Judgment No. 1999-2

Mr. "V", Applicant v. International Monetary Fund, Respondent

(August 13, 1999)

Introduction

1. On August 11, 12 and 13, 1999, the Administrative Tribunal of the International Monetary Fund, composed of Judge Stephen M. Schwebel, President, and Judges Nisuke Ando and Agustín Gordillo, Associate Judges, met to adjudge the case brought against the International Monetary Fund by Mr. "V", a former staff member of the Fund.

2. Mr. "V" contends that the Fund violated the terms of a Retirement Agreement ("Agreement") with him. That Agreement was entered into in settlement of differences between Mr. "V" and the Fund. The Agreement provides for Mr. "V"'s early retirement and settles all claims he may have had against the Fund arising up to the date of the Agreement, May 9, 1996. It further provides that all copies of Mr. "V"'s 1992 and 1994 performance reports are to be destroyed and the originals kept under seal in the Administration Department, subject to review only by the Director of Administration and General Counsel acting jointly, and that the performance rating assigned to Mr. "V" in 1992 and 1994 be removed from the Fund's "personnel data base."

3. The essence of Mr. "V"'s complaint is that the Fund violated the Agreement when it included in its 1996 Report of the Separation Benefits Fund ("SBF Report" or "Report") an entry pertaining to Applicant, but not identifying him by name, which listed as the reason for his separation: "Performance. Unable to produce work that met department standards. Retired," and circulated this Report to Fund Management, the Personnel Committee (Senior Personnel Managers in each department), the Ombudsperson, and the Chairman of the Staff Association Committee in whose office, Mr. "V" alleges, it became available for staff members to read. He also alleges that the preparation and distribution of this information violated GAO No. 35 (Information Security) and other Fund rules and regulations.

The procedure

4. The Application was filed on October 9, 1998. In accordance with the Rules of Procedure of the Administrative Tribunal, the Application, having twice been amended to bring it into compliance with those Rules[1], was transmitted to the Respondent on December 4, 1998.

[1] Pursuant to Rule VII, para. 6 of the Tribunal's Rules of Procedure, the Office of the Registrar advised Applicant that his Application did not fulfill the requirements of para. 3 of that Rule, which requires that all documents cited in the Application be attached as Annexes in a complete text unless part is obviously irrelevant, Applicant was given fifteen days to correct these deficiencies. On November 3, 1998, Applicant filed a Corrected Application, which complied only partially with the instructions of the Office of the Registrar. As

(continued)

5. The Fund's Answer was filed on January 19, 1999[2]. The Applicant's Reply and the Fund's Rejoinder were filed on February 19, 1999[3] and April 16, 1999 respectively.

6. On April 14, 1999, the Tribunal denied Applicant's request for oral proceedings, as the condition laid down in Rule XIII, para.1[4] that they be held only if "necessary for the disposition of the case" in its view was not met. The Tribunal had the benefit of a transcript

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Applicant presented legal argumentation as to why he should not comply fully with those instructions, the views of the President of the Tribunal were sought by the Registry. Thereafter, Applicant was informed that the President had considered his arguments but did not find them persuasive. Therefore, at the direction of the President of the Tribunal, and pursuant to Rule VII, para. 6(i) of the Rules of Procedure, the period for compliance with Rule VII was further extended until December 1, 1998, on which date the Application was brought into full compliance with the earlier instructions of the Office of the Registrar. Accordingly, by Rule VII, para. 6, the Application is considered filed on October 9, 1998, which is within the statutory period specified in Article VI, Section 1 of the Statute of the Administrative Tribunal.

[2]Applicant contends that the Answer was not timely filed because it was due on January 18, 1999. As the Fund explains in its Rejoinder, January 18, 1999 was a Fund holiday, and therefore, by operation of Article II, Section 2.d. of the Statute and Rule XVI of the Rules of Procedure, both of which include in the calculation of time limits "the next working day of the Fund when the last day of the period is not a working day," the Answer was timely filed on January 19, 1999.

[3]The original Reply was timely filed but failed to include as annexes all of the documents cited therein as required by Rule IX, paragraph 2; nor did it comply with the requirement of Rule IX, paragraph 3 that an original and four copies of the Reply be filed with the Office of the Registrar. Applicant included with his Reply a request that he be allowed additional time to file an amended Reply with appropriate annexes attached, as a family emergency had necessitated his travel out of the country. Applicant's request for additional time to comply with the procedural requirements was granted by the President of the Tribunal pursuant to Rule XXI which provides in part:

> "....
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> 2. The Tribunal, or, when the Tribunal is not in session, the President after consultation where appropriate with the members of the Tribunal may in exceptional cases modify the application of these Rules, including any time limits thereunder.
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> 3. The Tribunal or, when the Tribunal is not in session, the President may deal with any matter not expressly provided for in the present Rules."

The Reply, having been brought into compliance within the prescribed period, is considered filed on the original date.

[4] "1. Oral proceedings shall be held if the Tribunal decides that such proceedings are necessary for the disposition of the case. In such cases, the Tribunal shall hear the oral arguments of the parties and their counsel, and may examine them."

of oral hearings by the Fund's Grievance Committee, at which Applicant and senior officials of the Fund were heard.[5]

7. On April 27, 1999, at the request of Applicant, the President of the Administrative Tribunal exercised his authority under Rule XI[6] of the Rules of Procedure to call upon the parties to submit additional written statements. According to the schedule fixed by the President, Applicant was given until April 30 to submit his additional written statement and Respondent was given until May 6 to submit its responsive written statement. Applicant included in his additional written statement a request for production of documents. This request was denied by the President[7] on July 12, 1999, on the ground that the documents requested were irrelevant to the case.[8] At the same time, the President denied the Fund's request, included in its responsive written statement, for a copy of the text of Applicant's April 21, 1999 request for additional pleadings, noting that the Rules of Procedure of the Administrative Tribunal do not provide for a request by a party for additional pleadings to be transmitted to the other party or for any response to that request.

The factual background of the case

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[5] "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, Judgment No. 1996-1 (April 2, 1996), para. 17.)

[6] Rule XI provides:

"*Additional Pleadings*

1. In exceptional cases, the President may, on his own initiative, or at the request of either party, call upon the parties to submit additional written statements or additional documents within a period which he shall fix. The additional documents shall be furnished in the original or in an unaltered copy and accompanied by any necessary translations.

2. The requirements of Rule VII, Paragraphs 4 and 8, or Rule VIII, Paragraphs 2 and 3, as the case may be, shall apply to any written statements and additional documents.

3. Written statements and additional documents shall be transmitted by the Registrar, on receipt, to the other party or parties."

[7] Rule XVII, para. 4 provides:

"When the Tribunal is not in session, the President shall exercise the powers set forth in this Rule."

[8] Rule XVII, para. 2 provides:

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

8. Applicant began his employment with the Fund in 1969 as a staff member in one of the Fund's departments. He received promotions in 1979 and 1986. During the later course of Mr. "V"'s employment, disputes apparently arose regarding his performance and its evaluation, notably in Annual Performance Reports. In May 1996, Applicant and the Fund entered into a Retirement Agreement providing for the termination of his career with the Fund. The Agreement permitted Mr. "V" to remain in his department until May 1997, at which time he was placed on separation leave and nominally transferred to a different department. His early retirement, more than a decade before the retirement age of 65, took effect on November 30, 1998, two and one-half years after the signing of the Retirement Agreement.

9. Mr. "V"'s separation leave was financed by the Fund's Separation Benefits Fund ("SBF"). Pursuant to Fund decision, in 1996 the Fund produced a Report (as it had the previous year, for the first time) describing disbursements from the SBF, which included identifying characteristics of recipients but did not state their names, along with the reasons for their separation from service. In accordance with established practice, this Report was transmitted to Fund Management, the Personnel Committee, the Ombudsperson, and the Chairman of the Staff Association Committee. During the period in which he was on separation leave, Mr. "V", then Vice-Chairman of the Staff Association Committee, visited the Office of the Staff Association. There, he contends, he happened upon several copies of the 1996 SBF Report, which had been placed on an information desk. It was then that he first became aware of the existence of the Report and that it contained information about himself.

The Retirement Agreement

10. The Fund's alleged breach of the Retirement Agreement ("Agreement") forms the core of Applicant's complaint before the Tribunal. That Agreement provides in its entirety as follows:

> "In conjunction with your early retirement from the Fund staff effective November 30, 1998, it has been agreed that:
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> 1. You will remain in the [ ] Department until May 9, 1997, and continue to receive regular assignments from your [ ] Department supervisors during this period.
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> 2. In the period while you are on separation leave from May 12, 1997 through your early retirement effective November 30, 1998, you will be allocated an office in International Square, a computer, and a telephone. You will also have access to a fax and photocopy machines.
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> 3. The originals of your performance reports for 1992 and 1994 will be held under seal in the Administration Department and will not be subject to review in any way by any person other than the Director of Administration and the General

Counsel, acting jointly. It is understood, however, that this undertaking will not govern in the event that (i) you seek to reopen issues relating to your performance in the [ ] Department, whether such action is internal or external to the Fund, or (ii) in the opinion of the Director of Administration, you make disparaging statements about the integrity or competence of any member of the Fund's staff. All copies of your 1992 and 1994 performance reports will be destroyed within ten days from the signing of your separation agreement.

4. The performance rating of [ ] allocated to you in 1992 and 1994 will be removed from the Fund's personnel data base.

5. No performance reports will be prepared for you for 1995 and 1996.

6. On May 1, 1996 and May 1, 1997, you will receive a merit pay increase equivalent to the maximum of the range of possible merit increases associated with a '2' rating and your salary quartile.

7. In consideration of the above, any and all causes of action, demands and claims, of every nature, known or unknown, which you may have as of the date of this agreement against the Fund or any of its officials or former officials are hereby settled. Accordingly, you hereby agree, on behalf of yourself and your successors and assignees, that you shall not institute, prosecute, assert or voluntarily aid in the institution, prosecution, or assertion of any claim, suit, appeal or action, within or outside the Fund, against the Fund or any of its officials or former officials by virtue or arising out of any matter whatever up to the date hereof.

8. The above terms and conditions shall remain confidential and shall not be disclosed by you, either during or after your employment with the Fund.

9. The Ombudsperson will, if required, help ensure compliance with this agreement.

10. Please indicate your agreement with this arrangement outlined above by signing and returning to me a copy of this memorandum."

11. The conclusion of the Retirement Agreement was the result of intensive negotiations between Applicant and the Fund. The Assistant Director of the Administration Department (ADM) testified before the Grievance Committee that he had been involved in talking with Mr. "V" about working out a separation agreement for at least five years before the Agreement was actually concluded in May 1996. Mr. "V" testified that negotiation of the actual Agreement began in December 1995. These negotiations involved both oral and written communications. Several documents exchanged in the course of these negotiations

were included in the dossier and were reviewed by the Tribunal. Among the matters considered by the parties were: the amount of retroactive salary increases for 1992 and 1994; the length of the period of salary continuation; the length of time Mr. "V" would remain in his department; the location of office space for him once he concluded work in his department; and the preparation of a "To Whom It May Concern" letter regarding the absence of performance reports for the years 1 92, 1 94, 1995, and 1996.

12. In more than one of Applicant's written proposals to the Fund, he sought "expungement" of portions of the 1992 and 1994 APRs as "necessary to repair wide-spread reputational damage in the community", urging that a notation that the evaluations were "seriously flawed" (rather than "disputed") would be required. These requests were rejected and never agreed to by the Fund. Instead, the final agreement provided that the originals of these performance reports would be kept under seal in the Administration Department, all copies would be destroyed, and the performance ratings for these years would be removed from the Fund's personnel data base.

