ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

JUDGMENT No. 2016-2

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

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INTRODUCTION

1. On May 24 and 25, 2016, the Administrative Tribunal of the International Monetary Fund, composed for this case, pursuant to Article VII, Section 4 of the Tribunal's Statute, of Judge Catherine M. O'Regan, President, and Judges Jan Paulsson and Edith Brown Weiss, met to adjudge the Application brought against the International Monetary Fund by Mr. "KK", a staff member of the Fund. Applicant was represented by Mr. Peter C. Hansen, Law Offices of Peter C. Hansen, LLC. Respondent was represented by Ms. Diana Benoit and Mr. Brian Patterson, Senior Counsels, and Ms. Juliet Johnson, Counsel, IMF Legal Department.

2. Applicant challenges his Annual Performance Review (APR) decisions for FY2012 and FY2013. Applicant alleges that the process of arriving at these decisions was vitiated by the following factors: (i) the assessment of his performance was improperly motivated by harassment and retaliation; (ii) his work was not evaluated in a fair and balanced manner (including that he was held to unreasonable standards and that the type of work to which he was assigned, and in which he had expertise, was disfavored by his managers); and (iii) his APR ratings were unfairly affected by the application of the Fund's policy limiting the number of staff eligible for ratings above the "Effective" level.

3. In challenging the assessment of his performance, Applicant alleges harassment by his Division Chief, including physically-threatening actions and yelling. Applicant contends that the alleged harassment was abetted by his Deputy Division Chief and by the Senior Personnel Manager (SPM) of the Department. He also alleges that his supervisors failed to manage his workload in accordance with a medical restriction communicated by the Joint Bank/Fund Health Services Department (HSD) to limit Applicant's workweek to 40 hours, a factor that he contends also wrongfully affected the assessment of his performance. Applicant additionally contends that elements of the Grievance Committee's consideration of his case represented failures of fair process.

4. Applicant seeks as relief rescission and removal of the contested APR decisions, along with monetary compensation for the Fund's "many, repeated and severe infringements of [his] rights in connection with his APRs for FY12 and FY13, including harassment and retaliation." Applicant also seeks legal fees and costs, which the Tribunal may award, in accordance with Article XIV, Section 4, of the Statute, if it concludes that the Application is well-founded in whole or in part.

5. Respondent, for its part, maintains that Applicant's APR decisions for FY2012 and FY2013 reflect fair and balanced assessments by a number of different managers, that the

assessments were consistent in identifying particular performance strengths and weaknesses, and that Applicant was on notice regarding areas for improvement. The Fund denies that Applicant's work was unfairly evaluated on account of the nature of his assignments or expertise, or that the rating system was unfair to him. The Fund also rejects Applicant's assertions that his workload was excessive and that supervisors failed to heed the medical restriction on his working hours.

6. As to Applicant's allegations that his FY2012 and FY2013 APR decisions were improperly motivated by harassment or retaliation, the Fund maintains that a few "outbursts" by the Division Chief did not amount to impermissible harassment, and, in any event, the APR decisions could not be attributed to that allegedly hostile manager. The Fund additionally maintains that it acted promptly and effectively to address Applicant's complaints about his working conditions, including removing him from the direct supervision of the Division Chief.

7. Respondent urges the Tribunal to reject Applicant's complaints relating to the Grievance Committee process on the ground that they fall outside of the Tribunal's jurisdictional competence and, in any case, are without merit.

PROCEDURE

8. On September 30, 2015, Applicant filed an Application with the Administrative Tribunal, which was transmitted to Respondent on October 2, 2015. On October 6, 2015, pursuant to Rule IV, para. (f), the Registrar circulated within the Fund a notice summarizing the issues raised in the Application.

9. On November 13, 2015, the Tribunal denied Applicant's requests for provisional relief, which he had asserted in his Application and in additional submissions, and to which the Fund had responded. The Tribunal concluded that Applicant's requests for provisional relief did not seek suspension of any decision that he contested in the Application and that the orderly presentation of claims through the Fund's dispute resolution system, along with the requirements of Article V, Section 1, of the Tribunal's Statute, required that Applicant first raise his additional claims through the channels of review. *Mr. "KK", Applicant v. International Monetary Fund, Respondent (Requests for Provisional Relief)*, IMFAT Order No. 2015-1 (November 13, 2015).

10. On November 16, 2015, Respondent filed its Answer to the Application. On December 18, 2015, Applicant submitted his Reply. The Fund's Rejoinder was filed on January 20, 2015.

11. On January 27, 2016, pursuant to Rule XI (Additional Pleadings), the President of the Administrative Tribunal requested that Applicant file an Additional Written Statement to address the issues of the case in the light of the recently issued Judgment in *Ms. "GG" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2015-3 (December 29, 2015), which the Fund had cited extensively in its Rejoinder. On February 16, 2016, Applicant filed his Additional Written Statement, which was transmitted to the Fund for its information.

A. Applicant's request for anonymity

12. Applicant seeks anonymity pursuant to Rule XXII of the Tribunal's Rules of Procedure on the grounds that the case involves allegations of misconduct by Applicant's manager, health

conditions allegedly consequent to that purported conduct, and medical restrictions on Applicant's working hours that are relevant to the challenges to his APRs.

13. Respondent does not oppose the anonymity request. The Fund favors anonymity for Applicant in order to protect the "reputations of numerous Fund managers" against allegations of harassment and retaliation and to support supervisors who gave "carefully considered feedback to Applicant under the assumption that the feedback and ratings would be kept confidential."

14. In its earlier Order in this case, denying Applicant's requests for provisional relief, the Tribunal granted anonymity "[f]or purposes of this Order only" and "defer[red] until its Judgment on the Application a decision on whether Applicant shall be afforded anonymity in that Judgment." *Mr. "KK" (Order),* note 1.

15. Rule XXII provides that the Tribunal shall grant a request for anonymity "where good cause has been shown for protecting the privacy of an individual." The Tribunal has interpreted the "good cause" standard in the light of the principle that granting anonymity to an applicant is an exception to the ordinary rule that the names of parties to a judicial proceeding should be made public. *Ms. "AA", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application),* IMFAT Judgment No. 2006-5 (November 27, 2006), para. 13.

16. The Tribunal's jurisprudence supports granting anonymity requests to applicants in cases such as those (a) challenging performance assessments, so as to protect the candor of the assessment process, *Mr. "HH," Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2013-4 (October 9, 2013), para. 43, (b) involving allegations of staff misconduct, including harassment and retaliation, *Ms. "GG" (No. 2)*, paras. 73-74, and (c) in which the health of the applicant is at issue, *Mr. "DD", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-8 (November 16, 2007), para. 7 (medical evidence submitted in connection with claim of workplace harassment). All three of these matters are at issue in the instant case.

17. In the light of this jurisprudence and the nature of his claims, the Tribunal grants Applicant's request for anonymity.

B. Applicant's requests for production of documents

18. Pursuant to Article X of the Statute and Rule XVII of the Rules of Procedure, Applicant requests the Tribunal to order the Fund to produce:

(i) "[a]ny Ethics reports concerning [the Division Chief's] behavior, or summaries of their findings and conclusions," and

(ii) "[a]ny and all decisions by the HRD Director concerning [the Division Chief] in connection with the aforementioned Ethics processes."

Respondent opposes these requests.[1]

19. On March 6, 2013, Applicant filed a complaint with the Fund's Ethics Office alleging misconduct by his Division Chief. That complaint was followed on May 6, 2013, by an amended complaint. It is not disputed that Applicant's Ethics complaints raise issues related to those raised in his Application before the Tribunal. (It may also be observed that Applicant's document requests appear to extend beyond seeking information about the resolution of the complaints that he himself filed with the Ethics Office.)

20. Applicant has identified in the Ethics complaints, as well as throughout the channels of administrative review and in his pleadings before the Tribunal, three incidents of April, June, and December 2011 in which the Division Chief allegedly displayed extreme anger towards him in the course of their work-related interactions. According to Applicant, the Division Chief raised his voice and moved towards Applicant in a manner that Applicant perceived as physically threatening. Applicant asserts that these incidents caused him to experience intimidation and to fear for his physical safety. In his amended complaint to the Ethics Office, under the heading "[The Division Chief's] Perpetuation of a Hostile Work Environment," Applicant also alleges that he witnessed the Division Chief engage in similar conduct towards another staff member in 2013.[2] Applicant's Ethics complaints also allege that the Division Chief retaliated against Applicant for contesting his FY2012 APR by referring to him sarcastically in an interoffice email of October 31, 2012, as "my always reliable and non-grieving colleague."

