



World Bank Administrative Tribunal

2017

Decision No. 566

**DO (No. 2),
Applicant**

v.

**International Bank for Reconstruction and Development,
Respondent**

**World Bank Administrative Tribunal
Office of the Executive Secretary**

**DO (No. 2),
Applicant**

v.

**International Bank for Reconstruction and Development,
Respondent**

1. This judgment is rendered by the Tribunal in plenary session, with the participation of Judges Stephen M. Schwebel (President), Mónica Pinto (Vice-President), Ahmed El-Kosheri, Andrew Burgess, Abdul G. Koroma, Mahnoush H. Arsanjani, and Marielle Cohen-Branche.
2. The Application was received on 23 August 2016. The Applicant was represented by Peter C. Hansen and J. Michael King of Law Offices of Peter C. Hansen, LLC. The Bank was represented by David R. Rivero, Director (Institutional Administration), Legal Vice Presidency.
3. The Applicant challenges the decision to initiate an investigation into his recording of a conversation with the Vice President of his unit, without the latter's knowledge or consent. The Applicant contends that Locke Lord, the law firm hired to conduct the investigation, grossly violated his due process rights and that his case was improperly publicized.

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 Level GF in March 2014. Mr. X was appointed Vice President of the unit in May 2012.
5. On 9 September 2014, a senior position at Level GG in the unit was advertised. The Applicant applied for the position, was shortlisted, interviewed and ranked as the top candidate by the interview panel.

6. On 10 February 2015, Mr. X and the Applicant met in Mr. X's office to discuss the Level GG position. Mr. X informed the Applicant that he would not be appointed to the position for a variety of reasons.

7. On 24 February 2015, the Applicant filed a Request for Review with Peer Review Services (PRS) challenging the non-selection decision. During the PRS hearing, the Applicant and Mr. X appeared to have different recollections of the reasons Mr. X provided to the Applicant for not appointing him to the position. The Applicant then revealed that he had an audio recording of his 10 February 2015 meeting with Mr. X and requested that the recording be entered into the record. According to the Applicant, the content of the recording demonstrated what Mr. X told the Applicant was the rationale for the non-selection decision. Mr. X expressed surprise as he was unaware that their conversation had been recorded and he objected to the recording being heard by the PRS Panel. Since the Applicant had made the recording without Mr. X's knowledge or consent, the Panel declined to admit the recording or permit the Applicant to ask Mr. X questions based on the recording.

8. On 30 June 2015, Mr. X resigned from the World Bank Group effective 1 July 2015. Prior to his departure, Mr. X reported the Applicant's conduct in recording their 10 February 2015 conversation. In Mr. X's opinion, such an act amounted to misconduct and a "serious violation of a supervisor's privacy."

9. On 9 July 2015, the PRS Panel issued its report and recommendation to the then Managing Director and Chief Operating Officer.

10. On 31 July 2015, the Managing Director and Chief Operating Officer issued her decision letter concerning the recommendations of the PRS Panel. She affirmed the report of the Panel and offered the Applicant two weeks' net salary as recommended by the Panel for the procedural irregularities in the non-selection decision. In addition, she stated:

Finally, at the PRS hearing, you admitted to making a recording of a meeting between you and [Mr. X], without [Mr. X's] knowledge or consent. The Panel declined to admit the recording into the record in this matter or to allow you to ask

[Mr. X] questions based on this recording. As a WBG manager, I am referring this matter to [...], [Vice President, Institutional Integrity (INTVP) and Acting Vice President, Ethics and Business Conduct (EBCVP)], for appropriate handling.

11. The Applicant declined to receive the compensation offered and filed an Application before the Tribunal, the details of which are contained in *DO*, Decision No. 546 [2016].

12. On 28 September 2015, the Vice President of Human Resources (HRVP) appointed the law firm, Locke Lord, as “alternative reviewers in connection with a matter that has come to the attention of [the Acting EBCVP]. [The Acting EBCVP] has referred the matter to me so as to avoid even an appearance of conflict of interest.” With respect to the terms of reference, the HRVP noted that Locke Lord was appointed to:

[C]onduct a review of allegations that a staff member assigned to the [...] unit [...] may have made a surreptitious and unauthorized audio recording of a conversation he had with the former Vice President, [Mr. X,] and then attempted to use the recording in a Peer Review hearing. You are requested to conduct an impartial fact finding consistent with the procedures and safeguards stated in Staff Rule 3.00, so as to enable the Management to determine whether misconduct may have occurred. You should submit a report of your findings to me in as expeditious a manner as possible, consistent with a fair process to all concerned.