13. In the course of the negotiations, Applicant, through counsel, also proposed that paragraph 3 of the Agreement include the following sentence: "The assessment of your performance for 1992 and 1994 shall not be referred to or communicated, orally or in writing, to anyone except as provided in this paragraph." This proposal was rejected by the Fund and is not included in the final Agreement.

14. By April 30, 1996, negotiations had progressed sufficiently so that Applicant signed a standard letter confirming his separation arrangements from the Fund. Three days later, on May 2, 1996, Applicant signed a document similar to the final Retirement Agreement at issue in this case, but not including paragraphs 7 and 8. According to the Fund, the May 2 agreement never took effect as it did not yet have management's approval.

15. In any event, on May 3, Mr. "V" filed a grievance seeking reconsideration of his 1994 Annual Performance Report (APR). Thereupon Applicant was informed that the May 2 agreement had not become effective as management's approval remained to be obtained, and that that approval would not be forthcoming unless the agreement served to resolve the underlying dispute between Applicant and his supervisors regarding his performance. Hence, a new Agreement (adding paragraphs 7 and 8) was drafted --the one at issue in this case-- dated May 7, 1996 and issued by the Deputy Director of Administration. Applicant signed the Agreement on May 9, 1996, releasing the Fund from all pre-existing claims and providing for confidentiality of the Agreement. The next day, Mr. "V" withdrew his request for review of the 1994 APR.

Implementation of the Agreement

16. Promptly after conclusion of the final Agreement, the Fund took steps to implement its provisions. On May 17, 1996, Mr. "V" was notified by the Assistant Director of Administration that, pursuant to the Retirement Agreement, the originals of the 1992 and 1994 performance reports had been sealed, all copies had been destroyed, and the

numerical ratings for those years had been removed from the personnel data base. Applicant has not disputed that these actions were taken.

17. In addition, a "To Whom It May Concern" letter, dated April 26, 1996 was issued by the Assistant Director of Administration stating: "The unavailability of a completed performance report for 1 92, 1 94, 1995 and 1996 does not in any way reflect adversely on Mr. ["V"]'s performance during those years or on his career." Although the issuance of this letter was not provided for by the terms of the Retirement Agreement, the negotiating history indicates that it was negotiated collaterally with that Agreement.

The Separation Benefits Fund (SBF) and reporting requirements

18. The regulatory basis for the Separation Benefits Fund (SBF) is found in GAO No. 16, Rev. 5 (Separation of Staff Member), which provides for both mandatory and discretionary use of the Separation Benefits Fund.[9] Mandatory SBF benefits are provided in cases of separation for medical reasons without access to disability pension, and in cases of abolition of position, reduction in strength, or change in job requirements. SBF benefits may also be awarded on a discretionary basis to facilitate separation. Such payments are distinct from the automatic separation payments provided under the mandatory provisions of GAO No. 16 and are granted at the sole discretion of the Director of Administration. It was under this latter provision that benefits were afforded to Mr. "V".

19. The SBF has been in existence for several decades. In 1995, in the interest of promoting transparency and in response to concerns that had arisen over the years with

[9] "4.06 *Payments Under the Separation Benefits Fund.* Whenever, under this Order, a staff member is entitled to a payment on separation from the Separation Benefits Fund (separation for medical reasons without access to a disability pension, abolition of position, reduction in strength, or change in job requirements), the payment shall be in an amount equivalent to one and one-fourth months' salary for each year of service, subject to a maximum that is the smaller of:

> (a) the equivalent of 22-1/2 months' salary; and
> (b) the amount of salary that would otherwise have been payable to the staff member between the last day on duty and his mandatory retirement age of 65.

The salary rate used for calculating the payment shall be the salary the staff member is receiving on the last day on duty;[footnote omitted] and length of service shall be computed to the nearest full month served."

"4.07 *Discretionary Payments Under Separation Benefits Fund to Facilitate Separation.* In exceptional circumstances, the Director of Administration may offer a separation payment to a staff member to facilitate his separation. Such payments, which are distinct from the automatic separation payments described in Section 4.06 above, are granted at the sole discretion of the Director of Administration. The maximum amount that may be granted is set out in Section 4.06 above." (GAO No. 16, Rev. 5.)

respect to the allocation of these funds, the Administration Department (ADM) adopted a policy of preparing and circulating to the Fund's Personnel Committee (Senior Personnel Managers in each Department) an annual SBF Report. While previously an annual report had been prepared strictly for internal ADM use, the new reporting policy was designed to provide Fund-wide reactions by placing information in the hands of the Senior Personnel Managers in each department, along with the Managing Director, Deputy Managing Directors, the Ombudsperson and the Chairman of the Staff Association Committee who, by agreement, receives all materials circulated to the Personnel Committee.

The 1996 Separation Benefits Fund (SBF) Report

20. The 1996 SBF Report at issue in this case is marked "STRICTLY CONFIDENTIAL" and consists of a memorandum from the Director of Administration to the Deputy Managing Director, summarizing the use of SBF resources for the year and discussing the underlying policies governing their use. As required by the new reporting policy, it includes a table listing each case of SBF disbursement, identifying recipients according to the following characteristics: nationality; age at separation; department; grade; date of entry on duty; years of service; type of SBF; SBF months; effective date; and reasons for separation. Another table analyzes the distribution of SBF funds by grade, nationality, age, length of service and the like.

21. The 1996 SBF Report documents a total of twenty cases, encompassing both mandatory and discretionary uses of the SBF funds. Four cases, including that of Applicant, are designated as performance related. With respect to performance-related use of SBF Funds, the Report states:

> "**Performance Problem**: SBF resources for performance related problems are used only where such problems have been fully documented, where other remedies have failed and where separation is clearly in the best interest of the institution. Use of SBF on the grounds of performance was made for four staff members in FY 1996."

The entry pertaining to Applicant, Case No. 10, lists as the reason for his separation: "Performance. Unable to produce work that met department's standards. Retired." Unlike the entry for Case No. 4, also a performance-related case, no notation is made of Mr. "V"'s numerical performance ratings.

22. The Assistant Director of Administration who had been involved in negotiating Applicant's separation from the Fund testified before the Grievance Committee that, in preparing the 1996 SBF Report, it was he who supplied the reason for Applicant's separation on the basis of his own knowledge of the case. He also testified that he was aware of the terms of the Retirement Agreement prior to the drafting of this conclusion and that there was no discussion as to the appropriateness of including the information provided.

23. Consistent with the SBF reporting policy, Applicant's name was not included, except, as required, on the copy of the Report transmitted to the Deputy Managing Director. Nonetheless, the Assistant Director of Administration acknowledged in his testimony before the Grievance Committee that the entry pertaining to Applicant was identifiable on the basis of the information provided as to nationality, departmental affiliation and age, noting that beginning with the 1997 SBF Report, in the interest of confidentiality, the annual SBF Reports no longer reveal the nationalities of SBF recipients.

24. In accord with the reporting policies described above, the 1996 SBF Report was transmitted to the Fund's Managing Director, Deputy Managing Directors, Senior Personnel Managers, the Ombudsperson and the Chairman of the Staff Association Committee, a total of thirty individuals. According to Applicant, he became aware that the 1996 SBF Report contained information about himself when he happened upon several copies of the Report in August 1997 on an information desk in the Office of the Staff Association Committee.

Information Security within the IMF

25. The 1996 SBF Report, like all information and records in the ownership or possession of the Fund, is governed by the Information Security policies set forth in GAO No. 35, which provides for four information classification levels: NOT FOR PUBLIC USE; CONFIDENTIAL; STRICTLY CONFIDENTIAL; and SECRET. (Section 3.03.1.) The 1996 SBF Report was classified and labeled "STRICTLY CONFIDENTIAL." This designation is used to protect both information sensitive to the Fund and information involving matters of personal privacy:

> "3.04.3 STRICTLY CONFIDENTIAL
>
> (i) information entrusted to the Fund on a confidential basis that, in the opinion of the staff or responsible authorities, is not adequately protected by the CONFIDENTIAL classification; or,
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> (ii) information generated by the Fund, including the views of the staff on policy or country issues, or information pertaining to discussions between the Fund and its members, the unauthorized disclosure of which would likely cause embarrassment or difficulties for the Fund or one or more of its members and/or compromise Fund or members' objectives or operations; or,
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> (iii) information involving matters of strict personal privacy (e.g. medical and financial information related to benefit entitlements); or,
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> (iv) other information for which it is judged necessary to restrict access only to those who have a specific need to know the information."

Access to information classified as STRICTLY CONFIDENTIAL is limited to those having a specific need to know the information:

> "4.02.3 For information classified STRICTLY CONFIDENTIAL, access shall be limited to those having a specific need to know the information, as determined by the originating office or by those having authority for clearance, in consultation with the originating office."

Finally, Section 7 of GAO No. 35 is designed to assure compliance with the information security policies. It provides in part:

> "7.02 Any person in the possession of information or records that are subject to this Order shall safeguard them, as applicable, in accordance with:
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> (i) the Rules and Regulations of the International Monetary Fund (specifically Rules N4, N5, N6 and N11),
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> (ii) the provisions of this Order and the standards, procedures and guidelines issued pursuant to this Order, and
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> (iii) the agreements, arrangements or understandings under which the information or records were provided."

Applicant's efforts to secure alternative employment

26. Applicant testified that following conclusion of the Retirement Agreement in May 1996, he made a number of efforts to secure alternative employment, all to no avail.

27. In the autumn of 1996, Applicant sought the assistance of the Assistant Director of Administration in an attempt to secure a particular senior position open in another international organization. A general employment background letter was provided for use in his job search, summarizing Applicant's employment history with the Fund and the matters on which he had worked. A copy of this letter was transmitted to an official of the organization with which Applicant was seeking the position in question. Although Applicant had sought a letter of reference that would come directly from the Managing Director or from his former department, an institutional decision was made that, in view of the circumstances of Applicant's separation from the Fund, the letter should come from the Administration Department. The Senior Personnel Manager of Applicant's former department also testified before the Grievance Committee that he was prepared to provide positive references on Applicant's behalf if he were approached by a prospective employer, but that no such inquiries had come.

28. Although the Assistant Director of Administration testified that the personnel director of the organization in question told him that Applicant's prospects were not good as there

were other candidates with background in the particular subject matter of the position, Applicant testified that he had been told by a very senior official of that organization that he was the top candidate. Testimony before the Grievance Committee by Applicant and by his former immediate supervisor indicate that the Managing Director personally and verbally recommended Mr. "V" to the Director-General of the organization concerned. Applicant speculated that he was not selected for the position because the organization's personnel director was a former Fund staff member who may have been aware of his performance ratings.

29. Applicant also testified that he has had difficulty getting interviews and finding out about positions that are not advertised. He contends as well that in his negotiations with another potential employer, persons in that organization referred to his difficulties with his department chief at the Fund. Additionally, Applicant claims that when interviewers inquire about the circumstances that led to his resignation, he is "put into a situation of having to fend off conflicting official records" on account of the information about him included in the 1996 SBF Report. Finally, Applicant has alleged that, subsequent to his separation from the Fund at the end of November 1998, he was denied a consulting opportunity with one of the Fund's departments.

Summary of parties' principal contentions

Applicant's principal contentions

30. The Administration Department violated the terms and conditions of the Retirement Agreement by including information that was inconsistent with Applicant's record or with information it specifically agreed to seal and keep confidential, thereby damaging Applicant's reputation and career. It was inherently unfair and inconsistent with the Retirement Agreement to create thereafter a new document that discussed Applicant's performance before May 1996.