21. Applicant asserts that the Fund informed him "orally that it had found [the Division Chief] guilty of unspecified misconduct after it investigated his accusations," and that it "should consequently have been estopped from denying his guilt in the 'civil' proceedings where damages for his misconduct have been sought." The Fund does not concede that Applicant was ever so informed and maintains that it would have been inconsistent with the Fund's policies to have done so. In the oral proceedings[3] before the Tribunal, the Fund asserted that it has never admitted or publicized what the findings were in respect of those Ethics complaints.

22. Applicant asserts that he deserves to see the Ethics findings: "If the Fund is in fact denying misconduct after having found it, this should be held against the Fund, particularly as regards moral damages and an award of costs. [Applicant] should not have to litigate the truth of a fact established by the Fund." In Applicant's view: "The Fund cannot rightfully discipline a manager for wrongdoing, and then pretend to staff harmed by the manager that the manager did nothing wrong. The need for staff to independently prove wrongdoing by the manager unfairly raises the costs and level of uncertainty faced by aggrieved staff. This violates the staff members' right to due process."

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[1] Applicant's request for disclosure of these materials was also extensively litigated before the Grievance Committee, which denied Applicant's request.

[2] That staff member testified to this incident as part of the Grievance Committee proceedings in Applicant's case.

[3] *See infra* Applicant's request for oral proceedings.

23. Respondent opposes the document requests: "Such disclosure is not authorized under Fund law and would abridge the policy of the Ethics Advisor at the time of the conduct of its investigations. More generally, disclosure would undermine the Fund's institutional design wherein the ethics process and the grievance process are independent of one another." The Fund notes that GAO No. 33 does not provide for follow-up by the Ethics Advisor with a complainant or for disclosure of the Report of Investigation. These reports are considered "strictly confidential" and their disclosure is limited to those having a "strict need to know," GAO No. 35, Section 3.08. In the oral proceedings before the Tribunal, the Fund also maintained that disclosure of such materials would have a chilling effect on the candor of witnesses in the Ethics processes, hampering the ability to enforce its Ethics policies.

24. Pertinently, the Fund cites the Tribunal's Judgment in *Ms. "GG" (No. 2)* in support of the non-disclosure to Applicant of the Ethics reports. In *Ms. "GG" (No. 2)*, the Tribunal was presented with a similar but different question, namely, whether the Tribunal should grant an applicant's request to strike from the record redacted Ethics Office Reports of Investigation that the Fund had attached to its Answer. The Tribunal noted that the case was the first in which it had been presented with the question of "what relevance, if any, the findings of the Ethics Office relating to complaints of misconduct may have upon the Tribunal's consideration of an application by a staff member alleging that the purported misconduct adversely affected her conditions of employment." *Id.*, para. 63.

25. The Tribunal in *Ms. "GG" (No. 2)*, para. 64, observed that the Ethics process is "manifestly not final" when its outcome is adverse to a staff member charged with misconduct, given the staff member's right to contest such decision in the Tribunal. "Similarly," stated the Tribunal, "a finding by the Ethics Office exonerating a staff member following an investigation for misconduct cannot be accepted by the Tribunal as dispositive of the factual and legal issues as to whether an applicant has established that the alleged misconduct improperly affected career decisions such as performance ratings and selection decisions and/or that the applicant was the object of a pattern of unfair treatment linked to the alleged misconduct." *Id.*, para. 65. The Tribunal emphasized that its task in *Ms. "GG" (No. 2)* was "not to review a disciplinary decision but rather to decide whether the Fund has abused its discretion in failing to provide Applicant with a workplace free of unfair treatment." *Id.*

26. The Tribunal also noted that a feature of the Ethics process in the Fund is that "reports emanating from this process are maintained as confidential, except on a need-to-know basis. This approach precludes the complainant from having access to the reports." *Id.*, para. 67. (Unlike in the instant case, in *Ms. "GG" (No. 2)* the Fund had stated that the applicant had been informed of the "result" of the investigation. *Id.*)

27. The Tribunal in *Ms. "GG" (No. 2)* concluded as follows:

> 68. In the view of the Tribunal, the weight that it may give to Ethics Office findings is limited by the following factors: (i) the Tribunal's duty to assess independently the claims raised in an application so as to fulfill its obligation ". . . as a judicial body, to determine whether a decision transgressed the applicable law of the Fund," Commentary on the Statute, p. 13; (ii) the confidential

> nature of the investigatory process, by which the reports of investigation are withheld from the complaining party; and (iii) the requirement that, as a judicial body, the Tribunal is to draw its conclusions based on evidence tested through an adversary process. Accordingly, in the absence of a compelling reason, the Tribunal will not ordinarily have a basis for taking account of the findings of Ethics investigations.
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> 69. Staff members must feel free to pursue all channels of recourse when presented with circumstances that they perceive as raising issues both of misconduct by other staff members and of the illegality of an administrative act by which they have been adversely affected. Given the distinct purposes of these channels, and the differences among their fact-finding methods and standards of proof, the Tribunal concludes that it would not be appropriate to give weight to the findings made by the Ethics Office in response to Applicant's complaints.
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> 70. In the light of the foregoing, the Tribunal grants Applicant's request to strike from the record the redacted Ethics Reports. The Tribunal will, however, take notice that Ethics investigations were undertaken and completed, given that Respondent has cited the Ethics inquiry in answering Applicant's allegation that it failed to respond effectively to her complaints of unfair treatment.

28. The question is whether the Tribunal's decision in *Ms. "GG" (No. 2)*, granting the motion to strike evidence from the record, governs the question presented by Applicant's request for production of documents in the instant case. The Tribunal concludes that it does. For the reasons set out in *Ms. "GG" (No. 2)*, the Tribunal reaffirms that "in the absence of a compelling reason, the Tribunal will not ordinarily have a basis for taking account of the findings of Ethics investigations." *Id.*, para. 68. The Tribunal has not been persuaded that any compelling reason exists in this case. Accordingly, the Tribunal denies Applicant's requests for production of documents emanating from the Ethics process in relation to his Division Chief, including any decision by the HRD Director in connection with that process.[4]

29. A further question arises. Applicant seeks to invoke Article X, Section 1, of the Tribunal's Statute which provides:

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[4] The Tribunal observes that in *Ms. "GG" (No. 2)*, para. 70, it took notice that Ethics investigations had been undertaken and completed, "given that Respondent has cited the Ethics inquiry in answering Applicant's allegation that it failed to respond effectively to her complaints of unfair treatment." The Tribunal also held that ". . . undertaking an Ethics investigation will not shield the Fund from responsibility before the Administrative Tribunal for the effect of alleged misconduct on the conditions of employment of other staff members." *Id.*, para. 269. In the instant case, Respondent has not referred to the Ethics process in maintaining that it responded effectively to Applicant's complaints about his working conditions.

> The Tribunal may require the production of documents held by the Fund, except that the Managing Director may withhold evidence if he determines that the introduction of such evidence might hinder the operation of the Fund because of the secret or confidential nature of the document. Such a determination shall be binding on the Tribunal, provided that the applicant's allegations concerning the contents of any document so withheld shall be deemed to have been demonstrated in the absence of probative evidence to the contrary. The Tribunal may examine witnesses and experts, subject to the same qualification.

The associated Commentary[5] on the Statute, p. 32, states:

> With respect to the issue of document production, the tribunal would be able to require the production of documents from the Fund, except that the Managing Director would retain authority to decide, on a case-by-case basis, whether there was a compelling institutional need to protect the confidentiality of the requested document. In this event, the Managing Director's decision would be binding on the tribunal. However, if an applicant made an assertion regarding the content of a particular document and the Managing Director decided to withhold that document from the tribunal, the applicant's assertion would be prima facie evidence as to that content, and would create a rebuttable presumption as to the accuracy of the assertion. Accordingly, the tribunal would accept the applicant's assertion as to its content, so long as there was no other evidence presented to contradict that assertion. If there was other probative evidence presented, the tribunal would have to weigh all of the evidence before it in order to make an appropriate finding.