13. Pursuant to its appointment, Locke Lord conducted an initial review into the general allegations set forth in the Managing Director and Chief Operating Officer’s 31 July 2015 decision and conducted background interviews with Mr. X, the PRS Executive Secretary, a PRS consultant, and the Acting EBCVP. The initial review confirmed that the Applicant made the recording without Mr. X’s knowledge or consent and subsequently attempted to introduce the recording at the PRS hearing.

14. On 20 October 2015, Locke Lord submitted a Notice of Alleged Misconduct to the Applicant.

15. On 6 November 2015, the Applicant was interviewed by Locke Lord.

16. On 10 December 2015, Locke Lord sent the Applicant a Draft Report of its findings.

17. On 7 January 2016, the Applicant sent Locke Lord his comments on the Draft Report.

18. On 21 January 2016, Locke Lord sent its Final Report to the HRVP. With respect to the propriety or impropriety of the recording, Locke Lord concluded as follows:

We believe that the following aspects of [the Applicant's] conduct bear on whether his conduct rises to the level of actionable misconduct that warrants the imposition of disciplinary measures:

1. The February 10, 2015 meeting took place in [Mr. X's] office, a private space in which [Mr. X] had a reasonable expectation of not being recorded by another staff member;
2. [Mr. X] was [the Applicant's] superior at the time of the meeting;
3. [The Applicant] had likely already considered challenging [Mr. X's] decision through PRS at the time of the February 10, 2015 meeting and, therefore, at least a partial ulterior motive for the meeting itself and the questions asked by [the Applicant] was to obtain information or statements that would bolster [the Applicant]'s Request for Review; and
4. [The Applicant] acknowledged during his interview that at least a part of his motive for recording the February 10, 2015 meeting was that he was somewhat suspicious of [Mr. X] (as opposed to simply recording the conversation because [Mr. X] was difficult to understand).

19. Locke Lord further concluded that “[w]e believe [the Applicant's] conduct implicates Principle 3 of the Principles of Staff Employment,” and noted that the Applicant's position was that “his conduct violated no Bank rule or policy.”

20. Between 2 February and 16 April 2016, the Applicant was in contact with a Senior Case Management Specialist about delays in the issuance of the HRVP's decision.

21. On 25 April 2016, the HRVP issued his decision in which he determined that there was “insufficient evidence to support a finding that [the Applicant] engaged in misconduct, as defined under Staff Rule 3.00, paragraph 6.01(c).” The HRVP nonetheless informed the Applicant that while he had not engaged in misconduct, “your non-consensual tape recording of your conversation with your former Vice President [Mr. X] demonstrates a lack of judgment and discretion on your part. I ask that you refrain from engaging in such behaviour in the future particularly based on the sensitivity of your role [...]”

22. On 23 August 2016, the Applicant submitted this Application in which he asserts the following: 1) the decision to initiate an investigation against him was flawed and improperly motivated by retaliation; 2) the Locke Lord investigation grossly violated his due process rights; and 3) his case was improperly publicized. He seeks three years' salary for moral and intangible damages, rescission of the HRVP's decision letter, and replacement with a simple exoneration. He further seeks legal fees and costs in the amount of \$37,501.25.

SUMMARY OF THE CONTENTIONS OF THE PARTIES

The Applicant's Contention No. 1

The Applicant was wrongfully subjected to an investigation

23. The Applicant contends that there was no reasonable basis for an investigation into his conduct. First, the Applicant asserts that there is nothing in the Bank's law or practice prohibiting one-party consent recordings, which are legal in Washington, DC. According to the Applicant, given the express permission of one-party consent recording in Washington, DC, and the silence of the Bank on the matter, it must be presumed that such recordings are legal at the Bank. Second, the Applicant maintains that his intended use of the recording, namely as a contemporaneous record of Mr. X's reasons for the non-selection decision, did not run afoul of any laws.

24. The Applicant asserts that the investigation was retaliatory. It is the Applicant's contention that the investigation was launched at the behest of Mr. X "because [the Applicant] sought to introduce at a PRS hearing his personal recording of his disputed conversation with [Mr. X], about which [Mr. X] had made material misstatements during his testimony." The Applicant presented email correspondence between EBC and the Legal Department concerning surreptitious audio recordings made by staff members. These staff members were not investigated and the Applicant asserts that the fact he was investigated is evidence of retaliation and improper bias in favor of senior management. The Applicant requests an independent investigation into the Bank's conduct.