31. Documents that had been sealed formed the basis for the information included in the SBF Report. Sealing a document refers not only to the physical piece of paper, but also to its contents. The Fund agreed to cleanse Applicant's record; Applicant would not have waived his right to pursue a grievance without having his record cleansed of all collateral negative comments.

32. The circulation of the information through the 1996 SBF Report was at least grossly negligent, if not intentional. The Administration Department's knowledge of the policy requiring preparation and dissemination of the SBF Report demonstrates at least bad faith, if not fraud, on its part in negotiating with Applicant. Applicant had no knowledge of these reporting requirements, as the source of funding for Applicant's continued status with the Fund was not even mentioned during negotiations.

33. Distribution of the Report damaged Applicant's reputation within the Fund, and created conflicting official records, impairing his ability to obtain supportive references in seeking outside employment.

34. An internal policy of the Administration Department, particularly one unknown to staff members, does not excuse the Fund from performing its obligations under an independently negotiated agreement. Even if the Agreement did not exist, the Fund acted in an arbitrary and capricious manner by publishing the Report.

35. Circulation of the Report violated GAO No. 35, Section 7.02(iii),which requires the Fund to honor agreements, arrangements and understandings under which information and documents are provided. It also violated the N Rules (Staff Regulations) which regulate transmission of information. In preparing the Report, the Fund breached the guidelines for the scope and content of the Report.

36. The dispute between Applicant and the Fund pertained to a defined contractual relationship, not to the exercise of administrative discretion, and therefore it was outside the Grievance Committee's jurisdiction. The Grievance Committee's scope of review, GAO No. 31, Section 5 improperly "disapplies law other than 'applicable Fund rules and regulations'".

37. Article X, Section 3 of the Tribunal's Statute prohibits the Fund's Legal Department from representing the Fund before the Administrative Tribunal.

38. Applicant seeks the following remedies: a) rescission of the decision of the Managing Director accepting the recommendation of the Grievance Committee rejecting his claim; b) "rescission, annulment and expungement" of the Recommendation and Report of the Grievance Committee; c) declaration of those provisions of GAO No. 31 illegal that "unlawfully or wrongfully derogate from the exact performance by the Fund of its contractual obligations"; d) issuance of an order directing the Fund to comply with its commitments under the Retirement Agreement; e) "recall" of the 1996 SBF Report and redaction of comments pertaining to Applicant; f) conversion of Applicant's leave of absence to leave with pay "'in the interest of the Fund'" and extension of the leave for an additional year (to November 30, 1999), or, at Applicant's option, reinstatement to the position he held prior to May 1997; g) rescission of Applicant's undated notice of resignation; h) compensation in the amount of three times Applicant's annual gross pay, with interest; and i) costs and attorneys' fees.

Respondent's principal contentions

39. The preparation and limited circulation of the 1996 SBF Report did not violate any duty owed to Applicant, either under the Retirement Agreement or the rules and regulations of the Fund.

40. The Fund did not agree to maintain total secrecy regarding Applicant's performance or the reasons why SBF funds were expended for his benefit. The provision of the Retirement

Agreement (Paragraph 8) that requires that the terms "remain confidential and shall not be disclosed by you" was not violated by circulation of the Report as this provision applied only to Applicant and not to the Fund. The Fund would in any event, under its practice, treat such a document as "confidential" but as such it would be subject to limited availability and disclosure consistent with the regulations of the organization. The term "confidential" is understood within the Fund to mean available only on a need-to-know basis, for legitimate institutional purposes.

41. The Fund rejected proposals from Applicant and his counsel regarding expungement of his performance records. Correspondence between the parties shows the Fund was not willing to accept language that would have amounted to an obligation of secrecy respecting his performance and instead agreed to specific, narrower constraints, consistent with its institutional needs.

42. The reference in the SBF Report to the Applicant's performance problems did not emanate from unauthorized access to the sealed performance reports, but from the Assistant Director of Administration's own knowledge of Applicant's history.

43. Circulation of the SBF Report to the Personnel Committee, as well as to the Chairman of the Staff Association and the Ombudsperson, was designed to enhance the credibility of the SBF policy and avoid any perception of abuse by ensuring its uniform application across the Fund. The information about age, nationality, grade, and department was highly relevant to the objectives of transparency and accountability.

44. GAO No. 35, Section 4.02.3 expressly authorizes access to documents classified as "Strictly Confidential" by those "having a specific need to know the information, as determined by the originating office...."

45. Assuming, as Applicant alleges, that copies of the Report were left on the table in the Staff Association Office, then the responsible officials of the Staff Association acted inconsistently with the "Strictly Confidential" designation placed on the document by the Fund. However, the Fund is not responsible for the actions of the Staff Association and is not liable for misfeasance on its part.

46. Applicant has not established any nexus between the circulation of the SBF Report and any harm to his ability to find subsequent employment or to his professional reputation. His claim with regard to alleged improper interference, following his separation from the Fund, on November 30, 1998, with a proposed consultancy arrangement with the Fund is not properly before the Tribunal.

47. Article X, Section 3 of the Tribunal's Statute does not prohibit the Fund's Legal Department from representing the Fund before the Administrative Tribunal.

48. The Grievance Committee was competent to determine whether the Fund breached the Retirement Agreement with Applicant.

49. Finally, the Fund seeks reasonable attorneys' fees for the costs that it incurred before the Grievance Committee in respect of allegedly frivolous claims brought by Applicant in that forum. These claims, originally advanced by Applicant in his grievance, were shown to be manifestly without foundation in law or fact, and they have not been included in the Application to the Tribunal.

Consideration of the issues of the case

Did the Fund breach the Retirement Agreement by preparing and circulating the 1996 SBF Report?

50. The core of Applicant's complaint before the Tribunal is that the Fund breached the Retirement Agreement by disseminating in the 1996 SBF Report information that reflected adversely on his performance, i.e. that gave as the reason for his separation from service that he was "[u]nable to produce work that met department's standards." Applicant's argument appears to be based upon three specific provisions of the Agreement: a) the sealing of the 1992 and 1994 performance reports and destruction of all copies thereof (paragraph 3 of the Agreement); b) the removal of the 1992 and 1994 ratings from the "personnel data base" (paragraph 4 of the Agreement); and c) the confidentiality clause (paragraph 8 of the Agreement). In addition, Applicant asserts that the underlying purpose of the Agreement was to "cleanse his record" and that publication of the information in the SBF Report violated that purpose.

51. The Fund argues, to the contrary, that it carried out fully the requirements of the Agreement dealing with Applicant's performance record, which were limited to the sealing of the original 1992 and 1994 performance reports, destruction of copies, and the removal of the ratings for those years from the personnel data base. The Fund also contends that the confidentiality clause applies only to Applicant's conduct and not to its own, but that, in any event, the Fund has treated the terms of the Agreement as confidential. Finally, in the Fund's view, the Agreement did not provide for a blanket cleansing of Applicant's performance record.

1. Sealing of original 1992 and 1994 performance reports and destruction of copies

52. Paragraph 3 of the Retirement Agreement provides:

> "3. The originals of your performance reports for 1992 and 1994 will be held under seal in the Administration Department and will not be subject to review in any way by any person other than the Director of Administration and the General Counsel, acting jointly. It is understood, however, that this undertaking will not govern in the event that (i) you seek to reopen issues relating to your performance in the [ ] Department, whether such action is internal or external to the Fund, or (ii) in the opinion of the Director of Administration, you make disparaging statements about the integrity or competence of any

> member of the Fund's staff. All copies of your 1992 and 1994 performance reports will be destroyed within ten days from the signing of your separation agreement. "

53. There is no dispute that, as provided for by this paragraph of the Agreement, the originals of Applicant's performance reports for 1992 and 1994 were placed under seal in the Administration Department and all copies destroyed. Applicant asserts, nonetheless, that "…sealing a document refers not only to the physical piece of paper, but also to its contents." He also contends that information contained in the sealed documents must have formed the basis for the entry about Applicant in the 1996 SBF Report, as the SBF policy requires that performance problems be documented.

54. The Fund argues, to the contrary, that the information regarding Applicant in the SBF Report was supplied independently of the sealed Annual Performance Reports (APRs). The Assistant Director of Administration who was involved in negotiating the Retirement Agreement testified that it was he who supplied the information regarding the reason for Mr."V"'s separation as it appeared in the Report, and that in doing so he relied on his own knowledge of the case, not upon the sealed documents.

55. Applicant does not explain his view that information, as opposed to documents, may be "sealed". As regards the sealing of records, to seal means "to close by any kind of fastening that must be broken before access can be obtained." For example, "[s]tatutes in some states permit a person's criminal record to be sealed and thereafter such records cannot be examined except by order of the court or by designated officials." (Black's Law Dictionary, 6th ed., 1990.) The procedure described by paragraph 3 of the Agreement for the review of the sealed documents only by the Director of Administration and the General Counsel acting jointly is consistent with this definition. It is also consistent Applicant's own testimony before the Grievance Committee, in which he explained his understanding of the requirements of paragraph 3:

> "*Q Was there a discussion of what the term 'under seal' meant?*
>
> A The discussion 'under seal' meant that there would be a container, metal or plastic, whatever, that would have glued upon it the statement that pursuant to this agreement, this can be only opened by joint action of the director of Administration and the general counsel, presuming that both would have to be present, upon satisfaction that there is a legal case that has my name as a plaintiff under it pertaining to the period before May, whatever the May date was, pertaining to the period before signing of the agreement."

Applicant also testified that he understood that the sealing of the APRs was agreed to as an alternative to the "expungement" he had proposed because the Fund sought to retain one copy for its defense should he attempt to reopen performance issues.

56. The Administrative Tribunal concludes that the provisions of paragraph 3 of the Retirement Agreement did not prohibit the Assistant Director of Administration from preparing an entry in the 1996 SBF Report based on his knowledge of Applicant's case. Pursuant to paragraph 3, the originals of Applicant's 1992 and 1994 Annual Performance Reports had been placed "under seal" and all copies destroyed. The Fund thus complied with the express requirements of paragraph 3. Moreover, it respected not only the letter of this paragraph. In view of its rejection of Applicant's requests for "expungement" of his "flawed" Annual Performance Reports, the Fund did not undertake to conceal or obfuscate the broader contours of Mr. "V"'s performance. It may indeed be asked whether a public, legally governed institution such as the Fund could have properly entered into such an undertaking.

2. Removal of 1992 and 1994 performance ratings from "personnel data base"

57. Paragraph 4 of the Retirement Agreement provides:

> "4. The performance rating of [ ] allocated to you in 1992 and 1994 will be removed from the Fund's personnel data base."

On May 17, 1996, Applicant was informed by the Assistant Director of Administration that his numerical ratings for 1992 and 1994 had been "deleted from the personnel data base." This notice was based on communications from the responsible officials to the Assistant Director of Administration that the " . . . ratings for CY 1992 and 1994 have been removed and replaced with a blank entry in the personnel database. . ." and " . . . the copies of these [1992 and 1994] performance reports maintained in the APR database have been deleted and . . . all other known copies of said reports have been destroyed."

58. Applicant has not disputed that these actions took place. His argument as to the alleged violation of Paragraph 4 seems to be that there may have been some ambiguity as to the meaning of the term "personnel data base," so that it may have encompassed something more than the electronic records referred to in these communications.