30. Applicant seeks to rely on Article X, Section 1, to "have his allegations about [the Division Chief's] unethical conduct treated as fact, as the Managing Director has chosen to withhold the Fund's relevant reports for its own exclusive use." "Under Fund law," he asserts, "applicants are entitled to have their allegations concerning the 'contents of any [suppressed] documents' presumed true."

31. The Fund has not commented in its written or oral pleadings on Applicant's assertion relating to the applicability of Article X, Section 1, in the circumstances of the case.

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[5] The consolidated Commentary on the Statute comprises the Report of the Executive Board to the Board of Governors on the Establishment of an Administrative Tribunal for the International Monetary Fund (1992) and the Report of the Executive Board to the Board of Governors on Amendments to the Statute of the Administrative Tribunal for the International Monetary Fund (2009).

32. In the view of the Tribunal, Article X, Section 1, applies in the event that the Tribunal orders the Fund to produce a document and the Fund declines to produce it. In such case, Article X, Section 1, would permit the Tribunal to draw an inference as to the content of the document withheld. That is not the case here, however, because the Tribunal has denied Applicant's requests for production of documents. Accordingly, there is no order from the Tribunal to Respondent that could trigger the process envisioned by Article X, Section 1. The Tribunal therefore finds no ground to draw any inference as to the contents of the requested documents.

C. Applicant's request for oral proceedings

33. Article XII of the Tribunal's Statute provides that the Tribunal shall ". . . decide in each case whether oral proceedings are warranted." Rule XIII, para. 1, provides in part: "Oral proceedings shall be held if, on its own initiative or at the request of a party and following an opportunity for the opposing party to present its views pursuant to Rules VII-X, the Tribunal deems such proceedings useful."

34. In his Application, Applicant requested a ". . . hearing in this case, and to appear in person before the Tribunal." On May 6, 2016, Applicant was asked to clarify his request for oral proceedings. That clarification was filed on May 10, 2016, seeking both witness testimony and oral argument by the parties' counsel. The Fund submitted a response on May 13, 2016.

35. Respondent opposed Applicant's request for oral proceedings on the ground that a comprehensive testimonial and documentary record had been developed through the Grievance Committee process. Given that record, the Fund asserted that it would be a "waste of time and resources for all concerned to engage in further oral proceedings." The Fund also took the view that lengthy legal arguments had been set out in the parties' written pleadings before the Tribunal and that oral arguments by the parties' counsel would "serve no useful purpose."

36. This Tribunal has ". . . recognized the advantages of holding oral proceedings to the consideration of cases, especially when an applicant has requested them." *Mr. R. Niebuhr, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2013-1 (March 12, 2013), para. 30. When it revised its Rules of Procedure in 2004, changing the standard for holding oral proceedings from "necessary" to "useful," it did so "with a view towards making the possibility of holding oral proceedings more likely." *Id.*, para. 29. In addition, by adding a provision permitting the Tribunal to ". . . limit oral proceedings to the oral arguments of the parties and their counsel or representatives where it considers the written evidentiary record to be adequate," Rule XIII, para. 6, the Tribunal underscored the value of conducting oral proceedings for purposes of addressing questions of law.

37. In *Niebuhr*, the Tribunal granted the applicant's request for oral proceedings, taking note of the revisions of Rule XIII. It also considered that oral proceedings had not been part of the underlying administrative review process in that case, which arose through the Administration Committee of the Staff Retirement Plan. *Id.*, para. 32. In the *Niebuhr* case, following notification of the Tribunal's decision granting the request for oral proceedings, the applicant withdrew that request and such proceedings were not held. *Id.*, para. 33.

38. In *Ms. "GG" (No. 2)*, the applicant requested oral proceedings for purposes of seeking testimony from individuals who had not testified in the Grievance proceedings. The Tribunal rejected one of the requests for witness testimony on the basis of the sufficiency of the written record as supplemented by additional documentary evidence that resulted from the Tribunal's granting a request for production of documents pursuant to Rule XVII. As to other proposed witnesses, the Tribunal concluded, based on the proffers that the applicant had made as to the proposed nature of their testimony, that such evidence would "not be probative of the issues of the case." *Id.*, para. 59. Accordingly, the request for oral proceedings in *Ms. "GG" (No. 2)* was denied. In denying that request, the Tribunal noted that the applicant had not indicated that she sought oral proceedings for purposes of making an oral argument on the issues of the case. *Id.*, para. 58.

39. In determining whether oral proceedings will be "useful" (Rule XIII, para. 1), the Tribunal ". . . consistently has taken account of the sufficiency of the written record of the case." *Ms. "GG" (No. 2)*, para. 48. The sufficiency of the record is particularly pertinent to the determination of whether oral proceedings will include witness testimony, given that the Tribunal will ordinarily have the benefit of the transcript of oral hearings held by the Fund's Grievance Committee in those cases that emerge from that channel of review. The Tribunal frequently has noted that it is ". . . authorized to weigh the record generated by the Grievance Committee as an element of the evidence before it." *Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 1996-1 (April 2, 1996), para. 17. The Tribunal has such a record in this case.

40. With these considerations in mind, the Tribunal denied Applicant's request to appear as a witness before the Tribunal to "answer any questions that the Tribunal may have about his experiences at work, the challenges he faced, and his physical and mental conditions as they relate to his claims." The Tribunal concluded, in the light of the written record, including of Applicant's testimony before the Grievance Committee, that it would not be useful to the disposition of the case for him to testify before the Tribunal.

41. Likewise, the Tribunal denied Applicant's requests to call as witnesses the SPM, the Department Director, and one of his medical treatment providers. The Tribunal considered that the SPM had testified in the Grievance Committee proceedings. The point on which Applicant sought further testimony from the SPM, namely, the issue of "coaching" by the Fund of her Grievance Committee testimony, had been raised in those proceedings and the Tribunal did not consider it material to the disposition of the case.[6] As to Applicant's requests to call before the Tribunal two witnesses who had not been called in the Grievance proceedings, i.e., the Department Director and a medical treatment provider, the Tribunal likewise concluded, based on Applicant's proffer, that such evidence would not be probative of the issues of the case. The Tribunal also took into account that Applicant had been represented by counsel throughout the Grievance Committee and Administrative Tribunal proceedings.

[6] *See infra* CONSIDERATION OF THE ISSUES: Did elements of the Grievance Committee's consideration of Applicant's case represent failures of fair process?

42. Given the structure of the Fund's dispute resolution system and the exhaustion requirement of Article V, Section 1, of the Tribunal's Statute, it will be rare for the Tribunal to admit witness testimony in cases arising through the Grievance Committee, in the absence of a showing that such testimony would be useful to clarify a material point at issue before the Tribunal. *See Ms. "GG" (No. 2)*, para. 59.

43. Having concluded that it would not be useful to hear witness testimony in the case, the Tribunal turned to Applicant's request that it "hear and question the parties' counsel." In the light of that request and the benefit that the Tribunal has recognized of providing parties a forum in which to present their cases through oral argument even when the evidentiary record is complete (Rule XIII, para. 6), the Tribunal decided that oral proceedings would be held, limited to the legal arguments of the parties' counsel. The Tribunal also decided that the proceedings would be "held in private," per Article XII of the Statute and Rule XIII, para. 1,[7] as the Tribunal had determined that "matters of personal privacy" were at issue in the case. *See* Commentary on the Statute, p. 34.[8] The parties were so notified.

44. Oral proceedings were held on May 25, 2016. Each party was allotted a fixed period for counsel to present its case, followed by questioning by the Tribunal. The Tribunal found the oral proceedings useful in clarifying the legal issues and in providing an opportunity to probe disputes of fact so as to enhance the legal appreciation of the record of the case.

FACTUAL BACKGROUND

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

A. Alleged incidents of harassment in 2011

46. Applicant has identified three incidents of April, June, and December 2011 in which the Division Chief allegedly displayed extreme anger towards him in the course of their work-related interactions. According to Applicant, the Division Chief raised his voice and moved towards Applicant in a manner that Applicant perceived as physically threatening. Applicant asserts that these incidents caused him to experience intimidation and to fear for his physical safety.