The Bank's Response

The Bank reasonably believed that there was sufficient basis to investigate the Applicant's secret recording

25. The Bank asserts that while there is no rule or policy permitting secret, one-party consent recordings, the absence of a rule is not determinative of whether particular actions may constitute misconduct. The Bank notes that there is no universally accepted standard applicable to the secret taping of conversations and the issue was, therefore, subject to reasonable inquiry. The Bank contends that since there is substantial non-World Bank authority prohibiting, "even criminalizing," secret recordings, it was entirely reasonable for the Bank to evaluate whether the Applicant's conduct, under the specific facts and circumstances of his actions, constituted misconduct.

26. The Bank argues that the email correspondence between the Applicant and a colleague in the Legal Department does not support his contention that there was a permissive atmosphere for surreptitious recordings. To the Bank, the fact remains that there was uncertainty about the appropriateness of the Applicant's conduct and it was reasonable to investigate. With respect to the Applicant's allegations of retaliation, the Bank contends that there is no evidence that the Managing Director who made the decision to refer the matter to EBC communicated with the Vice President who was the subject of the secret taping. The Bank asserts that the Managing Director was already addressing the Applicant's PRS case, and felt compelled to act on the "troubling information she had seen in the PRS Report explaining [the] Applicant's secret recording of a fellow staff member."

The Applicant's Contention No. 2

The investigation was a gross violation of due process

27. According to the Applicant, the investigation conducted by Locke Lord fundamentally violated his rights to due process insofar as Locke Lord conducted the investigation in a manner that was different from EBC investigations. The Applicant states that as the subject of an investigation by Locke Lord he was placed at a disadvantage because of his position within the

Bank. The Applicant maintains that the Bank discriminated against him on the basis of his position when his actions did not involve his official functions. To the Applicant, the decision to appoint Locke Lord rather than to conduct the investigation in-house was discriminatory and an abuse of discretion. The Applicant maintains that, given Mr. X's resignation, the Acting EBCVP was well-positioned to handle the investigation and, if necessary, skilled Bank investigators without unit-level ties to the Applicant could have conducted the investigation.

28. According to the Applicant, the following actions and inactions by Locke Lord amounted to due process violations:

- a. *No 'initial review' was conducted before a full-blown investigation was undertaken.* The Applicant states that the required interview with the "reporter," in this case the Managing Director and Chief Operating Officer, was not conducted. To the Applicant, this suggests that the Managing Director and Chief Operating Officer was "merely the conduit for [Mr. X's] retaliatory complaint." Furthermore, the Applicant asserts that there was a failure to conduct a preliminary legal analysis. This, according to the Applicant, deprived him of "the protection – accorded to all other staff members – of having an expert initial review conducted by Bank officials."
- b. *The Notice of Alleged Misconduct was wrongfully delayed and uninformative.* The Applicant maintains that since the basic facts were not in question, Locke Lord had a duty under Staff Rule 3.00, paragraphs 8.01, 8.02, and 10.01 to present the Notice to the Applicant at the earliest moment, prior to any further fact finding. The Applicant maintains that Locke Lord did not do so and instead interviewed four witnesses before the Applicant received any notice "or chance to respond." To the Applicant, this violated EBC's Operational Procedures and Policies for Misconduct Investigations. The Applicant further argues that the Notice was uninformative. It referred merely to unspecified allegations and was "wrongfully cryptic and misleading, particularly since no initial review for legal sufficiency was conducted, and no intake interview was conducted with the reporter, [the Managing Director and Chief Operating Officer], who did not actually level any allegations." The Applicant also asserts that the Notice failed to

indicate any valid legal grounds, and that Locke Lord “intimidatingly warned” him that it “represent[s] and act[s] on behalf of” the Bank.

- c. *The investigative procedure and reporting violated due process.* The Applicant avers that Locke Lord’s conduct was “unduly secretive, incompetent, and transgressive of due process.” The Applicant argues that Locke Lord refused to give him its appointment letter in advance of his interview which, according to the Applicant, “wrongfully denied him an opportunity to include comments on the appointment in his response to the Notice of Alleged Misconduct.” The Applicant also contends that Locke Lord ignored his complaints that he had not been informed of the provisions he was alleged to have violated. Furthermore, the Applicant contends that Locke Lord mistakenly informed him that if the HRVP orally censured him, “he would not receive any written notice of his disciplinary measure, its reasons, or his right to appeal.” The Applicant maintains that this incorrect information demonstrated that Locke Lord was not familiar with the Bank law and policy, and it caused him “deep and undeserved stress.” The Applicant argues that Locke Lord misrepresented his actions and statements in the draft and final reports, and “knowingly hindered due process” by failing to provide full transcripts, instead transcribing snippets of the Applicant’s interview.