59. In his testimony before the Grievance Committee, Applicant expressed the view that the term "personnel data base" must be understood "...as a part and parcel of the Clause Number 3. In other words, . . . after the reports were sealed, if there was any additional data in the Fund that would disclose these, that data would be removed." According to Applicant, there was discussion during the negotiations about the fact that the term was not defined. His position is that he accepted use of "personnel data base" as a "general term" rather than as a "Fund specific term of art."

60. The Assistant Director of Administration involved in negotiating the Agreement on behalf of the Fund testified to his understanding of the term "personnel data base" as referring solely to an electronic record, but that there was no discussion of the term during negotiations. He thought that Applicant understood the term as a reference to an electronic record because he had expressed concern as to the significance of having a blank space in that electronic record.

61. In considering the question of whether the term "personnel data base" refers solely to an electronic record or more broadly to other Fund records as well, the Tribunal observes that the Retirement Agreement, both in paragraph 4 (removal of the 1992 and 1994 numerical performance ratings from the personnel data base) and paragraph 3 (sealing of 1992 and 1994 APRs and destruction of copies) expressly refers to the sealing or removal only of records in existence at the time of the Agreement. Accordingly, these clauses would not appear to offer protection against the creation of a future record regarding Applicant's past performance, such as the 1996 SBF Report, particularly one that does not refer to the specific performance ratings at issue. In this regard it is noted that, unlike one of the other entries in the 1996 SBF Report that includes the beneficiary's performance ratings, the entry pertaining to Mr. "V" does not supply that information.

62. The negotiating history of the Retirement Agreement is again significant. As noted above in para. 13, Applicant's counsel proposed the inclusion of the following language to supplement the terms of paragraph 3 (sealing of the 1992 and 1994 APRs): "The assessment of your performance for 1992 and 1994 shall not be referred to or communicated, orally or in writing, to anyone except as provided in this paragraph." This provision might have offered some protection against the creation of future records relating to Mr. "V"'s performance. But the Fund rejected its inclusion.

63. The Administrative Tribunal concludes that there is credible evidence that the basis for the preparation of the entry in the 1996 SBF Report pertaining to Applicant's performance was the knowledge of the Assistant Director of Administration, who had been fully involved over a span of years in negotiating with Applicant regarding performance issues and his separation from the Fund, rather than the records that had been sealed or destroyed pursuant to the Retirement Agreement. Furthermore, the Administrative Tribunal concludes that nothing in the Agreement barred the Fund from relying on such knowledge or prevented it from creating, subsequent to the Agreement, a report stating that inability to produce work that met department's standards was the reason for Applicant's separation from service.

3. Confidentiality clause

64. Paragraph 8 of the Retirement Agreement provides:

> "8. The above terms and conditions shall remain confidential and shall not be disclosed by you, either during or after your employment with the Fund."

An initial issue with respect to paragraph 8 is on which party or parties does this paragraph impose express obligations. Applicant contends that this provision restricts the Fund from disseminating information about the Agreement through the 1996 SBF Report. The Fund's position, by contrast, is that paragraph 8 applies only to the Applicant and not to the Fund.

65. With respect to the negotiating history, Applicant claims, on the one hand, that it was he who had sought confidentiality and that he had raised the matter during negotiations, as

documented by one of the memoranda that he had sent to the Assistant Director of Administration. On the other hand, paragraph 8 was not part of the original draft of the Agreement that Applicant had signed initially on May 2, 1996. Instead, it was one of the two paragraphs (the other was paragraph 7 providing for the release of all claims) required by Fund management as part of the final Agreement signed on May 9, 1996. The Fund explains that it sought this provision to prohibit the disclosure by Applicant of the "exceptional" and "unprecedented" benefits it had bestowed on him.

66. The Tribunal concludes that despite the contested origins of the confidentiality clause, its language suggests that both parties were required to keep confidential the terms of the Agreement. The wording of paragraph 8 is that its terms and conditions "shall remain confidential", an obligation that apparently applies to both parties. However, the Applicant's obligation is elaborated since the provision states additionally that these terms and conditions "shall not be disclosed by you". Clearly, "you" refers to Applicant, as the Agreement is styled as a memorandum from Fund management to Mr. "V".

67. Holding that the Fund as well as Applicant are bound by the Agreement to keep its terms "confidential," the question arises as to what that obligation requires. In other words, what is the meaning of "confidential" for purposes of interpretation of the Agreement? Does the obligation of confidentiality prohibit the Fund from including a comment regarding Applicant's performance in a "Strictly Confidential" Report of the Separation Benefits Fund?

68. A reasonable interpretation of the term "confidential" for these purposes can be found in the usage of the Fund. "Confidential" is given specific meaning in the course of the Fund's work and practices through GAO No. 35, which regulates information security. The General Administrative Orders form part of the Fund's internal law and govern all staff members. Hence an understanding of the term consistent with GAO No. 35 is appropriately applied to an agreement between the Fund and one of its staff. It should be noted as well that the Fund has taken the view that, while paragraph 8 of the Retirement Agreement does not impose any contractual obligation on itself, as a matter of policy it treats such personnel documents as "Confidential" within the meaning of GAO No. 35 and that it did so in this case.

69. The Tribunal observes that, moreover, the SBF Report was accorded an even higher level of security than the confidentiality requirement imposed by the Retirement Agreement. The 1996 SBF Report was classified "Strictly Confidential", permitting its circulation only to those staff members with a "need to know" as determined by the originating office under GAO No. 35, Section 4.02.3.

70. Finally, Applicant contends that the "sealing" requirement of paragraph 3 requires that an even higher level of information security than "Confidential" or "Strictly Confidential" should apply to the SBF Report. Specifically, he contends that "[i]n permitting ADM to distribute the information to those 'with a need to know', the Managing Director overlooked the fact that the leaked information had been sealed in addition to being classified as confidential…." This argument fails to consider whether the obligation imposed by paragraph 3 to "seal" the originals of the 1992 and 1994 APRs can reasonably be understood

to govern only those documents rather than all information relating to Applicant's performance. It may be added that "sealing" of documents is not dealt with by GAO No. 35 and hence is not part of the Fund's standard policy relating to information security.

71. Accordingly, the Administrative Tribunal concludes that the confidentiality clause (paragraph 8) of the Retirement Agreement, which required the Fund to keep the terms of the Agreement "confidential", did not prohibit the Fund from commenting critically on Applicant's performance in the "Strictly Confidential" SBF Report, the purpose of which was to explain the uses of the Separation Benefits Fund.

4. Did the Fund agree to "cleanse" Applicant's record?

72. Underlying Applicant's arguments relating to the alleged breach of the Retirement Agreement is his contention that it was the intention of the parties to "cleanse" Applicant's performance record, that the preparation and circulation of the 1996 SBF Report entry relating to Applicant ran counter to this intention, and that therefore it was prohibited by the Agreement. The Fund counters that it was not the intent of the Agreement to maintain total secrecy regarding Applicant's performance or the reasons why SBF funds were expended for his benefit.

73. By "cleanse" his record, Applicant seems to mean that the Fund would not maintain any record that reflected negatively on his performance, so that a favorable recommendation of him by a staff member (or indeed his own representation of his performance history) could not be impeached by Fund documents to the contrary. In his testimony before the Grievance Committee, Applicant explained that in concluding the Retirement Agreement his "basic concern was reputational damage", that he needed a "completely clean record from the Fund" in order to secure new employment, and that he "was willing to make sacrifices to have this record." He emphasized in his testimony before the Grievance Committee that this purported "cleansing" was essential to the bargain he struck with the Fund:

> "The Applicant would not have settled certain disputes without the assurance that he would be able to obtain an equivalent position in another international organization based on his official performance record. Clearly the Applicant would not have waived his right to pursue a grievance without having his record cleansed of all collateral negative comments."

He testified further that his expectation was that there would not be references to performance problems in Fund documents created after the date of the Agreement.

74. Applicant expressed his concerns about the existence of "conflicting records". In particular, he was concerned that, given the existence of the 1996 SBF Report, he could not

> ". . . represent to prospective employers that I have a record that doesn't indicate any performance problems. In other words, if I apply for a job and

> this is brought up, I would be embarrassed and I could be fired at any time for having misrepresented my credentials."

Likewise, he expressed the concern that he could not ask Fund staff members for references because

> ". . . to have people to state that I had a satisfactory career with the Fund required. . . them to state a falsehood. They have been informed by the Administration Department that this was the reason for my departure."

75. The Tribunal is unable to find sufficient support in the record for Applicant's claim in his Application that "… the Fund agreed to cleanse the Applicant's record". In fact, as noted above, the Fund rejected a provision proposed by Applicant, through counsel, which would have applied broader protection to Applicant's reputation than that embodied in paragraph 3 (sealing of the 1992 and 1994 APRs) by stating: "The assessment of your performance for 1992 and 1994 shall not be referred to or communicated, orally or in writing, to anyone except as provided in this paragraph." In addition, Applicant had sought "expungement" of portions of the 1992 and 1994 APRs as "necessary to repair wide-spread reputational damage in the community." This proposal too was rejected by the Fund.

76. It appears from the negotiating history that both parties did share an understanding that the intention of sealing the performance records was to facilitate Applicant's ability to secure employment outside of the Fund. The Assistant Director of Administration testified that he understood Mr. "V"'s motivation for sealing the 1992 and 1994 performance reports was to ensure that they not get outside the Fund to prospective employers, and so prejudice his job search. However, it was also the testimony of the Assistant Director of Administration that, in his view, inclusion of the information about Mr. "V" in the 1996 SBF Report did not infringe on the "spirit of the Agreement" because it was unlikely that information from the Report would be revealed to any future employer. The Report was for internal circulation. Any inquiry from a prospective employer regarding Applicant's performance would most likely be made of individuals in his department who would have first-hand knowledge of his work. It would be quite unlikely that inquiry would be made of a Senior Personnel Manager of another department whose information was derived from the SBF Report. In any event, staff members were prohibited from disclosing information from the Report outside the Fund.

77. Accordingly, the Administrative Tribunal concludes that neither the language nor the negotiating history of the Retirement Agreement supports Applicant's view that he was able to achieve the meeting of the minds he may have sought as to the "cleansing" of his performance record. That record remained in existence. Only access to elements of it to which Mr. "V" made specific objection was blocked. Mr. "V"'s objective was doubtless more far-reaching. But the negotiating history indicates that he failed to carry that objective.

78. In reaching these conclusions, the Administrative Tribunal is mindful of the importance both to staff members and to the Fund of enforcing negotiated settlement and release agreements, like the one entered into with Mr. "V", in which a staff member receives

special compensation or benefits upon separation from service in exchange for the release of claims against the organization. As the World Bank Administrative Tribunal ("WBAT") commented in Mr. Y, Applicant v. International Finance Corporation, Respondent, WBAT Decision No. 25 (1985):

> "26. In an enterprise employing as many staff members as does the World Bank Group, it is inevitable that there will be claims of improper treatment, as witness the appeals to the Appeals Committee and applications to this Tribunal. It would unduly interfere with the constructive and efficient resolution of these claims if the Bank could not negotiate--in exchange for concessions on its part--for a return promise from the staff member not to press his or her claim further. If such an agreed settlement were not binding upon the affected staff member, there would be little incentive for the Bank to enter into compromise arrangements, and there might instead be an inducement to be unyielding and to defend each claim through the process of administrative and judicial review. It is therefore in the interest not only of the Bank but also of the staff that effect should be given to such settlements."