47. The first of these incidents occurred on April 27, 2011, when Applicant decided not to take part in an important meeting in his Division because he was busy preparing for a meeting of the same day called by another group to which he was also assigned. According to Applicant's account, the Division Chief confronted him, "growl[ed]" at him and got "right in [Applicant's] face . . . ." (Tr. 809-810.) Applicant testified: "[H]e was above me. I was leaning back. There was a printer behind me. . . . I didn't know whether the next thing was he was going to swing at

[7] Article XII of the Statute and Rule XIII, para. 1, of the Rules of Procedure provide: "Oral proceedings shall be open to all interested persons, unless the Tribunal decides that exceptional circumstances require that they be held in private."

[8] The Commentary on the Statute, p. 34, states: "Any oral proceedings conducted by the tribunal would be open to 'interested persons,' unless the tribunal decided that the nature of the case required that such proceedings be held in private, for example, if sensitive information or matters of personal privacy were involved."

me. I didn't know. I asked him to back up. . . . I was afraid. I didn't know what was going to happen. I moved back and to the side. He came right back and he started coming towards me again." (Tr. 810-811.) Applicant testified that following this meeting he was "shaking" and "fearful," and that his "head was swimming" and his "stomach was woozy." (Tr. 812.)

48. The Division Chief, for his part, testified that both he and Applicant "raised voices" during the April incident, that he was "incredulous" that Applicant would not have found time to attend a meeting of that nature, and that if Applicant ". . . had a conflicting priority, he should have told somebody." (Tr. 294.) The Division Chief denied encroaching on Applicant's physical space or engaging in any kind of threatening gestures: "I'm not a finger wagger. I'm not an intimidator. I'm not a bully . . . . I know very well how to behave around humans and that's just not in my nature." (Tr. 295.)

49. The second incident of alleged harassment took place on June 3, 2011, when Applicant and the Division Chief had a confrontation relating to the deferral of Applicant's use of a Compressed Work Schedule (CWS) day. On this occasion, Applicant contends that the Division Chief followed him back to his office, where he "stood up and put his hands on the desk and hovered above [Applicant]." (Tr. 818.) In this case, Applicant felt "less like [the Division Chief] was going to hit [him] because there was a desk between [them]." (Tr. 972.) This incident, testified Applicant, also left him "shaking." (Tr. 819.)

50. When asked in the Grievance proceedings whether he had lost his temper with Applicant on this occasion, the Division Chief replied that he "felt certain that [he] had a raised voice" but that he did not engage in any physically threatening gestures. (Tr. 299.)

51. The third incident took place in late December 2011. According to Applicant, he had come to the office early that day and advised the Division Chief that he wished to meet with him on assignments early in the afternoon in order to meet his transportation that evening, which differed from his usual. Finally, Applicant says, he needed to leave, as it was after 6 p.m., but the Division Chief tried to insist on a meeting and started walking towards Applicant in a manner that he found threatening. (Tr. 825-830.)

52. The Division Chief, for his part, testified that he had been waiting in the office to receive a project from Applicant when Applicant left for the evening. The Division Chief testified: "I raised my voice because I wasn't getting . . . what I would consider a courteous and respectful response." (Tr. 300-302.) Asked if he was physically threatening towards Applicant on that occasion, he replied, "Of course not." (Tr. 303.)

B. Applicant's June 6, 2011, meeting with the SPM

53. Following the CWS incident of June 3, 2011, Applicant sought out a meeting with his SPM. That meeting took place on the next business day, June 6, 2011.

54. According to Applicant, he recounted to the SPM the events of April 27 and June 3, "requested [the SPM]'s help with managing his crushing workload; . . . voiced concerns that his workplace situation was setting him up for failure; and . . . explained his ongoing fear of [the Division Chief]." He also states that at that time he told the SPM that he was "undergoing

medical treatment for health problems caused by his overly stressful work environment." According to Applicant, the SPM promised to "look into his situation, monitor his workload, support a mobility assignment and get back to him," but that despite these promises she never provided any assistance.

55. The SPM, for her part, testified that in the meeting of June 6, 2011, Applicant expressed concerns about his workload. (Tr. 57-58.) She also observed that he was "very sad" during this period. (Tr. 59.) The two discussed an opportunity in another unit of the Department, which Applicant declined to pursue. The SPM "sense[d] that [Applicant] needed a change of pace, so [she] thought that that might be good for him emotionally and also on the work side." (Tr. 60.)

56. The parties dispute whether Applicant raised with the SPM at this meeting that he felt he was "being threatened and [was] worried for [his] safety" (Tr. 820) as a result of the Division Chief's conduct. The SPM, who testified twice before the Grievance Committee on this matter, maintained in her later testimony that Applicant had communicated in the June 6, 2011, meeting only that he perceived that the Division Chief had been "disrespectful, . . . had raised his voice [and] . . . wasn't considerate of [Applicant's] feelings." (Tr. 1252.)

C. Changes in Applicant's reporting relationships (2011-2013)

57. Following the meeting of June 6, 2011, the SPM undertook efforts to find a suitable assignment for Applicant outside of the immediate supervision of the Division Chief. In early 2012, the Deputy Division Chief, who had joined the Division in summer 2011, took over the direct supervision of Applicant. The Division Chief testified that this move was to "take that bad chemistry out of the equation and to give [Applicant] a chance to shine . . . ." (Tr. 305.) Furthermore, the Division Chief wanted to ". . . take personality differences off the table and so as to clarify what's at issue, which is the questions about performance." (Tr. 486.)

58. In summer 2012, Applicant began reporting additionally to a second manager in a separate unit. In October 2012, tensions once again heightened between Applicant and the Division Chief. Applicant decided to move forward with his challenge to the FY2012 APR, and the documentation shows that managers also had ground to believe that the scope of Applicant's workplace complaints might range beyond that challenge. In response, the SPM met with Applicant on October 24, 2012, and discussed with him mobility prospects she had explored on his behalf, including the possibility of a formal transfer to the unit with which he had been working informally. The record shows that on November 19, 2012, the SPM and the Department Director met together with Applicant to discuss that mobility option, advising Applicant that they wanted to provide him with a "new environment" in which to succeed. The result of this exchange was that, in December 2012, Applicant formally transferred to the unit headed by that other supervisor.

59. In the first quarter of 2013, yet another individual became head of the unit where Applicant continued to serve. In late 2013, Applicant transferred to an assignment in another part of the Fund. (Tr. 740-741.)

D. Applicant's FY2012 APR (May 1, 2011–April 30, 2012)

60. Applicant's FY2012 APR assessed Applicant's performance for the period from May 1, 2011–April 30, 2012. The FY2012 APR identified as Applicant's Comparative Strengths his "data management skills" and his competencies in "building relationships." The FY2012 APR also identified Applicant's Comparative Developmental Areas; these were "analytical skills" and "oral communications." As to the Overall Assessment for the rating period, the FY2012 APR stated that the year had been "another productive one for [Applicant], and he has again demonstrated his willingness to contribute." At the same time, it noted that he had met his objectives for the year "with considerable oversight and guidance from his supervisor." Applicant's Relative Performance Level, which is to "reflect[ ] the department's assessment of performance relative to that of peers during the assessment period," was rated as "Effective."

61. Applicant's APR discussion with the Division Chief and Deputy Division Chief took place on July 18, 2012, and a few days later, on July 23, 2012, Applicant informed the Division Chief that he would be seeking review of the FY2012 APR through the Fund's dispute resolution system. Thereafter, Applicant sought out the assistance of the Fund's Ombudsperson to resolve the dispute informally, which resulted in his managers' making some revisions to the narrative comments on the APR. On October 16, 2012, Applicant informed his managers that he would proceed with the formal dispute resolution process.

E. Applicant's health condition and recommended modification of his work schedule, beginning August 29, 2012

62. Applicant asserts that following the April 2011 incident of alleged harassment, he "constantly feared another outburst of rage" from the Division Chief and "worried about his job security and career prospects," while maintaining a "grueling work schedule" and navigating "competing demands" of different offices. Applicant submits that the "resulting extreme stress impacted on [his] psychological and physical wellbeing so heavily that he had to seek medical treatment" and that in August 2012 he was diagnosed with a "severe health disorder comprising multiple complex symptoms."