29. The Applicant argues that Locke Lord’s conclusions had no basis in the Bank’s law, and that it failed to include any consideration of possible aggravating or mitigating factors in its report, contrary to EBC’s practice.

30. Finally, the Applicant contends that the HRVP wrongfully ignored the due process violations and nevertheless rebuked him, despite not finding that he committed misconduct. To the Applicant, this rebuke was “functionally indistinguishable from a formal (and permanent) censure under Staff Rule 3.00, para. 10.06(a).”

The Bank's Response***The Applicant's due process rights were respected***

31. Citing CW, Decision No. 516 [2015], the Bank asserts that the Applicant's due process rights were respected, namely that he was apprised of the charges being investigated with reasonable clarity, given a reasonably full account of the allegations and evidence brought against him, and given a reasonable opportunity to respond and explain. The Bank contends that the Applicant took full advantage of his due process rights and submitted voluminous criticisms and comments at every stage of the investigation. The Bank maintains that EBC would have been conflicted in this case and the use of external reviewers was consistent with Bank policy and practice.

32. The Bank argues that the Applicant cannot point to any procedural error made by Locke Lord. To the Bank, there are no inaccuracies in the report nor are there any mistakes in the process which affected the outcome of the report. The Bank avers that the Applicant's complaints of due process violations are more in the nature of professional disagreements about the best way to conduct investigations.

The Applicant's Contention No. 3***The Applicant's case was wrongfully publicized***

33. The Applicant refers to an email message dated 20 March 2016 sent by an unknown writer claiming to write on behalf of concerned staff members of the World Bank Group. This email message was sent to the Bank President as well as several other Bank staff, with copies to multiple journalists, to complain that investigations into conduct by staff members of the unit in question had not resulted in punishments. Although the Applicant was not mentioned by name, he contends that "[l]eaks have obviously occurred, and it cannot properly be doubted that such scandalous and detailed information was exposed to the writer without provision of [the Applicant's] identity."

The Bank's Response

34. The Bank does not expressly address this contention in its pleadings.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

35. This case concerns the investigation into conduct which is neither expressly permitted nor prohibited by the rules or policies of the World Bank Group. At the core of this case is the decision to investigate whether the Applicant's act of secretly recording a conversation he had with Mr. X about the Applicant's non-selection for the Level GG position nevertheless violated general provisions of Staff Rule 3.00 regulating the conduct of staff members of the World Bank Group.

36. The Tribunal notes, at the outset, that silence in the rules and policies regarding secret recording of conversations with other staff members does not necessarily make such recordings permissible. It is possible that in the past such incidents were not common enough to warrant implementation of policies and staff rules regulating such conduct. The Applicant, therefore, cannot infer automatic protection of his surreptitious recording from the absence of a staff rule or policy on the matter. At the same time, the absence of any rule or policy on the part of the Bank, leaving the treatment of incidents of secret recordings entirely discretionary without clear guidance, may be unfair to staff. Indeed, a decision to initiate investigations into allegations of misconduct is a discretionary decision, but it is one which is nevertheless subject to the Tribunal's scrutiny of the manner in which the discretion was exercised. The Tribunal has consistently held that it will not overturn a discretionary 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 citing *de Raet*, Decision No. 85 [1989], para. 67; *Marshall*, Decision No. 226 [2000], para. 21; *Desthuis-Francis*, Decision No. 315 [2004], para. 19.

37. Given the silence in the Staff Rules, and the absence of a policy statement on the part of the Bank that secret recordings are not permissible or the circumstances under which they may be permissible, the Tribunal finds that the burden of proof shifts to the Bank to justify an investigation of such recordings.

38. The record shows that there have been instances of secret recordings within the Bank which occurred prior and subsequent to the decision to investigate the Applicant's conduct. The staff members concerned were not investigated by EBC upon the advice of the Bank's Legal Department. In one such case, in October 2015, it was discovered during an EBC investigation that a witness had secretly taped the investigator's interview with that witness in order to show it to her husband. The investigator, in that case, sought legal advice from a Senior Counsel in the Institutional Administration unit of the Bank's Legal Vice Presidency (LEGIA). The Senior Counsel informed the investigator that "[i]nasmuch as surreptitious recording of conversation with a fellow staff or of EBS [sic] interview may be underhanded, if improper, I think that this case is one where we may have to exercise investigatory discretion and decide not to investigate." The Senior Counsel added that

[h]ere, in the Bank, from our list of what constitutes misconduct, all I can see is "disclosure of non-public information," which can only be the case depending on what use is made of the recorded interview. I am not saying that it is permissible to secretly record interviews but under the circumstances of this case, I do not think that we should investigate it for misconduct but we could reproach the staff member that EBC frowns upon such conduct.