79. In enforcing such agreements, international administrative tribunals have looked for exactly the elements present in this case, i.e. evidence of individualized bargaining and the exchange of consideration as indications that the agreement was entered into freely and reflected a real balancing and resolution of interests between the parties. (Mr. Y, Applicant v. International Finance Corporation, Respondent, WBAT Decision No. 25 (1985); Alexander Frederick Kirk, Applicant v. International Bank for Reconstruction and Development, Respondent, WBAT Decision No. 29 (1986); Arda Kehyaian, Applicant v. International Bank for Reconstruction and Development, Respondent (No. 2), WBAT Decision No. 130 (1993).) In doing so, tribunals often have noted that there are necessarily pressures in bargaining involved in relinquishing a party's goals and that not all of the terms sought may be attained. For example, in Mr. Y, the WBAT observed:

> "33. Even though the Applicant may have felt under some pressure to sign the release, it was no more than the pressure derived from the fact that he was urgently seeking an extension of his special-leave period and other perquisites and that he appears to have regarded those additional benefits as more important than the release of his claims against the Respondent. . . ."

80. In Alexander Frederick Kirk, Applicant v. International Bank for Reconstruction and Development, Respondent, WBAT Decision No. 29 (1986), the WBAT also enforced the release provisions of a settlement agreement as against the applicant's contention that it did not preclude the particular claim that he had presented to the administrative tribunal. The WBAT considered both the language and the negotiating history of the agreement:

> "32. The conclusion that the broad release provision embraced the Applicant's preexisting salary claim is confirmed by consideration of the circumstances surrounding the negotiation of the separation agreement. . . ."

In addition, the tribunal found that the agreement was supported by consideration, as the applicant had received substantial benefits in exchange for the broad release provision:

> "39. ....The arrangements for paid leave, for other financial benefits, and for outplacement assistance, were not entitlements of staff members retiring early; to a significant degree, the grants were within the Respondent's discretion. The only promise made by the Applicant in exchange for these benefits was expressed in the release provision he challenges here. The Tribunal therefore concludes that that promise was supported by a valid cause or consideration."

Furthermore, the tribunal noted:

> "35. . . . By accepting the terms of his separation agreement, the Applicant secured a substantial amount of money and other benefits. The alternative to concluding that agreement--continued service in OED, where the Applicant was allegedly unwelcome and unappreciated and at odds with his supervisor--may have been unpleasant for the Applicant to contemplate, but the desire to avoid a less pleasant alternative is always the motivation for entering into a settlement agreement, and cannot provide a basis for overturning it. . . ."

81. Finally, the WBAT also pointed out that, given the clarity of the language of the agreement, if applicant had intended a narrower release of claims than afforded by that language, he should have expressly sought such a limitation in the agreement's wording:

> "31. . . . In view of the clarity of this language, it might have been expected that, had the Applicant sought to confine its breadth in the manner he now
>
> contends, he would have expressly sought some qualification or limitation in the wording of the contract. . . ."

This point is significant in the consideration of the case of Mr. "V". Applicant did seek additional wording in the Agreement that might have protected him against the actions of which he now complains, but that wording was rejected by the Fund. (See para. 13 above.) In that effort, Applicant was assisted by counsel (although he apparently was not assisted by counsel in all of the negotiations), providing yet another indication that the balancing of interests reflected in the terms of the Retirement Agreement was a considered choice of Applicant. As the WBAT stated in Arda Kehyaian, Applicant v. International Bank for Reconstruction and Development, Respondent (No. 2), WBAT Decision No. 130 (1993):

> "26. ....In all cases of release agreements the staff member is assumed to have balanced the benefits resulting from the different options he or she has, and finally to have decided to consent to the proposed agreement. In each case the staff member must have been under certain pressures leading him to opt for what appeared to him to be the more advantageous alternative. This kind

> of pressure is inherent in the process and cannot be treated as by itself constituting duress. The fact that the Applicant's counsel took part in negotiating the terms of the agreement and finally conveyed to the Respondent that these terms were accepted by the Applicant shows clearly that the Applicant's acquiescence in the release agreement was a free and considered choice."

82. Although in the present case Mr. "V" does not challenge the validity of the Retirement Agreement as such, but rather seeks a remedy for its alleged breach, the WBAT's reasoning in the above cases is instructive. Where, as with the Retirement Agreement between Mr. "V" and the Fund, there is evidence of vigorous, individualized negotiation of terms, it is difficult to conclude that anything other than their plain meaning should be accorded those terms. This is especially so when alternative language was proposed and rejected in the course of negotiations.

83. These cases also emphasize the essential bargain involved in any settlement and release agreement: the value to each party of foregoing the risks of litigation. By giving up the right to challenge his treatment through litigation, Applicant relinquished the ability to present arguments in such fora for the purpose of rehabilitating his record. He received very substantial, indeed, according to the Fund, "unprecedented" consideration in exchange, particularly by way of large monetary and lasting pension benefits. Accordingly, the Administrative Tribunal concludes that the specific terms of the Retirement Agreement must be enforced and that Applicant's construction of those terms must be rejected.

Is there a conflict between the Fund's internal law, requiring preparation and circulation of the SBF Report, and its contractual obligations to Applicant under the Retirement Agreement? If so, which should prevail?

84. Applicant contends that the Fund's contractual obligations under the Retirement Agreement prevail over the Fund's internal law requiring reporting of disbursements from the Separation Benefits Fund. This contention is predicated on the assumption, inherent in Applicant's complaint, that there was a conflict between what was required of the Fund under the Retirement Agreement and the reporting requirements relating to the SBF.

85. The Tribunal has concluded that inclusion in the 1996 SBF Report of the information relating to Applicant's performance did not violate the Retirement Agreement entered into between Mr. "V" and the Fund. Therefore, the terms agreed to by the Fund (requiring the sealing of his 1992 and 1994 performance reports and destruction of copies, removal of the numerical ratings for those years from the personnel data base, and the obligation to keep confidential the terms of the Agreement) were not in conflict with its reporting requirements under the Separation Benefits Fund (requiring it to include in a "Strictly Confidential" report with limited circulation in the Fund a listing of cases, not identified by name, which gave the reasons for expenditure of SBF funds in each case). The question whether the Retirement Agreement prevails does not arise.

Did the Fund act illegally in not disclosing during negotiations with Applicant the SBF reporting requirements?

86. As a corollary to Applicant's argument that the Retirement Agreement conflicted with the SBF reporting requirements, Applicant contends that the Fund acted illegally in not disclosing those requirements during negotiation of the Agreement. The Fund has not disputed Applicant's claim that in negotiations, the Fund did not mention the source of funding for the Applicant's continued status as staff member at the Fund, or that there were any reporting obligations.

87. In Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1996-1 (April 2, 1996), the Administrative Tribunal had occasion to consider whether a staff member had been misled by the Fund in the process of negotiating his appointment. The Tribunal examined the problem of inequality of information and bargaining power between the Fund and a staff member, and held that the fact that Mr. D'Aoust accepted his initial grade and salary did not bar him from challenging the legality of their determination:

> "12. The Tribunal sustains the Fund's position on this question as a matter of presumption; the fact that a staff member accepts an offer that he or she is free to decline does weigh against challenge to the terms of the contract so accepted. But it is a question only of presumption. The Fund and an applicant for a position in the Fund are not in an equal negotiating position; e.g., as this case shows, the Fund is in possession of relevant information not within the knowledge of an applicant. Accordingly, while the presumption holds, the staff member nonetheless can be heard to argue contrary claims, as in this case, of misrepresentation of facts or irregularity in the process of appointment. The Tribunal concludes that the fact that Mr. D'Aoust accepted his initial grade and salary does not bar him from challenging the legality of the Fund's determination of grade and salary."

88. In D'Aoust, the Fund's own actions suggested that there was room for doubt as to whether there had been a true meeting of the minds, and this fact also supported the conclusion that the applicant was not barred from challenging the legality of the determination of his grade and salary. (Para. 13.) The Administrative Tribunal, nonetheless, held that the complaint was not sustainable, rejecting the applicant's challenge to his terms of appointment because it found "no evidence of Mr. D'Aoust having been deliberately misled" as to the nature of the job. (Paras. 27-28.)

89. Accordingly, consistent with the reasoning of D'Aoust, the Administrative Tribunal concludes that assuming that the SBF reporting requirements were "relevant information" in the possession of the Fund, the Fund did not deliberately mislead Applicant, misrepresent facts or engage in irregularity of procedure by not disclosing to him those requirements during negotiation of the Retirement Agreement. Rather, those officials reasonably could have believed (as the Tribunal now holds) that these requirements were not in conflict with

the terms negotiated in that Agreement. Moreover, disclosure to Mr. "V" might have transgressed the "Strictly Confidential" classification of the SBF Report.

Did circulation of the 1996 SBF Report violate any Fund rules or regulations or breach any duty owed by the Fund to Applicant independent of the Retirement Agreement?

90. In addition to contending that the preparation and circulation of the 1996 SBF Report violated the Retirement Agreement between himself and the Fund, Applicant also asserts that the Fund's actions violated GAO No. 35, the N Rules, and the guidelines governing the preparation of the Report. He claims as well that the Fund's actions in circulating the Report were "arbitrary and capricious" and "at least grossly negligent, if not intentional". These claims are considered below.

1. GAO No. 35 (Information Security)

91. As described above, GAO No. 35 prescribes policies and guidelines governing the security of information in the Fund, including information classification and the handling of classified information.

92. Applicant's argument that the Fund violated GAO No. 35 appears to have two prongs:

(1) the Retirement Agreement required that information pertaining to Applicant in the 1996 SBF Report be classified at a higher level of information security than "Strictly Confidential", which permitted access to those with a "need to know" under GAO No. 35, Section 4.02.3 ; and

(2) by allegedly violating the Retirement Agreement, the Fund also violated Section 7.02 (iii) of GAO No. 35, which requires the Fund to honor agreements under which information is provided.

93. The first argument, that classification of the SBF Report as "Strictly Confidential" (thereby limiting access "to those having a specific need to know the information, as determined by the originating office" (Section 4.02.3)) violated the terms of the Retirement Agreement has been addressed above. Specifically, Applicant contends that because his 1992 and 1994 APRs have been "sealed" pursuant to the Agreement, a higher level of information classification should have attached to the SBF Report. This argument, as pointed out above, conflates the content of the sealed documents (his individual performance reports) with the summary content of the SBF Report which does not mention Mr. "V"'s performance ratings.

94. Furthermore, the only level of information security higher than "Strictly Confidential" is "Secret". The "Secret" classification is reserved for the following:

"3.04.4 SECRET

> (i) extremely sensitive information entrusted to or generated by the Fund, the secrecy of which, in the opinion of management or the heads of departments, bureaus, or offices, is essential to the success of Fund initiatives or operations or of the plans of one or more of its members to which the Fund is privy; or,
>
> (ii) other information for which management or the heads of departments, bureaus, and offices judge the level of protection associated with the SECRET classification necessary."

Section 3.05.3 limits the use of the "Strictly Confidential" and "Secret" classifications, noting that "[t]he STRICTLY CONFIDENTIAL classification should be used sparingly, and the SECRET classification only in exceptional circumstances."

95. The requirements of GAO No. 35 must also be considered in light of the overall objective of the information security policy to balance the need for protecting sensitive information against the need for information flow and organizational efficiency:

> "1.02 The objective of these policies and guidelines is to ensure that necessary and sufficient levels of protection against unauthorized access and disclosure are afforded to all sensitive information in a manner that neither unnecessarily impedes the flow of information nor inhibits organizational efficiency and that balances the costs of protection against the risks and consequences of unauthorized access and disclosure."