63. Applicant consulted with the Bank/Fund Health Services Department (HSD). Having reviewed reports from Applicant's treating physicians, HSD endorsed their recommendation of a "modified work schedule," according to which Applicant would "work to a 40 hour week for a period of 3 months." This recommendation was communicated initially on August 29, 2012, to Applicant's Division Chief, with copies to the SPM and Department Director, noting that the work schedule modification was considered "important in his doctors[']' recommended treatment plan along with other modalities." The communication closed: "Thank you for your consideration and confirmation of this workplace accommodation."

64. The Division Chief responded by email on the following day: "[T]hanks for letting me know. We will of course make the necessary accommodations." The Division Chief then forwarded HSD's recommendation to the supervisor under whom Applicant was then principally working, noting that "we need to discuss how to manage this jointly . . . ."

65. In December 2012, HSD sent a follow-up note to that supervisor, recommending, in the light of "additional updated medical reports (December 2012)," that Applicant "should continue [to] work to a 40 hour week," as his doctors viewed this schedule as "essential to the ongoing management of [Applicant's] health condition." The modified work schedule was to continue "for an indefinite term," given the "chronic nature of his medical issues." In this note, HSD also communicated to Applicant's managers: "There is clear concern expressed by his care providers that failure to adhere to the above would put [Applicant's] recovery and progress at risk."

66. A few months later, in March 2013, HSD wrote to Applicant's next supervisor to "draw [his] attention to the medical recommendations . . . supported by [Applicant]'s treating doctor to maintain his work schedule at a fixed 40 hour week. This continues to be recommended by HSD."

67. HSD later certified a six-week leave of absence "justified on medical grounds." At the end of that period, Applicant was cleared to return to work and to participate in the CWS. That clearance stated: "By definition as long as [Applicant] continues with the CWS work schedule as defined (80 hours over 2 weeks), he can resume his respective duties." The note concluded: "Micro management of his daily hours to meet this requirement can be facilitated between [Applicant] and his management team."

F. Division Chief's email of October 31, 2012

68. On October 31, 2012, an incident occurred that forms the basis for Applicant's claim that his FY2013 APR was improperly motivated by retaliatory animus for disputing his FY2012 APR through the channels of administrative review.

69. In an interoffice email communication from the Division Chief to the SPM relating to the work of the Division, the Division Chief responded: "Let me check with my always reliable and non-grieving colleague." The record shows that later that day, following a further exchange with the SPM on the substance of her query, the Division Chief forwarded the entire email chain to the Deputy Division Chief, Applicant, and a co-worker.

70. In his Grievance Committee testimony, the Division Chief conceded that he had sent the email, that his comment did indeed refer to Applicant, and that it was a "stupid" and "inappropriate" thing to have done; further, he had "stupidly forwarded this to a larger group of people." (Tr. 343, 490.)

71. The SPM, for her part, testified that she had not noticed the sarcastic reference to Applicant and that she understood the email from the Division Chief as simply letting her know that he would get back to her on the query she had posed. (Tr. 98.) The SPM maintains that only after the Ombudsperson brought the matter to her attention did the comment register with her and that she then reprimanded the Division Chief. (Tr. 1320-1321.)

G. Division Chief's alleged harassment of another staff member in 2013

72. Applicant testified that he had witnessed an incident in 2013, in which the Division Chief confronted another staff member in an angry and physically threatening manner that was very

similar to the way in which the Division Chief allegedly had confronted him in the three incidents of 2011. (Tr. 831-838.)

73. That staff member also testified to this incident during the Grievance Committee proceedings. According to the staff member, in the course of a high-level meeting earlier in the day, the Division Chief had been "very, very rude," interrupting him with a "very angry tone" that he found "demeaning" and "very unprofessional." (Tr. 1207-1208.) That evening, as the staff member was preparing to leave for the day, the Division Chief came to his office and angrily confronted him again, "staring [him] down in [his] face, pointing at [him]." He testified that the confrontation continued for about 30 minutes with the Division Chief "yelling" and the staff member "telling him to back off." (Tr. 1208-1210.)

H. Applicant's complaints to the Fund's Ethics Office (March and May, 2013)

74. On March 6, 2013, Applicant filed a complaint with the Fund's Ethics Office, alleging misconduct by his Division Chief. That complaint was followed on May 6, 2013, by an amended complaint. These complaints recounted the three incidents of April, June, and December 2011 in which the Division Chief allegedly displayed extreme anger towards Applicant in the course of their work-related interactions. The amended complaint additionally included Applicant's account of having witnessed the Division Chief's alleged confrontation in 2013 with the other staff member. Applicant's complaints to the Ethics Office also alleged that the Division Chief had retaliated against Applicant for contesting his FY2012 APR by sarcastically referring to him in the interoffice email of October 31, 2012 as "my always reliable and non-grieving colleague."

I. Applicant's FY2013 APR (May 1, 2012–April 30, 2013)

75. Applicant's FY2013 APR assessed Applicant's performance for the period from May 1, 2012–April 30, 2013. The FY2013 APR identified as Applicant's Comparative Strengths: "building relationships"; "innovativeness"; and "technological/data management skills." Applicant's Comparative Developmental Areas for FY2013 reflected concerns as to his "adaptability" and "strategic thinking." As to "strategic thinking," the APR suggested that Applicant should "focus more on the big picture." Applicant's Overall Assessment for FY2013 indicated that he had taken on a "core assignment in the context of [a] highly complex" project and that he had "dedicated enormous effort" to it. It was noted that the project's objective was "fully achieved, albeit under significant guidance from other team members." Again, as in FY2012, Applicant's Relative Performance Level was rated as "Effective" for FY2013.

CHANNELS OF ADMINISTRATIVE REVIEW

76. On January 17, 2013, Applicant submitted a Request for Administrative Review of his FY2012 APR. In that Request, Applicant challenged the APR rating of "Effective" and the "arbitrary and baseless comments that fail to consider relevant facts, are improperly motivated and biased, and arise from unfair procedures that violate due process." Applicant also complained of an "unchecked environment of harassment, bullying and intimidation," alleging: "My manager's hostility towards me has manifested itself over the course of FY2012, as it had in previous years. On nearly half a dozen occasions, he has harassed me via verbal threats and through highly-charged displays of rage and threatening and hostile physical stances (e.g.,

'getting in my face'). . . . My manager's volatile nature had rendered him all but unapproachable." Applicant also alleged that his Department, "even after agreeing to HSD's notification that [his] doctors recommend a 40 hour work week, . . . attempted to dishonor the agreement, thereby forcing [him] to uncomfortably and defiantly mandate that the Department adhere to its agreement so as to protect [his] health and prevent further physical damage."

77. On July 1, 2013, Applicant filed a Grievance challenging his FY2012 APR as "arbitrary because its ratings and comments on Grievant's performance lack a reasonable and observable basis" and because the assessment was improperly motivated by a manager ". . . who has continuously expressed open bias and hostility towards Grievant and, over an extended period starting in FY2012, had subjected Grievant to harassment and a hostile work environment."

78. In filing the Grievance, Applicant requested that it be stayed pending the conclusion of the Ethics Office investigation into the "same acts by Grievant's manager (in which he harassed, retaliated against and created a hostile work environment for Grievant during the FY2012 APR review and discussion period and that evidence his hostility, arbitrariness and improper motivation in drafting Grievant's FY2012 APR)." Additionally, Applicant asserted that he expected that the Ethics findings "not only could sustain a finding by the Grievance Committee of improper motivation on [the Division Chief's] part, justifying a recommendation to set aside Grievant's FY2012 APR and rating, but the findings also could allow a review by the Committee into whether the Fund failed to timely address Grievant's clearly stated concerns about [the Division Chief's] conduct, and whether Fund officials failed to take effective measures in response." Applicant's Grievance cited the Tribunal's Judgment in *Mr. "F", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005) (awarding compensation for Fund's failures to take effective measures in response to religious intolerance and workplace harassment of which Mr. "F" was the object). In his Grievance, Applicant sought as relief, "[b]eyond the quashing of the unfair FY2012 APR, . . . compensat[ion] for the Fund's utter failure to remedy the unhealthy situation despite Grievant's requests for assistance."

79. On July 30, 2013, the Grievance Committee notified the parties that it would hold the Grievance in abeyance for up to six months while the Ethics Office conducted its investigation.