39. In that case, pursuant to the legal opinion received, EBC decided not to conduct an investigation into the staff member's conduct. In his message to the investigator, the Senior Counsel also alluded to another instance where a staff member secretly recorded her Overall Performance Evaluation (OPE) discussion with her supervisor. The Senior Counsel stated, "I do not recall that any action was taken against the staff member."

40. Prior to the initiation of an investigation against the Applicant, a case of secret recording arose with striking similarity to the Applicant's case. In March 2015, LEGIA was contacted by an EBC staff member seeking a legal opinion:

I have a question which needs your legal opinion. A manager was taken to PRS and they supported her decision. In the PRS report (attached) in the footnote for paragraph 14, she observed that the complainant had tape recorded her conversation with him without her knowledge. The PRS did not allow this as evidence. However, when the manager read the report, she reported his admission to taping her as unethical and breaking staff rules.

I consulted with the lawyers in EBC and they said such recordings are not against the law in DC. I spoke to [the Lead Human Resources Specialist] about it off the record and he said it is against the rules.

I cannot find any reference to it.

Can you help me determine if there is any precedent and advise on how to handle?

41. In response, the Senior Counsel stated: "I am not aware of the Staff Rule that is violated by a taped conversation in the Bank." He added "[i]n any event, secretly recording a conversation with either staff or manager may be underhanded but I do not think that it would be misconduct, without more."

42. Pursuant to the Tribunal's order for an explanation of why the Bank did not investigate any previous case of recordings without consent, the Bank also provided information that EBC had in the past faced a situation where a staff member who lodged a complaint of sexual harassment offered as evidence a recording she had secretly made of certain comments by her manager. The Bank states that "[t]he EBC investigator listened to the tape, and determined that the comments recorded on the tape did not warrant a harassment investigation. The EBC investigator also made the discretionary decision not to open a misconduct investigation against a complaining staff member for the secret recording."

43. Having reviewed the Bank's responses to other instances of secret recordings, the Tribunal is unpersuaded that the Bank has discharged the burden to demonstrate that there was more to the Applicant's case necessitating an investigation. Had this been the first instance in which the Bank encountered surreptitious recordings of other staff members, the reasonableness of initiating an investigation, and all that it entails, would have been well established. The Bank seeks to justify its different treatment of the Applicant's case by stating that his case was not addressed by EBC, and it was instead the HRVP who exercised his discretion to investigate. Arguably, this lends

credence to the Applicant's assertion that he was treated differently and unfairly because of his position within the Bank. It is the Applicant's view that had the matter been dealt with by EBC or internally within the Bank, rather than by external reviewers, EBC would have determined that an investigation was unwarranted. Thus, the fact that the matter was not handled by EBC and instead referred to the HRVP for his discretionary decision cannot be used to justify the reasonableness of the HRVP's decision to investigate.

44. The Bank further states that the HRVP's decision was influenced by factors including: a) the Applicant's position within the Bank, and the fact that he was "aware of the sensitivity of secret recordings by staff"; and b) "EBC had always considered it a close issue in the past whether or not surreptitious recording by staff should be investigated by EBC as misconduct." These arguments are similarly unconvincing. The Tribunal is unpersuaded that the mere fact that the Applicant held a certain position justifies triggering the decision to initiate an investigation into conduct which hitherto was considered not to warrant an investigation, "without more." Additionally, the surreptitious recording was not made in the context of duties and responsibilities associated with the Applicant's position. The Tribunal considers that clear policies and rules should have been established to govern such conduct if the Bank were concerned about the sensitivity of secret recording by staff.

45. The circumstances of the Applicant's recording were similar to those of the staff member who recorded her OPE discussion with her manager. In the present case, the Applicant recorded the conversation he had with the former Vice President of his unit about the Vice President's decision not to appoint the Applicant to the Level GG position. The Applicant was ranked the top candidate by the interview panel, and his Hiring Manager had also orally informed him that he had been selected for the job. The Applicant, therefore, had a personal interest in the conversation and his attempted use of the recording was limited to addressing alleged discrepancies between the reasons the Vice President told him in private and those the Vice President stated before the PRS Panel. However, these two cases were treated differently by the Bank and the Bank does not persuasively explain the different treatment.