96. The Administrative Tribunal concludes that it was a reasonable act of managerial discretion for the Fund (a) to classify the 1996 SBF Report as "Strictly Confidential", and (b) to decide that the Fund's Managing Director, Deputy Managing Directors, Senior Personnel Managers, the Ombudsperson and the SAC Chairman had a "need to know" this information. The classification as 'Strictly Confidential" appears entirely appropriate as that classification level is designed, among other things, to protect "information involving matters of strict personal privacy (e.g. medical and financial information related to benefit entitlements)." (Section 3.04.3 (iii).) As for the determination as to which Fund personnel had a "need to know", the Fund has explained and documented its rationale for circulating the Report to this limited group of individuals. The policy was undertaken in the interest of promoting transparency of personnel practices and to provide Fund-wide reactions, in response to criticisms that had arisen over the years with respect to the equitable allocation of scarce resources of the SBF.

97. The second prong of Applicant's argument alleging violation of GAO No. 35 is that the Fund's alleged failure to comply with the terms of the Retirement Agreement was a violation of Section 7.02 (iii). That provision reads:

> "7.02 Any person in the possession of information or records that are subject to this Order shall safeguard them, as applicable, in accordance with:

....

(iii) the agreements, arrangements or understandings under which the information or records were provided."

98. The Tribunal concludes that this provision is not applicable in the circumstances of this case, as no information or records were provided to any person under the Retirement Agreement. Moreover, Applicant's argument that the Fund violated Section 7.02 (iii) of GAO No. 35 appears to be predicated on a finding of breach of the Agreement itself, a conclusion which, as indicated above, the Tribunal does not sustain.

2. The N Rules

99. Applicant also asserts that circulation of the SBF Report violated the Fund's N Rules, which regulate the conduct of the staff. Although Applicant does not cite any particular N Rule, the only N Rule that appears to pertain to protection of information is N-6, which provides:

> "N-6. Persons on the staff of the Fund, and persons formerly on the staff of the Fund, shall not, at any time, without the express authorization of the Managing Director: (i) reveal any unpublished information known to them by reason of their service with the Fund to a person not authorized by the Fund to receive the information; or (ii) use, or allow the use of, unpublished information known to them by reason of their service with the Fund for private advantage, directly or indirectly, or for any interest contrary to that of the Fund as determined by the Managing Director. *Adopted as part of N-5 September 25, 1946, amended June 22, 1979.*"

Rule N-6 expressly governs the transmission of Fund information to parties outside of the Fund. As the 1996 SBF Report was circulated only to addressees within the Fund, the Tribunal is unable to conclude that this Rule applies to the circumstances of this case.

3. Rules regarding preparation of the SBF Report

100. Applicant also contends that in preparing and circulating the 1996 SBF Report, the Fund violated the guidelines for the scope and content of the Report. Specifically, he alleges that under the ADM Policy, as set forth in a memorandum from the Director of Administration to the Deputy Managing Director, the names of beneficiaries are to be disclosed only to the Managing Director. The memorandum in fact notes that the name of each recipient of SBF resources is to be provided to the Deputy Managing Director.

101. Applicant's argument on this point is obscure. Perhaps it is intended as a complaint that, while the names of the recipients of SBF resources were to be provided only to the Managing Director or Deputy Managing Director, the Report as circulated to the Personnel

Committee had the effect of revealing names because the identities of recipients might be deduced from the identifying characteristics provided. In testimony before the Grievance Committee, the Assistant Director of Administration conceded that the entry pertaining to Applicant was identifiable on the basis of the information given as to his nationality, departmental affiliation and age, and that, beginning with the 1997 Report, in the interest of confidentiality, the annual SBF Reports no longer reveal the nationalities of SBF recipients. Nonetheless, the Administrative Tribunal is unable to conclude that the possibility that some SBF recipients may have been identifiable in the Report that was circulated beyond the Deputy Managing Director constituted a violation of the guidelines governing the preparation of the Report.

4. Any other duty of confidentiality

102. Finally, Applicant also claims that the Fund acted in an "arbitrary and capricious" manner in circulating the 1996 SBF Report. As noted above, the policy requiring preparation and circulation of the Report was based upon considerations of transparency and equity of personnel practices. Furthermore, the selection of the thirty high-level Fund personnel to receive the Report was reasonably designed to support the objective of providing Fund-wide response to the allocation of SBF resources.

103. Applicant contends, further, that the circulation of "sensitive information" about himself was "at least grossly negligent, if not intentional". In Ronald K. Chan v. Asian Development Bank , Asian Development Bank Administrative Tribunal ("ADBAT") Decision No. 20 (1996), the ADBAT addressed a somewhat analogous claim. The tribunal concluded that limited notification within the organization of the suspension of a staff member's dependency allowance as the result of a domestic relations matter was "strictly limited to the needs of the good administration of the Bank and that this very restricted communication did not amount to 'insensitive and negligent (if not deliberate and malicious) publicity' as claimed by the Applicant." (Para. 46.) While, in this case, the Assistant Director of Administration who provided the information on the reason for Mr. "V"'s separation would have done well to consider more fully any relevant implications of the Retirement Agreement, any arguable lack of sensitivity on his part was not, in the view of the Tribunal, grossly negligent.

Is the Fund liable for actions of the Staff Association Committee with respect to the handling of the 1996 SBF Report?

104. Applicant asserts that the Staff Association Committee ("SAC"), in furtherance of its goals, provided copies of the 1996 SBF Report at its information desk, making it available for unfettered review by any staff member. He does not make the argument directly that the Staff Association Committee (the governing board of the Staff Association) was either bound by the Retirement Agreement between himself and the Fund or that the Fund is responsible for acts of the SAC or its Chairman that might violate the Fund's requirements for information security. Nonetheless, the thrust of this contention is to ask the Tribunal to conclude that, by circulating the Report to the SAC Chairman, the Fund became responsible

for damage allegedly resulting from the SAC's actions. The Tribunal concludes that this argument fails because the activities of the SAC are not "administrative acts" taken in the administration of the staff of the Fund and accordingly are not within its jurisdiction.

105. The Fund circulated to the SAC Chairman a copy of the 1996 SBF Report, as it has been the Fund's practice since the late 1980s to transmit all materials circulated to the Personnel Committee to the SAC Chairman as well. The Report was classified and marked "Strictly Confidential" pursuant to GAO No. 35. The evidence before the Tribunal that the Report was reproduced and left in the view of visiting staff members in the office of the Staff Association is Applicant's own testimony before the Grievance Committee, which has not been challenged. Applicant also testified that at the time of the alleged actions by the SAC he was serving as its Vice-Chairman.

106. The Fund in its Answer asserts that it takes no legal responsibility for the actions of the Staff Association Committee in the circumstances of this case. Specifically, it states that if the SBF Report were left out on a table in the Staff Association office available for anyone to view, this action would be "clearly inconsistent with the 'Strictly Confidential' designation placed on the document by the Fund." It goes on to conclude:

> "Thus, the Staff Association may well have transgressed its duty of confidentiality. However, the Staff Association is not part of the structure of the Fund nor under the control of Fund management. Accordingly, the Fund is not responsible for the actions of the Staff Association, and is not liable for misfeasance on its part. Therefore, even if it could be shown that the actions of the Staff Association resulted in injury to the Applicant, this cannot legally be attributed to the Fund."

In order to assess this argument, it is necessary to examine the legal status of the Staff Association, the jurisdiction of the Administrative Tribunal, and the acts that allegedly transpired in this case.

107. The right of staff members to associate for the presentation of their views to management is guaranteed by the Fund's N Rules (Staff Regulations). Rule N-14 provides:

> "Persons on the staff of the Fund shall have the right to associate in order to present their views to the Managing Director and the Executive Board, through representatives, on matters pertaining to personnel policies and their conditions of service."

(IMF Rules and Regulations, Rule N-14, Adopted June 22, 1979.) The Staff Association is, however, a self-governing organization, bound by its own Constitution and Bylaws. All members of the staff, including Assistants to Executive Directors, are eligible for membership in the Association, which is governed by a seven-member Staff Association Committee, including a Chairman, Vice-Chairman and Secretary-Treasurer elected from the membership. The Association may also be dissolved by its membership, pursuant to

referendum with the approval of two-thirds of the membership. (Constitution of the Staff Association, Articles IV, V and XV.)

108. As set forth in its Constitution, the Staff Association has determined its purposes to be two-fold:

> "a. to promote the interests and general welfare of the staff; and
>
> b. to cooperate with the Managing Director in furthering the efficient conduct of the work of the staff."

(Constitution of the Staff Association, Article II.) Similarly, its activities are defined to encompass the following:

> "a. arrange for communicating the views of the staff to the management with respect to any matter affecting the staff;
>
> b. assist the Managing Director, at his request, in matters relating to the staff; and
>
> c. organize and provide facilities for recreational, educational, and welfare activities for the staff "

(Constitution of the Staff Association, Article III.)

109. The question raised in this case is whether a complaint may be brought before the Administrative Tribunal by an allegedly adversely affected staff member, not directly against the SAC, but against the Fund complaining of an act of the SAC.

110. The Administrative Tribunal is a forum of limited subject matter jurisdiction. Its jurisdiction *ratione materiæ* is delineated by Article II of the Statute, which restricts its scope to challenges by an adversely affected staff member to the legality of an "administrative act." An "administrative act" is defined as "any individual or regulatory decision taken in the administration of the staff of the Fund." (Statute, Article II, Sections 1a. and 2.a.) Hence, the question arises, can an action taken by a staff member in his capacity as Chairman of the Staff Association be regarded as a "decision taken in the administration of the staff of the Fund" for purposes of the jurisdiction of the Administrative Tribunal?

111. As the Fund has sole responsibility for the administration of the staff, only the Fund is contemplated as a respondent before the Tribunal, and the Tribunal's Rules confirm that pleadings are always exchanged between an applicant and the Fund.[10] The question raised

[10] The Tribunal's Statute and Rules of Procedure also make clear that the Staff Association may be neither an applicant (Art. II, Section 1) nor an intervenor (Rule XIV, para. 1) before the Tribunal. The Report of the Executive Board notes: "The Staff Association would not be entitled to bring actions in its own name before the

(continued)

here is whether an act of the Staff Association Committee could be imputed to the Fund and thereby regarded as a decision taken in the administration of its staff. In other words, did the Fund's decision to circulate the SBF Report to the SAC Chairman, which itself may have been a "decision taken in the administration of the staff of the Fund", also encompass the SAC's alleged actions thereafter? The Commentary on the Statute lists some of the kinds of decisions that are typical of administrative acts:

> "The tribunal would be competent to hear cases challenging the legality of an 'administrative act', which is defined as all individual and regulatory decisions taken in the administration of the staff of the Fund. This definition is intended to encompass all decisions affecting the terms and conditions of employment at the Fund, whether related to a staff member's career, benefits, or other aspects of Fund appointment, including the staff regulations set forth in the N Rules."

(Report of the Executive Board, p. 14.)[11] In the view of the Tribunal, the alleged act of the SAC in this case is not such an administrative act.

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tribunal."(pp. 15-16.) Nonetheless, the Tribunal's Rule XV makes provision for the possibility that the views of the Staff Association may be communicated as *amicus curiae:* "The Tribunal may, at its discretion, permit any persons, including the duly authorized representatives of the Staff Association, to communicate their views to the Tribunal." (Rule XV.)