80. On January 10, 2014, Applicant filed a second Grievance, challenging his FY2013 APR. Applicant alleged that the FY2013 APR included comments of a "negative tone that even exceeded the nature of the baseless and unfair negative performance comments in the previously challenged FY2012 APR." Applicant also alleged that "since his July 1, 2013 Grievance filing, [he] has experienced a tangible change in his treatment by [Department] managers . . . ." Applicant sought consolidation of the two Grievances, subject to the ongoing stay of the initial Grievance.

81. The Grievance Committee consolidated the two Grievances, and it ultimately resumed its proceedings in mid-2014. Applicant, in his pre-hearing submission to the Grievance Committee, appeared to limit his challenge to the two APR decisions. This same approach was reflected in the statement of the issues provided by the Grievance Committee Chair during the pre-hearing conference.

82. The Committee held hearings on the merits of the Grievance in November and December, 2014. The Fund called the following witnesses: Applicant's Division Chief; Applicant's Deputy Division Chief; Applicant's SPM (who was called twice before the Committee); two other staff members having supervisory responsibilities in relation to portions of Applicant's work; and one of his co-workers. Applicant testified on his own behalf and additionally called as witnesses four other staff members from his Department, including a former supervisor.

83. In identifying the issues of the case, the Grievance Committee in its Report and Recommendation of May 1, 2015, concluded that it would consider the allegations of harassment and a hostile work environment "but only to the extent that Grievant alleges that his APRs were either part of or tainted by a continuing pattern of harassment."[9] The Committee addressed *inter alia* the following question: "Did Grievant Suffer from a Hostile Workplace that Prevented Him from Performing at a Level Above Effective?"

84. In responding to that question, the Committee noted that it found the Division Chief's testimony as to nature of three confrontations with Applicant to be "more evasive than persuasive" and that he "purposely withheld details of events." The Committee "largely [found] Grievant credible in his factual description of the three events"; however, it "question[ed] whether [the Division Chief's] conduct was as threatening or intimidating as Grievant now describes it, especially since Grievant did not report the conduct to anyone at the time."

85. Noting that another staff member testified credibly to the "very same kind of misconduct by [the Division Chief] in a completely separate, later incident," the Committee concluded that the Division Chief's conduct "crossed a line from mere disagreeableness to unacceptable anger and shouting." The Committee opined that such conduct was "unacceptable for a Fund supervisor" and that "steps should be taken, if they have not already been taken, to ensure that this type of conduct is not repeated."

86. At the same time, the Committee observed that it did not automatically follow that an objective observer would consider the conduct so "egregious or pervasive" as to create a "hostile work environment." The Committee also concluded that delays in pursuing complaints about the incidents suggested that these incidents of 2011 were "not as egregious as [Applicant] now claims and were not perceived as an impediment to the performance of his work."

87. The Committee made the following findings: "[T]he Grievance Committee finds that Grievant did not prove that [the Division Chief's] three inappropriate shouting episodes in 2011 rose to the level of compensable harassment or created a hostile work environment. Nor can it find that [the Division Chief's] conduct in 2011 so adversely affected Grievant's ability to work that he was unable to rise above an Effective performance rating in FY2012." The Committee concluded that the FY2012 APR decision was "rooted in Grievant's work product, not in a desire to harass Grievant. The APR was not a culmination of earlier acts of harassment."

[9] The Grievance Committee concluded that it was not necessary to decide whether it had jurisdiction to consider challenges to harassment or a hostile work environment that are "not manifested in a concrete personnel decision."

88. As to the FY2013 APR, the Committee found that the Division Chief "played virtually no role in that year's rating" and that Applicant was not subject to a hostile work environment during that rating year.

89. As to Applicant's retaliation claim, the Committee did not find a "sufficient nexus" between Applicant's availing himself of the Fund's dispute resolution system and the FY2013 APR decision so as to sustain a claim of retaliatory motive, given the Division Chief's "very minimal involvement" in that decision. Nonetheless, the Committee concluded that the Division Chief's email message of October 31, 2012, in which he sarcastically referred to Applicant as "my always reliable and non-grieving colleague," was "inexcusable" and evidenced that the Division Chief was "willing to cause harm to Grievant's status in the eyes of his SPM." The Committee concluded that "[s]ending a disparaging email to [the Department's] SPM about Grievant's use of the dispute resolution system can and should be recognized as an intentional effort to stigmatize Grievant in the eyes of both colleagues and a manager involved in the rating process" and was "inconsistent with the Fund's retaliation policy."

90. The Grievance Committee also considered the question whether the FY2013 APR decision was unfairly affected by any failure by Applicant's supervisors to respect the medical restriction on his hours of work. The Committee found that Applicant had not presented sufficient evidence of such failure and concluded that the APR decision was "not the product of overwork or of a failure by his managers to control his work hours."

91. On May 1, 2015, the Grievance Committee recommended that Applicant's Grievances be denied. On June 30, 2015, Fund Management notified Applicant that it had accepted the Grievance Committee's recommendation.

92. On September 30, 2015, Applicant filed his Application with the Administrative Tribunal.

SUMMARY OF PARTIES' PRINCIPAL CONTENTIONS

A. Applicant's principal contentions

93. The principal arguments presented by Applicant in the Application, Reply, and Additional Written Statement, may be summarized as follows:

1. The Fund abused its discretion in taking Applicant's APR decisions for FY2012 and FY2013 by erecting a series of obstacles to the fair evaluation of his performance.

2. The Fund wrongfully limited the number of slots for performance rankings above "Effective."

3. In assessing performance, Applicant's managers unfairly favored staff whose type of assignments and expertise differed from Applicant's. Managers failed to compare Applicant's performance with that of peers.

4. Applicant was held to unreasonable performance standards that others were not.

5. Applicant's managers overworked him and ignored the medical restriction on his hours of work. This abuse also unfairly affected the assessment of his performance.

6. Applicant's Division Chief subjected him to harassment and retaliation, which also improperly motivated the FY2012 and FY2013 APR decisions.

7. Applicant reported incidents of harassment promptly to his SPM, but the Fund failed to respond effectively.

8. Elements of the Grievance Committee process in Applicant's case represent failures of fair process.

9. Applicant seeks as relief:

    a. rescission and removal of his FY2012 and FY2013 APRs;

    b. three years' salary for moral and intangible damages, to "compensate for the Fund's many, repeated and severe infringements of [his] rights in connection with his APRs for FY12 and FY13, including harassment and retaliation"; and

    c. legal fees and costs incurred in pursuing his claims in the Administrative Tribunal and underlying Grievance Committee proceedings.

B. Respondent's principal contentions

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

1. The Fund did not abuse its discretion in taking Applicant's FY2012 and FY2013 APR decisions.

2. The contested APR decisions represented fair and balanced assessments by six different managers. Their assessments were consistent in identifying Applicant's performance strengths and weaknesses.

3. Applicant's challenge to the Fund's system for the allocation of performance ratings above "Effective" is without merit.

4. The evaluation of Applicant's performance was not unfairly affected by the type of work to which he was assigned and had expertise. Nor did his managers hold him to unreasonable performance standards.

5. Applicant was fully on notice regarding his areas for improvement.

6. Applicant's workload was not excessive and did not affect his FY2012 and FY2013 APR decisions. Applicant has not shown that the Fund failed to honor the medical restriction on his hours of work.

7. Neither harassment nor retaliation played a role in the contested APR decisions.

8. The Fund acted promptly and effectively to address Applicant's complaints about his working conditions once it was fairly placed on notice of them.

9. Applicant's complaints relating to the Grievance Committee's review of his case lie outside the Administrative Tribunal's jurisdiction and, in any event, are without merit.

RELEVANT PROVISIONS OF THE FUND'S INTERNAL LAW

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

A. Annual Performance Review (APR) Guidelines

96. The following Guidelines governed the FY2013 APR exercise. The record of the case, including a March 2012 Memorandum from the SPM of Applicant's Department, indicates that these Guidelines also applied to the FY2012 APR.

Attachment 1. Annual Performance Review (APR) Guidelines

I. FY 2013 Exercise

. . . .

III. APR Focus

The APR exercise will continue to place a strong focus on building a positive performance culture with emphasis on staff development, achievement of objectives, and accountability for managing performance. In line with these priorities, and as established previously, managers will be required to add at least one managerial objective in their objectives plan. Managers will also need to identify comparative strengths (normally, two to three competencies or elements within a competency) and at least one comparative development area for each staff member. These should not be based on a relative comparison with peers, but rather a comparative assessment of the staff member's competencies in relation to their current role and/or future assignment. Therefore, even outstanding performers would be expected to have

comparative development areas on which they could focus for performance enhancement or in preparation for future assignments. Development objectives will be located in Talent Plus, under the Development tab, and will be accessible to staff members and their managers for informal APR discussions.