46. The Tribunal is also unconvinced by the assertion that the HRVP's decision was motivated by the fact that EBC had always considered whether or not to investigate such cases "a close issue in the past." Yet, the Bank does not explain why the HRVP did not follow EBC's precedent and practice of not investigating such types of cases. The Bank also does not explain why the prevailing legal opinion from LEGIA – to exercise investigatory discretion and not to investigate – was not adopted in this case. In other words, what was the "without more" which triggered an investigation in the Applicant's case? The Bank has not submitted a convincing explanation.

47. The Tribunal notes the Applicant's contention that the investigation was initiated following a complaint by Mr. X against the Applicant, and the fact that Mr. X perceived the surreptitious recording to be a violation of a supervisor's right to privacy. In response, the Bank asserts that Mr. X never "reported" anything, and that the "Applicant was not 'reported for misconduct.'" The Bank further attempts to explain the discrepancy between its pleadings and Locke Lord's Final Report, which included Mr. X's testimony that he reported the Applicant's conduct. According to the Bank, "[t]he context of the October 2, 2015 interview [between Locke Lord and Mr. X] allows the inference that any report from [Mr. X] to the Vice President of HR occurred after the July 31, 2015 Decision Letter from the MD, which initiated the investigation."

48. The Tribunal finds that there is no basis for such an inference. The record plainly reveals that Mr. X informed an undisclosed individual at the Bank of his complaint against the Applicant prior to his departure from the Bank on 1 July 2015. Locke Lord notes the following in its Final Report:

Additionally, [Mr. X] stated during his interview that – though he does not remember specifically whether any specific policy mentions the recording of conversations without permission – his position is that recording a supervisor without permission is misconduct and a serious violation of a supervisor's privacy. [Mr. X] also stated that he reported [the Applicant's] conduct prior to his leaving the Bank because he believed it was potentially misconduct.

49. The Bank has not disclosed to whom Mr. X reported the Applicant's alleged misconduct and instead maintains, despite indications to the contrary, that there was no possible connection between Mr. X's complaint against the Applicant and the HRVP's decision to conduct an

investigation. Although a conclusive finding on this matter cannot be made, this lack of transparency is disconcerting and does not support the Bank's argument that the HRVP exercised his discretion in a fair and reasonable manner without improper motives. Instead, such opacity regarding the manner in which the decision to investigate was made tends to support the Applicant's contention that the only reason he was investigated was because the recording pertained to the conversation he had with Mr. X, a Vice President, who felt that the recording of a supervisor without permission is a "serious violation of a supervisor's privacy."

50. The Bank is reminded of its obligation to treat staff members consistently in its decision to conduct investigations into similar conduct. Special privilege should not be afforded to complainants who happen to be senior members of staff. Furthermore, a staff member recording a conversation with a supervisor about his/her own performance and career opportunities on World Bank premises cannot be considered an invasion of the supervisor's personal privacy. It is imperative that the HRVP does not, through his exercise of managerial discretion, create the impression that allegations of misconduct affecting senior managers and Vice Presidents are treated differently from those affecting other staff members. There is no basis for such preferential treatment.

51. Having made the above observations and findings, the Tribunal turns to the Applicant's contention that the decision to investigate his conduct was improperly motivated by retaliation. As with the Bank, the Applicant has neither offered persuasive arguments nor set out a *prima facie* case of retaliation. A finding that the Bank has not conclusively demonstrated the HRVP's decision was made independently of Mr. X's complaint and personal views does not mean that the investigation was retaliatory. As it is the Applicant's contention that the decision to initiate an investigation into his conduct was based on retaliation, the burden lies on the Applicant to make a *prima facie* case of retaliation. See *CW*, Decision No. 516 [2015], para. 94. The Tribunal has recognized that "[a]lthough staff members are entitled to protection against reprisal and retaliation, managers must [...] have the authority to manage their staff and to take decisions that the affected staff member may find unpalatable or adverse to his or her best wishes." See *O*, Decision No. 337 [2005], para. 49; *AI*, Decision No. 402 [2010], para. 80.

52. The Tribunal recalls that retaliation is prohibited and treated as misconduct under Staff Rule 3.00, paragraph 6.01(g), which provides that:

Retaliation by a staff member against any person who provides information regarding suspected misconduct or who cooperates or provides information in connection with an investigation or review of allegations of misconduct, review or fact finding, or who uses the Conflict Resolution System, including retaliation with respect to reports of misconduct to which Staff Rule 8.02, “Protections and Procedures for Reporting Misconduct (Whistleblowing)” applies.