[11]The term "decision" as it is used in the context of "regulatory decision" (Article II, Section 2.b. of the Statute) has been given definition by the Administrative Tribunal in Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent, Judgment No. 1996-1 (April 2, 1996), in which it was held:

> "35. It is clear that for a practice to constitute a regulatory decision there must be a "decision". That decision must have been taken by an organ authorized to take it. However, the evidence in these proceedings shows that the practice of truncating the weight given to the previous experience of non-economists at ten years was never decided upon by the Executive Board, the Managing Director, or the most senior officials of the Fund. The practice is distilled in no rule, General Administrative Order, handbook or handout, statement on conditions of employment, contract or other published official paper of the Fund. Rather, at the time that that practice was applied to Mr. D'Aoust, it was an unpublished practice known to and employed by a small number of officials of the Administration Department of the Fund. In view of these uncontested facts, the Tribunal is unable to regard the practice in question as flowing from or constituting a regulatory decision. This being its conclusion, it follows that the Tribunal lacks jurisdiction to pass upon the practice as a regulatory decision, though it has found itself competent to consider the validity of the application of that practice to Mr. D'Aoust as an 'individual' rather than a 'regulatory' decision."

112. Applicant's allegation seems to suggest that because management had transmitted the Report to the SAC Chairman, it had blurred the distinction between Fund action and SAC action or that thereby the SAC acted as an extension of Fund management. In the Tribunal's view, this argument confuses the Fund's act in transmitting the Report with the SAC's subsequent handling of that Report. While it is true that there is a certain congruency between the interests of Fund management and that of the Staff Association with respect to the SBF Report, inasmuch as both share the twin concerns that SBF resources be fairly apportioned and that the confidentiality interests of staff beneficiaries be protected, this concordance of interests does not afford Fund authority to acts by the SAC taken in contravention of those interests.

113. Furthermore, it is clear from the Staff Association's constitutive documents and from its actual work that it acts independently of the Fund. While it may sometimes function in an advisory role to management, its primary purpose is to act as representative of staff (vs. management) interests. There is nothing in the circumstances of this case to suggest that its purpose was otherwise here. Indeed, even Applicant alleges that if the SAC made available to staff members copies of the SBF Report it did so "in furtherance of its goals", not the goals of the International Monetary Fund. If the SAC Chairman regarded it as within the scope of his responsibilities as representative of staff interests to make the Report available to members of the staff at large, it would be difficult to treat such an act as a "decision taken in the administration of the staff of the Fund" within the meaning of Article II of the Tribunal's Statute.

114. Accordingly, the Administrative Tribunal concludes that, whatever complaint or remedy Applicant may or may not have against the Staff Association Committee for its actions with respect to the 1996 SBF Report, that complaint or remedy cannot be pursued in the Administrative Tribunal. Nor may the Administrative Tribunal entertain as part of Applicant's complaint against the Fund (for breach of the Retirement Agreement and violation of GAO No. 35) all of the alleged consequences of the Fund's circulation of the 1996 SBF Report, including the handling of the Report by the SAC after it reached its offices. Such an extension of the Tribunal's jurisdiction to acts taken by the SAC would be inconsistent with the statutory limitation on the Tribunal's jurisdiction to consideration of "decision[s] taken in the administration of the staff of the Fund". Hence, Applicant's allegation that the Fund is liable for acts of the Staff Association Committee in handling the 1996 SBF Report is not within the Tribunal's jurisdiction *ratione materiæ.*

Has Applicant established that he suffered injury as a result of the Fund's alleged breach of the Retirement Agreement, or any other alleged violation by the Fund, in preparing and circulating the 1996 SBF ?

115. Applicant contends that distribution of the 1996 SBF Report damaged his reputation within the Fund, and created conflicting official records, impairing his ability to obtain supportive references in seeking outside employment. The Fund counters that Applicant has established no nexus between the preparation and circulation of the Report and his inability to find employment outside the Fund or any damage to his professional reputation and that

absent any injury attributable to an illegal act on the part of the Fund, no remedy is authorized under the Tribunal's statute.

116. Applicant's efforts to secure alternative employment following the conclusion of the Retirement Agreement were reviewed above. Applicant has introduced no evidence as part of the dossier of this case that anyone responsible for denying him employment subsequent to his separation from the Fund acted on knowledge obtained from the SBF Report.

117. Applicant speculated that a former Fund staff member, now with another organization with which Mr. "V" had applied for a position, may have been aware of his performance ratings. He offered no proof, nor did he claim that that person had access to the SBF Report or that his possible knowledge of Applicant's performance history was a result of preparation and distribution of the Report. Applicant offered similar speculation that information about his history was known by another potential employer. Again, no proof was offered and no particular connection with the SBF Report was alleged. Finally, Applicant's claim that his former department intervened in preventing him from obtaining a consultancy with the Fund is inapposite as it too bears no relation to the circulation of the SBF Report.[12]

118. More generally, Applicant complains that his job search has been hampered by having to "fend off conflicting official records." Once again, the assertion that "conflicting official records" have caused injury is speculative. Applicant expresses concern that he or a recommendation of him might be subject to a claim of misrepresentation should the 1996 SBF Report come to light with a potential employer, and that therefore his ability to secure references is adversely affected.

119. Not only is this argument speculative, it also ignores the reality of Applicant's circumstances. As the Fund has pointed out, it would be most unlikely for a potential employer to seek references from persons other than those in Applicant's own department with whom he had worked over the course of his extended career. The Retirement Agreement does not prevent such individuals from drawing on their own recollections and evaluations of his performance. Furthermore, the suggestion that circulation of the Report has damaged Applicant's professional reputation also tends to ignore the reality, attested to by Applicant himself, that "wide-spread reputational damage in the community" pre-existed the Retirement Agreement. While he may have sought to repair this damage through the Retirement Agreement, that Agreement does not serve to obscure completely the fact that-- rightly or wrongly-- Applicant's performance was at issue during his career at the Fund, at any rate in its late stage.

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[12]The Tribunal rejected Applicant's document request concerning the matter of alleged improper interference with a consultancy contract because the requested documents were "irrelevant" to the case before the Tribunal. The Fund argued that the entire issue of the consultancy contract was not properly before the Tribunal because the acts complained of allegedly took place after Applicant's separation from the Fund on November 30, 1998. Applicant claimed there had been a pattern of interference pre-dating his separation.

120. Accordingly, the Administrative Tribunal concludes that Applicant has not shown that he has suffered injury to his professional reputation or to his ability to find alternative employment as a result of the Fund's allegedly illegal or negligent action in preparing and circulating the 1996 SBF Report.

Additional issues raised by Applicant

1. Representation of Fund by its Legal Department before the Administrative Tribunal

121. In his Reply, Applicant objects to the representation of the Fund by its Legal Department in these proceedings before the Administrative Tribunal as allegedly violative of Article X, Section 3 of the Tribunal's Statute, which provides:

> "3. Each party may be assisted in the proceedings by counsel of his choice, other than members of the Fund's Legal Department, and shall bear the cost thereof, subject to the provisions of Article XIV, Section 4 and Article XV."

122. Contrary to Applicant's contention that this statutory provision excludes members of the Legal Department from representing the Fund as a party before the Tribunal, the purport of Article X, Section 3 is to prohibit members of the Legal Department from representing Applicants before the Tribunal. As the Statute's Commentary elaborates:

> "Section 3 makes clear that each party may be assisted by counsel in the proceedings. Thus, an applicant would have the opportunity to be assisted by any person of his choice (other than members of the Fund's Legal Department, given the inherent conflict of interest such assistance would pose) at any stage of the case." (emphasis added)

(Report of the Executive Board, p.32.) The "inherent conflict of interest" noted by the Commentary adverts to the responsibility imposed on members of the Legal Department to their own client, the Fund.

123. That the prohibitions of Article X, Section 3 operate only to bar Legal Department attorneys from representing Applicants (but not from representing the Fund) before the Administrative Tribunal is indicated by the Tribunal's Rules of Procedure. The Rules apparently contemplate representation of the Fund by the Legal Department. Rule VII, paragraph 7, provides that the Registrar shall notify the Fund when an application has been filed, and "shall transmit a copy of it to the General Counsel". Moreover, in practice, the Legal Department has represented the Fund from the outset of the Tribunal's operations.

124. Accordingly, the Administrative Tribunal concludes that Applicant's objection to the Legal Department's representation of the Fund in these proceedings cannot be sustained.

2. Applicant's challenge to the Grievance Committee's jurisdiction and standard of review

125. Applicant contends that the Grievance Committee did not have subject matter jurisdiction over the dispute between himself and the Fund regarding the alleged violation of the Retirement Agreement because "[t]he complaint pertained to a defined contractual relationship not to the exercise of administrative discretion." Applicant appears to argue both that the Grievance Committee's standard of review is inappropriate, and that, on the basis of that standard of review, the Grievance Committee did not have jurisdiction over his complaint.[13]

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[13] The relevant legal provision, GAO No. 31, Rev. 3 includes the following provisions with respect to the Grievance Committee's jurisdiction and standard of review:

> "Section 4. Jurisdiction of the Grievance Committee
>
> 4.01 *Committee's Jurisdiction.* Subject to the limitations set forth at Section 4.03, the Grievance Committee shall have jurisdiction to hear any complaint brought by a staff member to the extent that the staff member contends that he or she has been adversely affected by a decision that was inconsistent with Fund regulations governing personnel and their conditions of service.
>
> 4.02 *Exhaustion of Administrative Review.* The Committee shall have jurisdiction to hear a case only after the grievant has exhausted the applicable channels of administrative review set forth in Section 6 of this Order, unless the Managing Director, or the Managing Director's designee, agrees that the grievance may be submitted directly to the Committee.
>
> 4.03 *Limitations on the Grievance Committee's Jurisdiction.* The Committee shall not have jurisdiction to hear any challenge to (i) a decision of the Executive Board; (ii) staff regulations as approved by the Managing Director; or (iii) a decision arising under the Staff Retirement Plan that is within the competence of the Administration or Pension Committees of the Plan.
>
> 4.04 *Grievance Committee's Examination of its Jurisdiction.* The Committee, for the purpose of proceeding with a grievance, shall decide whether it has jurisdiction over the matter.
>
> *Section 5. Standard of Review*
>
> 5.01 *Non-Discretionary Decisions.* The Grievance Committee shall review each non-discretionary decision challenged by the grievant and shall determine whether the challenged decision was consistent with and taken in accordance with applicable Fund rules and regulations.

(continued)

126. The Fund contests Applicant's reading of the Grievance Committee's jurisdictional competence as too narrow. It argues instead that the Grievance Committee's authority to ". . . hear any complaint by a staff member to the extent that the staff member contends that he or she has been adversely affected by a decision that was inconsistent with Fund regulations governing personnel and their conditions of service" embraces contractual as well as regulatory requirements. Therefore, concludes the Fund, the Grievance Committee had jurisdiction to decide Applicant's claim.

127. Having submitted his case to the Grievance Committee, it is odd for Applicant now to argue that that body was without jurisdiction. Ordinarily an argument that the Grievance Committee lacked jurisdiction would be raised by an applicant-- as it was in Ms. "Y", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1998-1 (December 18, 1998)-- only as a defense to a motion to dismiss for failure to exhaust applicable channels of review. Furthermore, if, as Applicant now contends, the Grievance Committee did not have jurisdiction over his complaint, an issue would arise as to the timeliness of his Application with the Tribunal; in the absence of the existence of applicable channels of administrative review, an Application must be filed no more than three months after notification of the challenged decision.[14]

128. Applicant suggests that the recommendation of the Grievance Committee was "misleading" because, he contends, the Committee was not authorized to settle contractual disputes. By contrast, he argues, "[T]he Tribunal, however, can recognize an agreement between the Fund, on the one hand, and a staff member, on the other, and settle all or any differences which arise between the contracting parties in respect of the determined legal relationship, whether contractual or not." Perhaps by asserting that the Grievance Committee did not have jurisdiction and stressing its standard of review, which he seems to suggest differs from that of the Administrative Tribunal, Applicant seeks to persuade the Tribunal not to accord deference to the Grievance Committee's decision or reasoning.