Relative performance levels determination

Relative performance levels should be determined based on: (i) overall contributions against objectives and other assignments during the APR review period; (ii) key strengths and development areas displayed based on the Fund competencies; (iii) impact of contributions to the department and/or the Fund; (iv) complexity of work assignments relative to level; (v) workload; and (vi) performance relative to peers.

These key components of the Fund's APR process provide for a merit-based APR exercise, based on contributions and exemplary behaviors for the year under review. Rotation or purposely allocating top performance levels for promotion for talent review purposes is discouraged. Such practices create inconsistencies across departments and erode the credibility and value of the exercise.

Departments determine the relative performance level for their eligible A1–B3 staff based on the three-level scale and distribution ranges shown in the table below. Distribution ranges should be applied separately for grade groups A1–A8 and A9–B3.

FY 2013 Distribution Ranges for A1—B3 Staff
(In percent)

	Level 1 (Outstanding)	**Level 2 (Superior)**	**Level 3 (Effective)**
Distribution Range	Up to 15	Up to 15	

Departments are responsible for adhering to the Fundwide distribution ranges and the accuracy of the information they provide in Talent Plus. As in last year's exercise, departments will have the option of submitting the final performance level for staff via Talent Plus or directly into PeopleSoft. These relative performance levels should **not** be communicated to staff until the department has received confirmation from HRD.

These distribution ranges are not applicable to contractual employees and relative performance levels should not be assigned to their performance.

Outstanding performance

Key characteristics of outstanding performance could include:

- Top quality work; work that required little review.
- Depth and breadth in many areas of professional expertise.
- Speed and accuracy.
- High initiative and originality, innovation and creativity.
- Strong cooperation, teamwork; significant/exceptional contributions to the work of a group or team or division/department.

Superior performance

It should reflect:

- Consistently high quality work.
- Strong drive for results.
- Innovative and well conceived ideas.
- Depth and breadth in assigned professional areas.
- Strong collaboration with others, key/strong contributions towards divisional/departmental objectives.

Effective performance

It should reflect mostly:

- High quality of work with some supervision/guidance.
- Timely completion of assignments.
- Depth or breadth in professional knowledge.
- Good collaboration with others.
- Willingness to contribute and learn.
- Cooperate with others, make expected contributions to the team or group.

Unsatisfactory Performance

Key characteristics of unsatisfactory performance could include:

- Performance below expected standards in terms of quantity, quality or timelines.

- Failure to demonstrate key competencies expected for the position.
- Lack of breadth of professional knowledge and or initiative.
- Need for substantially more than average supervision and revision of output; inability to learn from mistakes.
- Display of undesirable behaviors or disrespectful behavior(s).

Staff with unsatisfactory performance are not eligible for merit salary increases. Departments should: (i) give the staff member feedback[1] about his/her performance deficiency prior to the APR discussion; (ii) complete a formal annual performance review discussion with the staff member; and (iii) advise the staff member of the "Not Rated" determination.

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[1] Feedback includes: (i) discussion of areas for improvement that were noted in last year's APR which have not improved; (ii) performance concerns discussed during the mid-year review, whether formalized or not; (iii) formal/informal discussions on specific projects either during the project or at the end; (iv) email exchanges or comments on specific tasks pointing out gaps or shortcomings; (v) feedback from other departments/mission chiefs; (vi) pointing out obvious mistakes/errors that impacted the department or division's work; and (vii) setting objectives for FY2014.

CONSIDERATION OF THE ISSUES

97. The Application of Mr. "KK" presents the following issues for consideration. Did the Fund abuse its discretion in taking Applicant's FY2012 and FY2013 APR decisions? Did the Fund fail to respond effectively to Applicant's complaints about his working conditions? Did the Fund fail to fulfill any duty arising from HSD's recommendation that Applicant's work schedule be modified in response to a health condition? Did elements of the Grievance Committee's consideration of Applicant's case represent failures of fair process?

A. Did the Fund abuse its discretion in taking Applicant's FY2012 and FY2013 APR decisions?

98. Applicant's principal claim is that his APR decisions for FY2012 and FY2013 represented an abuse of discretion. Applicant alleges that the process of arriving at those decisions was vitiated by the following factors: (i) the assessment of his performance was improperly motivated by harassment and retaliation; (ii) his work was not evaluated in a fair and balanced manner (including that he was held to unreasonable standards and that the type of work to which he was assigned, and in which he had expertise, was disfavored by his managers); and (iii) his APR ratings were improperly affected by the application of the Fund's policy limiting the number of staff eligible for ratings above the "Effective" level. Applicant additionally contends that the contested APR decisions were wrongfully affected by a failure of his

supervisors to "manage his time in a sustainable way, notwithstanding his formal medical restriction." That latter claim is considered separately below.[10]

99. Respondent, for its part, maintains that the contested APR decisions reflect fair and balanced assessments by a number of different managers, that the assessments were consistent in identifying particular performance strengths and weaknesses, and that Applicant was on notice regarding areas for improvement. The Fund denies that Applicant's work was unfairly evaluated on account of the nature of his assignments or expertise, or that the rating system was unfair to Applicant. The Fund also disputes Applicant's assertions that his workload was excessive and that supervisors failed to heed the medical restriction on his working hours. As to Applicant's allegations that his FY2012 and FY2013 APR decisions were improperly motivated by harassment or retaliation, the Fund maintains that a few "outbursts" by the Division Chief did not amount to impermissible harassment, and, in any event, the APR decisions could not be attributed to that allegedly hostile manager.

(1) What standard of review governs Applicant's challenges to his APR decisions?

100. As with any challenge to an individual decision taken in the exercise of managerial discretion, a challenge to an APR decision will succeed only if the applicant shows that the decision was "arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or carried out in violation of fair and reasonable procedures." Commentary on the Statute, p. 19.

101. This Tribunal has recently reaffirmed, in the context of a challenge to an APR decision, that the "principle of deference to managerial discretion is 'particularly significant with respect to decisions which involve an assessment of an employee's qualifications and abilities,' and 'administrative tribunals have emphasized that the determination of the adequacy of professional qualifications is a managerial, and not a judicial, responsibility.'" *Ms. "GG" (No. 2)*, para. 327, quoting Commentary on the Statute, p. 19. *See also Ms. "JJ", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2014-1 (February 25, 2014), para. 50 and cases cited therein. In cases challenging performance assessments, '"[i]n the absence of clear error or improper motive . . . , the Tribunal will not substitute its judgment for that of supervisors charged with that task.'" *Ms. "JJ"*, para. 51, quoting *Ms. "BB", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-4 (May 23, 2007), para. 108.

(2) Were Applicant's FY2012 and FY2013 APR decisions improperly motivated by harassment or retaliation?

102. Applicant's principal ground for challenging his APR decisions is that the Division Chief allegedly exhibited an "overt personal dislike of [him] that occasionally manifested in episodes of severe harassment and intimidation." In the oral proceedings before the Tribunal, Applicant's counsel referred to an irrational animus on the part of the Division Chief as a factor that unfairly affected the assessment of Applicant's performance. Applicant further contends that the alleged

[10] *See infra* Did the Fund fail to fulfill any duty arising from HSD's recommendation that Applicant's work schedule be modified in response to a health condition?

hostility of his Division Chief was abetted by the Deputy Division Chief and the SPM, and that his FY2013 APR decision was "fatally tainted" by the Division Chief's "retaliatory vindictiveness."

103. The Tribunal considers below the question whether Applicant has raised as a separate claim for relief that he was subject to a hostile work environment to which the Fund failed effectively to respond.[11] It is important to observe, however, that an applicant need not persuade the Tribunal that he was subject to harassment or retaliation in violation of the Fund's internal law in order to show that an APR decision was "improperly motivated" in terms of the Tribunal's standard of review applicable to challenges to discretionary decisions. *See Mr. H.N.M., Applicant v. African Development Bank, Respondent*, AfDBAT Judgment No. 70 (2009), para. 53. "Improper motive" in this context includes taking account of factors not relevant to the assessment of the staff member's professional competencies.

