a "business case" for not accepting its recommendation.

56. The Tribunal finds that Mr. X's assessment criteria was subjective and did not conform to the advertised criteria. He was unable to substantiate his assessment that the Applicant lacked Level GG leadership skills and knowledge of the Bank's culture with concrete examples or by objective standards. He further based his assumption that the Applicant lacked requisite knowledge of the Bank's operations and culture on generalizations, rather than on the Applicant's actual knowledge, the assessment of the interview panel, the views of the Hiring Manager, or the views of the other Level GG senior officer, Mr. AB. Mr. X was also expressly informed by the short-term consultant that the Applicant and the other recommended candidate were "very strong [officers] and are considered the 'go to' persons for assistance." By not giving weight to any of the foregoing and instead relying on his own perceptions, Mr. X's decision did not comport with the advertised selection criteria. Based on the totality of the record, the Tribunal finds that the Bank has not shown that Mr. X had a reasonable and observable basis for failing to comply with best practices by overruling the decision of the Hiring Manager and declining to follow the recommendation of the interview panel.

Whether the non-selection decision was improperly motivated

57. The Tribunal will now consider whether there were improper motivations for the non-selection decision. According to the Applicant, the non-selection decision was "tainted by race-based considerations." He clarifies that he does not allege that Mr. X harbored any racial animus or stereotypes, nor is there evidence that Mr. X treated individuals of African descent differently from others. What the Applicant contends is that Mr. X "wrongly allowed rumors of racial favoritism to motivate his involvement" in the hiring process, and his eventual non-selection of either of the recommended candidates. The Applicant avers that if Mr. X's rationale for rejecting his candidacy for the position was genuine, Mr. X would have selected the other recommended candidate who had a longer service at the Bank Group, previously held a Level GG position at the International Finance Corporation (IFC), and had worked in the unit for a year longer than the Applicant. However, Mr. X did not select this candidate and instead cancelled the vacancy announcement.

58. The Bank for its part contends that there is no evidence, direct or circumstantial, that Mr. X considered race in the selection process. To the Bank, Mr. X's decision was based on a legitimate assessment and did not "account for race in an effort to advance racist objectives or to rectify a perception of favoritism in the unit." The Bank relies upon the report of the PRS Panel which notes that the Panel did not find "evidence demonstrating any link between [the Applicant's] color and the non-selection decision" and instead determined that there was "insufficient evidence to conclude [Mr. X] acted in a discriminatory manner, or otherwise not in good faith, in connection with the non-selection decision."

59. The Tribunal is of the view that the issue at hand is not whether Mr. X was racist. The Tribunal will also not focus its review on whether there was evidence that Mr. X treated the Applicant differently from others on the basis of his race. Additionally, the fact that Mr. X recruited and promoted Mr. Y, himself of African descent, several years ago is inconsequential to the core issues in this case. Rather, the question is whether there is evidence that Mr. X's decision was tainted by the perception that Mr. Y, as the Hiring Manager, preferentially recruited to the unit individuals of African descent. For Mr. X's non-selection decision to be improperly motivated, the

racial considerations need not be the *sine qua non* for that decision. It is sufficient that the decision not to hire the Applicant was influenced by these considerations.

60. The record shows that some staff members within the small unit expressed concern to Mr. X that the Hiring Manager exhibited favoritism in his recruitment of staff by allegedly predominantly hiring individuals of African descent. At least one such complaint was expressly noted in Mr. Y's 2015 Managerial 360 Assessment Report, and Mr. Y testified before the PRS Panel that such complaints have appeared in each of his three Managerial 360 Assessment Reports. Mr. X himself acknowledged that he was aware, for at least a year, that the perception existed that Mr. Y had a preference for hiring staff members of African descent. Mr. X stated that some staff members raised this concern directly with him, and he discussed this with Mr. Y during the latter's performance review in February or March 2015. When asked by the PRS Panel whether there was a perception that he wanted to hire the Applicant because he was of African descent, Mr. Y stated that in his view it was not "impossible" that such a perception existed. Mr. Y explained that he only hires the best candidates. In terms of formal recruitment to the unit, Mr. Y stated that, as a Hiring Manager, he had been involved in three formal recruitment processes in the unit. Only one, the Level GF recruitment process, resulted in the recruitment of a staff member of African descent – the Applicant.

61. The Tribunal finds that on balance, though Mr. X attested that he did not take the foregoing matters into consideration, the Bank has failed to demonstrate a reasonable and observable basis for his decision to select neither the Applicant nor the second recommended candidate who were highly recommended by the interview panel. Both candidates, who happen to be of African descent, met the advertised criteria for the position and were found by an independent interview panel to have satisfied the requirements for leadership – one of Mr. X's expressed requirements. Mr. X nevertheless decided to cancel the position rather than hire the Applicant who was considered the most qualified candidate, or the second candidate who had a longer tenure of service at the World Bank Group – another of Mr. X's expressed requirements.

62. The Tribunal emphasizes that its finding in this regard is based solely on the consideration that Mr. X's decision was influenced by a number of extraneous factors. These factors included

the fact that the Applicant had not been confirmed in his Level GF position and the perception – or misperception – that the Hiring Manager exhibited racial favoritism in his recruitment of staff.

DECISION

(1) The non-selection decision is rescinded. The case is remitted to the Vice President of the unit in question, to consider appointing the Applicant to a Grade Level GG position in the unit, if appropriate, *via* an *in-situ* promotion process retroactive to 10 March 2015, the date the Applicant was formally informed by Human Resources that the position was cancelled. If the Applicant is not so promoted, the Bank shall pay the Applicant two years' net salary;

(2) The Bank shall pay the Applicant compensation in the amount of three months' net salary;

(3) The Bank shall pay the Applicant the amount of $13,903.05 in legal fees and costs; and

(4) All other claims are dismissed.

/S/ Stephen M. Schwebel
Stephen M. Schwebel
President

/S/Olufemi Elias
Olufemi Elias
Executive Secretary

At Washington, D.C., 4 November 2016