129. Applicant's concern that the Tribunal may be misled by the Grievance Committee's decision is misplaced. In D'Aoust v. International Monetary Fund, IMFAT Judgment No. 1996-1 (1996), the Tribunal discussed at some length the interrelationship between the Grievance Committee and the Administrative Tribunal. D'Aoust held that the Tribunal is authorized only to weigh the record generated by the Grievance Committee as part of the

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5.02 *Review of Discretionary Decisions.* When a grievant challenges a decision made in the exercise of discretionary authority, the Committee shall uphold the challenge only if it finds that the decision was arbitrary, capricious, or discriminatory, or was procedurally defective in a manner that substantially affected the outcome."

[14] Article VI, Section 1 provides: "An application challenging the legality of an individual decision shall not be admissible if filed with the Tribunal more than three months after all available channels of administrative review have been exhausted, or, in the absence of such channels, after the notification of the decision."

evidence and does not stand in the position of an appellate court reviewing the actions of that Committee:

> "17.... Moreover, the Tribunal does not accept the Applicant's assertion that it functions as an appellate body from the Grievance Committee because the Tribunal's competence is not limited as it would be if it were a court of appeal; e.g., it makes findings of fact as well as holdings of law. At the same time, the Tribunal may take account of the treatment of an applicant before, during and after recourse to the Grievance Committee. The Tribunal is authorized to weigh the record generated by the Grievance Committee as an element of the evidence before it."

As the Tribunal makes its own independent findings of fact and holdings of law, it is not bound by the reasoning or recommendation of the Grievance Committee.

130. Assuming that Applicant intends his challenge to the Grievance Committee's standard of review as a challenge to a "regulatory decision" of the Fund under Article II of the Statute, then he must establish that he has been "adversely affect[ed]" (Article II, Section 1.a.)[15] by that decision. Given the holding of D'Aoust that the Tribunal decides each case *de novo*, it would be difficult for Applicant to show that he had been adversely affected either by the Grievance Committee's exercise of jurisdiction in his case or by the application of its standard of review. Furthermore, GAO No. 31 grants to the Grievance Committee itself authority to decide, for the purpose of proceeding with a grievance, whether it has jurisdiction over a matter. (GAO No. 31, Section 4.04.) (Applicant has not specifically challenged the legality of this provision of the GAO.)

131. The Administrative Tribunal accordingly concludes that it cannot entertain Applicant's contentions about the Grievance Committee's exercise of jurisdiction.

Respondent's request that the Tribunal award it costs for defending allegedly frivolous claims brought by Applicant in the Grievance Committee

132. The Fund requests, on the basis of Article XV of the Statute of the Administrative Tribunal and the Tribunal's Order No. 1997-1 (December 22, 1997), Interpretation of Judgment No. 1997-1 (Ms. "C.", Applicant v. International Monetary Fund, Respondent), that the Tribunal award it costs incurred in defending allegedly frivolous claims brought by

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[15] Article II, Section 1.a. provides:

> "The Tribunal shall be competent to pass judgment upon any application:
>
> a. by a member of the staff challenging the legality of an administrative act adversely affecting him; . ..."

Applicant in the underlying Grievance Committee proceedings, claims which have not been made part of the Application before the Tribunal.

133. Article XV of the Tribunal's Statute provides:

> "1. The Tribunal may order that reasonable compensation be made by the applicant to the Fund for all or part of the cost of defending the case, if it finds that:
>
> a. the application was manifestly without foundation either in fact or under existing law, unless the applicant demonstrates that the application was based on a good faith argument for an extension, modification, or reversal of existing law; or
>
> b. the applicant intended to delay the resolution of the case or to harass the Fund or any of its officers or employees.
>
> 2. The amount awarded by the Tribunal shall be collected by way of deductions from payments owed by the Fund to the applicant or otherwise, as determined by the Managing Director, who may, in particular cases, waive the claim of the Fund against the applicant."

134. The Fund does not allege that Applicant has brought frivolous claims before the Tribunal, noting that the allegedly unfounded claims brought in the administrative review process "have not been included in the Application to the Tribunal." Hence, the Fund has failed to allege the predicate required for an award of reasonable compensation under Article XV, i.e. that "a. the application was manifestly without foundation..." (emphasis supplied) or that "b. the applicant intended to delay the resolution of the case or to harass the Fund or any of its officers or employees."

135. Nonetheless, the Fund suggests that the Tribunal's Order No. 1997-1 provides a basis for the relief it seeks because that Order "made clear . . . that costs of legal representation during the administrative review process may be the subject of fee awards by the Tribunal." In Order No. 1997-1, the Tribunal was presented with a question of interpretation of a decision rendered under Article XIV, Section 4, another statutory provision from that at issue here. Article XIV, Section 4 provides:

> "4. If the Tribunal concludes that an application is well-founded in whole or in part, it may order that the reasonable costs incurred by the applicant in the case, including the cost of applicant's counsel, be totally or partially borne by the Fund, taking into account the nature and complexity of the case, the nature and quality of the work performed, and the amount of the fees in relation to prevailing rates."

136. In the case that gave rise to Order No. 1997-1, the statutory predicate for the award of costs, that the "application is well-founded in whole or in part" had already been determined to have been met. (Ms. "C.", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1997-1 (August 22, 1997).) The Tribunal was later confronted with the question of whether the costs of legal representation in the administrative review that the applicant had to exhaust before coming to the Tribunal, as required by Article V of the Statute, should be included in the award of costs, and it decided that they should. The rationale for the Tribunal's Interpretation was that the preparation of a claim that ultimately succeeds in the Tribunal necessarily involves the presentation of that claim to, and its rejection by, the Grievance Committee. The Tribunal reasoned that unless awards under Article IV, Section 4 of the Statute could encompass costs incurred in pressing such claims in the Grievance Committee, the statutory purpose of giving all staff members access to the Tribunal would not be well served. The Tribunal considered as well that had the claim succeeded initially in the Grievance Committee (as success in the Tribunal suggests it should have), the grievant could have had the benefit of the Grievance Committee's own fee-shifting authority.[16]

137. The decision and rationale of interpretative Order No. 1997-1 are readily distinguishable from what the Fund asks the Tribunal to do in this case. First, while in the circumstances of Ms. "C." the statutory trigger that the Application be "well-founded in whole or in part" (Article XIV, Section 4) had been met, here the statutory trigger that the Application be "manifestly without foundation" (Article XV) has not even been alleged. The allegedly frivolous claims complained were made not in the Tribunal but in the administrative review process itself. Second, the rationale of Order No. 1997-1 was to give effect to a principle embodied in the Grievance Committee's constitutive instrument GAO No. 31. By contrast, if the Tribunal were to adopt the Fund's argument in the case of Mr. "V", it would not give effect to GAO No. 31 but, rather, in essence, supply a provision absent from that General Administrative Order, i.e. that costs could be awarded against a grievant for pressing frivolous claims. Whether or not there may be good reasons for such a rule, it is not within the competence of the Tribunal to so amend GAO No. 31.

138. Finally, Article XIV, Section 4 and Article XV are not symmetrical provisions and should not be interpreted as such. The statutory purpose of Article XIV, Section 4, is to provide for cost-shifting in favor of prevailing applicants, thereby increasing access to the Tribunal for aggrieved staff members. This purpose is distinct from that of Article XV, which penalizes the bringing of frivolous claims by exacting from the offending party the cost of

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[16] GAO No. 31, Rev. 3, para. 7.05 provides:

> ". . . At the conclusion of the case, if the Committee concludes that a grievance is well-founded in whole or in part, it may recommend that the Fund reimburse the grievant for some or all of the reasonable costs, including legal fees, incurred by the grievant in pursuing the grievance...."

defending against them, thereby deterring the pursuit of cases that amount to an abuse of the review process. (See Report of the Executive Board, p. 39.)

139. Accordingly, the Administrative Tribunal concludes that there is no basis, either in Article XV of the Statute or in the Tribunal's interpretation of Article XIV, Section 4 in Order No. 1997-1, for the Tribunal to award costs to the Fund for defending any frivolous claims brought by Applicant in the Grievance Committee.

Decision

FOR THESE REASONS

The Administrative Tribunal of the International Monetary Fund unanimously decides:

1. The Fund did not act illegally, either with respect to the Retirement Agreement it had entered into with Applicant or with respect to any Fund rule or regulation, when it prepared and circulated the 1996 SBF Report, in accordance with Fund Policy.

2. The preparation of the SBF Report and its circulation to a limited number of addressees within the Fund, which by way of explanation for the disbursement of SBF resources on Applicant's behalf characterized his performance as "[u]nable to produce work that met department's standards", did not violate any of the following clauses of the Retirement Agreement: paragraph 3 (sealing of Applicant's 1992 and 1994 APRs); paragraph 4 (removal of the numerical APR ratings for 1992 and 1994 from the "personnel data base"); or paragraph 8 (confidentiality clause). Nor did the Fund agree as part of the Retirement Agreement to "cleanse" Applicant's record or to refrain from producing any document subsequent to the conclusion of that Agreement that might reflect on his performance.

3. There is no conflict between the Fund's internal law, requiring circulation of the SBF Report, and its contractual obligations to Applicant under the Retirement Agreement. Likewise, the Fund did not act illegally or improperly in not bringing to Applicant's notice during negotiations with Applicant the SBF reporting requirements.

4. The preparation and circulation of the 1996 SBF Report did not violate any Fund rules or regulations or breach any duty owed by the Fund to Applicant independent of the Retirement Agreement, either under GAO No. 35, the N Rules, the SBF reporting requirements themselves, or any other duty of confidentiality.

5. Applicant's claim that the Fund is liable for alleged acts of the Staff Association Committee (SAC) with respect to the handling of the 1996 SBF Report that was circulated on a "Strictly Confidential" basis to the SAC Chairman is not within the Tribunal's jurisdiction *ratione materiæ*, which is limited to "decision[s] taken in the administration of the staff".

6. As the Tribunal holds that the Fund did not breach the Retirement Agreement or violate any Fund rule or regulation in its preparation and distribution of the 1996 SBF Report, and that Applicant's claim that the Fund is responsible for acts of the SAC is not within the Tribunal's jurisdiction, it is therefore not necessary to reach the question of whether Applicant suffered any injury thereby. In any event, it holds that Applicant has not

established any nexus between the Fund's acts in the preparation and distribution of the 1996 SBF Report and Applicant's failure to obtain new employment.

7. The Tribunal holds that the representation of the Fund by its Legal Department before the Administrative Tribunal does not violate Article X, Section 3 of the Tribunal's Statute.

8. The Tribunal cannot entertain Applicant's challenge to the Grievance Committee's exercise of jurisdiction in his case or its application of its standard of review.

9. Finally, as there is no supportive statutory basis, the Tribunal holds that it cannot grant the Fund's request for an award of costs for defending allegedly frivolous claims brought by Applicant in the Grievance Committee.

Stephen M. Schwebel, President

Nisuke Ando, Associate Judge

AgustPn Gordillo, Associate Judge

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Stephen M. Schwebel, President

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Celia Goldman, Acting Registrar

Washington, D.C.
August 13, 1999