53. EBC’s brochure entitled “Retaliation: What Staff and Managers Need to Know” provides further clarification:

What is retaliation?

Retaliation is any form of retribution or threat of retribution taken against an individual because he or she officially:

- Reports to management, INT, or EBC an allegation of misconduct that may threaten the operations or governance of the Bank Group, or serves as a witness in a related investigation (see Staff Rule 8.02);
- Reports any other allegation of misconduct to management, INT or EBC, or serves as a witness in a related investigation (see Staff Rule 3.00);
- Uses any of the resources of the World Bank Group Conflict Resolution System, which includes Ombuds Services, the Office of Mediation Services, and Peer Review Services. (see Staff Rule 3.00).

A staff member must have engaged in at least one of the three above “protected activities” for an action by someone to be considered retaliation.

54. It is the Applicant’s contention that the investigation was initiated in retaliation for the surreptitious recording he made. However, the secret recording of another staff member is not a protected activity under the Staff Rules, and evidence that Mr. X reported the surreptitious recording as suspected misconduct on its own is insufficient to characterize the subsequent investigation as retaliatory. As addressed above it is not unreasonable, in principle, to inquire whether, in the absence of clear rules and policies, surreptitious recordings are a violation of the Staff Rules and Principles of Staff Employment of the World Bank Group.

55. The protected activity which the Applicant engaged in was the use of PRS, part of the Bank’s conflict resolution system. Yet, the Applicant does not draw a nexus between his use of

PRS and the Vice President's complaint against him. There is no evidence that, barring the Applicant's attempted introduction of the recording into evidence before PRS, the Vice President would have made any complaints about the Applicant's use of the conflict resolution system. Thus, the Applicant has failed to make a *prima facie* case of retaliation.

56. The Tribunal stresses that "[t]he fact that the conclusion may ultimately be favorable to the person under investigation plainly does not mean that the inquiry should not have been conducted at all." *See G*, Decision No. 340 [2005], para. 73. The Applicant's claim of a "permissive state of Bank law and practice regarding recordings" is wholly unsupported by the record. Trust among staff of the Bank is essential to a harmonious, effective, and efficient working environment. Recording of conversations with colleagues in the absence of their consent is not conducive to such a working environment, constraining candid discussions and creating distrust. The Tribunal is also aware of the chilling effect on the expression of opinions which may arise where staff members are concerned that their conversations are being surreptitiously recorded. Nevertheless, there may be circumstances justifying such recording, for instance when it is done to prove a misconduct that would not have been revealed otherwise. The responsibility is on the Bank to provide clear policies and guidelines to staff members to avoid inconsistencies in the treatment of this matter.

Due process violations

57. The Tribunal will now consider the Applicant's claims that his due process rights were violated. The Tribunal has consistently held that an investigation into a disciplinary matter is administrative and not adjudicatory in nature (*see, e.g., Arefeen*, Decision No. 244 [2001], para. 45; *Rendall-Speranza*, Decision No. 197 [1998], para. 57). In addition, "compliance with all technicalities of a judicial process is not necessary, if it is conducted fairly and impartially." *CB*, Decision No. 476 [2013], para. 43. The criteria for due process were elaborated in *Kwakwa*, Decision No. 300 [2003], para. 29:

[T]he due process requirements for framing investigations of misconduct in the context of the World Bank Group's relations with its staff members are specific and may be summarized as follows: affected staff members must be [apprised] of the

charges being investigated with reasonable clarity; they must be given a reasonably full account of the allegations and evidence brought against them; and they must be given a reasonable opportunity to respond and explain.

58. Even though the Tribunal takes “‘a fuller examination of the issues and circumstances’ in misconduct cases,” it nevertheless “does not micromanage the activity of investigative bodies.” See *Houdart*, Decision No. 543 [2016], para. 112 citing *G*, para. 73. In *G*, para. 73 the Tribunal added that

[it] has no authority to micromanage the activity of INT. What is required of INT is not that every inquiry be a perfect model of efficiency, but that it operates in good faith without infringing individual rights.

59. The same approach can be applied to the investigation conducted by Locke Lord. Though Locke Lord did not conduct its review in the same manner as EBC, the Tribunal finds that the Applicant has not proven his claim that his due process rights were violated. The record shows that the Applicant was apprised of the charges being investigated with reasonable clarity and in a timely manner. The Notice of Alleged Misconduct informed the Applicant that “pursuant to Staff Rule 3.00,” Locke Lord was engaged as “an alternative reviewer of certain allegations of possible employee misconduct in connection with an audio recording you made of a conversation between yourself and [the Vice President] on or about February 10, 2015, without [the Vice President’s] knowledge or consent.”

60. During his interview, the Applicant was given a reasonably full account of the allegations and evidence brought against him. In addition, the Applicant’s assertion that “no ‘initial review’ was conducted before a full-blown investigation was undertaken” is not supported by the record since the record shows that Locke Lord engaged in an initial assessment prior to conducting further review and fact-finding regarding the recording. Finally, the Applicant was given a reasonable opportunity to respond and explain his position. The Applicant provided his responses directly during the interview and subsequently in writing in response to the Draft Report. He was also provided with an extension of time to submit his comments.

61. However, the Tribunal observes that Locke Lord's Final Report did not maintain the same balance found in EBC's investigation reports. Furthermore, Locke Lord did not provide the Applicant with transcripts of its interviews with other witnesses, such as the then acting Vice President of EBC who referred the matter to the HRVP for the appointment of an external reviewer. The document entitled "Conduct of Disciplinary Proceedings for EBC Investigations," sets forth a summary of staff rights, obligations, and procedural safeguards in the conduct of disciplinary proceedings under Staff Rule 3.00, "Office of Ethics and Business Conduct." The document notes that staff members who are the subject of an EBC investigation will be provided a draft report which "will contain all findings and evidence (including transcripts of witness interviews) upon which the decision-maker will make his/her decision."

62. The Bank acknowledges that transcripts were not initially made of any of the interviews conducted, including the Applicant's. The Bank has not addressed why it deviated from the standard practice of producing a transcript of all interviews, and providing the subject of an investigation with copies of said transcripts. This would be beneficial to the subject in preparing his/her response to the allegations against him/her in the comments on the draft report. This would be particularly beneficial where the HRVP found that the staff member committed misconduct and, having reviewed the transcripts, the staff member seeks to challenge particular aspects of this finding or the proportionality of the sanctions imposed before the Tribunal.

63. In this case however, the Applicant's ability to defend and represent himself before the HRVP or the Tribunal was not impinged upon due to the absence of the transcripts. It is worth recalling that the Applicant was cleared of any misconduct and, besides making this claim as a matter of principle, the Applicant has not shown how he was harmed by the absence of these transcripts. The Tribunal considers it sufficient to draw the Bank's attention to the importance of consistency in its investigative practices regardless of whether the investigations are conducted by EBC or an external reviewer.

Publication of the Applicant's case

64. The Applicant refers to an email message dated 20 March 2016 sent by an unknown writer claiming to write on behalf of concerned staff members of the World Bank Group. This email message was sent to the President of the World Bank Group as well as several other Bank staff, with copies to journalists, to complain that investigations of staff in the Applicant's unit had not resulted in sanctions. Although the Applicant was not mentioned by name, he contends that "[l]eaks have obviously occurred, and it cannot properly be doubted that such scandalous and detailed information was exposed to the writer without provision of [the Applicant's] identity."

65. The Tribunal finds this claim unsubstantiated. Not only has the Applicant failed to demonstrate that his identity was leaked to the writer of the email message, he has also failed to proffer any evidence that the Bank is responsible for the alleged leak of information.

Request for an independent investigation

66. The final issue which the Applicant raises in his pleadings is a request for an independent investigation into the Bank's conduct in view of: "(1) the extraordinarily high level of the officials involved in the instigation of the investigation undertaken against him; (2) the seriousness of the prospect that retaliation was undertaken at the highest levels of the Bank against a staff member; and (3) the paucity of materials that has [sic] been disclosed to date about how the Locke Lord investigation came to pass." The Tribunal finds such an investigation unwarranted. The Applicant has not made a *prima facie* case that the initiation of an investigation was retaliatory. As noted above, the prohibition of retaliation concerns protected activity which does not apply to the facts at hand.

Concluding remarks

67. In view of the fact that, while the Applicant's claims are dismissed, the Application has raised questions which merit clarification, the Bank will be ordered to pay a proportion of the Applicant's legal fees and costs.

DECISION

- (1) The Applicant's claims are dismissed.
- (2) The Bank is ordered to pay \$12,500.42 as a contribution to the Applicant's legal fees and costs.

/S/ Stephen M. Schwebel

Stephen M. Schwebel

President

/S/Zakir Hafez

Zakir Hafez

Acting Executive Secretary

At Washington, D.C., 25 October 2017