104. Likewise, in order to show that an APR decision was "improperly motivated" by taking account of a staff member's recourse to the Fund's dispute resolution procedures, an applicant need not prove that the APR decision was tantamount to retaliation under the Fund's governing law. In assessing remedies for a pattern of unfair treatment in *Ms. "GG" (No. 2)*, the Tribunal recognized that, having raised complaints alleging misconduct in relation to the treatment of women in her Department, the applicant became "especially vulnerable to her Department Director's unfair treatment"; nonetheless, it stopped short of concluding that Ms. "GG" had substantiated a case of retaliation. *Ms. "GG" (No. 2)*, paras. 455-456.

105. In this case, in support of his claim of retaliatory animus, Applicant points to the Division Chief's email of October 31, 2012, sent two weeks after Applicant had confirmed to him that he would be pursuing his FY2012 APR challenge through the formal channels of review. The Division Chief concedes that he referred sarcastically to Applicant in that email as "my always reliable and non-grieving colleague" and that he forwarded the email to colleagues. Whether or not sending that email may be considered actionable retaliation—an allegation not clearly raised by the Application—the Tribunal accepts that this conduct is relevant to the issue of the Division Chief's attitude toward Applicant during the period encompassed by the FY2013 APR.

106. Moreover, the Division Chief himself referred to "bad chemistry" (Tr. 305) between himself and Applicant. In the Division Chief's view, "[e]verything with [Applicant] is contentious" (Tr. 493), "every encounter is a challenge and a challenge to be managed" (Tr. 496). The Deputy Division Chief observed that "when we had a meeting, there tended to be kind of a degree of tension in the air when both [Applicant and the Division Chief] were present." (Tr. 126.) It is not disputed that these tensions were the reason for Applicant's transfer away from the Division Chief's direct supervision in early 2012. (Tr. 305, 486.)

107. Respondent concedes that the relationship between Applicant and the Division Chief represented a clash of personalities. Furthermore, in its written pleadings, the Fund states that it "does not contest . . . that [the Division Chief] was [as the Grievance Committee had found]

[11] *See infra* Did the Fund fail to respond effectively to Applicant's complaints about his working conditions?

'neither respectful nor courteous during the three incidents'" identified by Applicant. The Fund also submits that it "does not condone [the Division Chief's] sarcasm to [the SPM] regarding Applicant's resort to the dispute resolution system." In its oral pleadings, the Fund associated itself with the Grievance Committee's findings on these points.[12]

108. In *Ms. "GG" (No. 2)*, having held that the applicant had been subject to a pattern of unfair treatment constituting a hostile work environment, the Tribunal considered whether she had established a "causal link" between the hostile work environment and her contested APR decision. The Tribunal concluded that she had not shown that the performance assessment was tainted by that same pattern of unfair treatment.[13] In the instant case, Applicant alleges that his APR decisions for FY2012 and FY2013 have been improperly motivated by the alleged hostility of his Division Chief. In the view of the Tribunal, the Division Chief's testimony and Respondent's admissions provide sufficient ground to conclude that the relationship between supervisor and supervisee was a particularly difficult one. In those circumstances and in view of Applicant's allegation that his APR decisions were improperly motivated by harassment and retaliation, the Tribunal will scrutinize both the role that the Division Chief took in those decisions and the cogency of the evidence supporting them. *See Ms. "GG" (No. 2)*, para. 329.

(a) Has Applicant established a causal link between his Division Chief's alleged hostility towards him and his FY2012 and FY2013 APR decisions?

109. To establish abuse of discretion on the ground of improper motive it is essential that the applicant show a "causal link" between the alleged improper motive and the decision being contested. *Ms. GG (No. 2)*, para. 330 (challenge to APR decision), citing *Ms. C. O'Connor (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2011-1 (March 16, 2011), paras. 172, 178.

110. Respondent maintains that Applicant's FY2012 APR rating of "Effective" was "jointly determined" by the Division Chief and Deputy Division Chief and that the two "collaborated on drafting the APR narrative." As for the FY2013 APR decision, the Fund asserts that the Division Chief "played virtually no role." Rather, says the Fund, it was the head of Applicant's unit who "alone, made the original proposal to grade Applicant 'Effective' for FY2013 and he wrote the original draft of Applicant's APR."

111. Applicant disputes the Fund's rendering of these facts, alleging that the Division Chief had an adverse influence in the decision-making processes on both APRs. Additionally, Applicant alleges that the Deputy Division Chief sought to conceal the Division Chief's role in the FY2013 APR process.

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[12] The Grievance Committee's findings are summarized *supra* at CHANNELS OF ADMINISTRATIVE REVIEW.

[13] Ms. "GG" failed to substantiate that her APR decision represented an abuse of discretion because "(a) there was a reasonable and observable basis for the decision; (b) higher ratings were scarce as a result of the applicable rules and therefore highly rationed by the Department; and (c) Applicant has not shown that the Division Chief, who recommended the contested rating in the first instance, harbored improper motives in taking that decision." *Ms. "GG" (No. 2)*, para. 348.

112. The Tribunal has examined the record of the case and finds as follows. As to the FY2012 APR, it is recalled that the Deputy Division Chief (who had joined the Division in summer 2011) took over the direct supervision of Applicant in early 2012 to "take personality differences off the table." (Tr. 486.) The Deputy Division Chief testified that he and the Division Chief discussed the preparation of Applicant's APR together and that the Division Chief "wrote up basically what [they] discussed and then asked if [the Deputy Division Chief] had any comments and [the Deputy Division Chief] added a few precisions." (Tr. 134.) The Division Chief confirmed this discussion. (Tr. 305-306.) Both indicated that they were of like mind as to the "Effective" rating. (Tr. 134, 306.) The record includes the drafting notes for the narrative comments that were exchanged between the Division Chief and Deputy Division Chief.

113. As to the FY2013 APR, the record shows a range of contributors. Applicant had begun working under a new supervisor in summer 2012 and formally transferred to the unit headed by that individual in December 2012. The documentation of the case also shows that the process of formulating the FY2013 APR originated with the notes of that unit head, who had left the post near the end of the rating period. Thereafter, the former unit head transmitted to the new unit head a draft APR for the new head's "comments and suggestions." Additionally, because Applicant also held responsibilities with the Division during the rating year, the Deputy Division Chief drew up a contribution to the APR reflecting Applicant's work performance there. He circulated the write-up to the Division Chief who replied: "Looks good, please go ahead and share as indicated."

114. Accordingly, the record shows that the contested APR decisions (in particular for FY2013) were not principally the work of the Division Chief but rather were the collaborative undertakings of multiple decision makers. Nor does the record support Applicant's assertion that the head of the unit who was responsible for preparing the FY2013 APR had given the Division Chief and the Deputy Division Chief a "large say" in that decision or that the Division Chief "had his uncomplimentary views of [Applicant] included (under [the Deputy Division Chief]'s name) in the FY13 APR." These facts undercut Applicant's assertion that his APR decisions can be attributed to ill will on the part of the Division Chief. *See Ms. "JJ"*, para. 97 (accusation of improper motive in APR process rebutted by the fact that the conclusion that performance was significantly lacking was reached not by one but by three supervisors), cited in *Ms. "GG" (No. 2)*, para. 347. *See also Ms. "GG" (No. 2)*, para. 334 (no causal link to hostile work environment where record showed that contested APR decision "originated with" another of the applicant's managers who was also its "principal author," rather than with the Department Director who was responsible for pattern of unfair treatment).

115. Accordingly, the Tribunal is not persuaded that Applicant has met his burden of showing a causal link between alleged hostility on the part of the Division Chief and the outcome of his performance assessments for FY2012 and FY2013.

(b) Was there a reasonable and observable basis for Applicant's FY2012 and FY2013 APR decisions?

116. A key question that the Tribunal seeks to answer in considering whether an APR decision represents an abuse of discretion is whether there is a "reasonable and observable" basis for it. *Ms. "JJ"*, para. 58. When an applicant challenges a performance decision on the ground of

improper motive, the "cogency of the evidence in the record of a reasonable and observable basis for that decision will be particularly important." *Ms. "GG" (No. 2)*, para. 335.

117. The Tribunal's jurisprudence reflects this approach. In *Ms. "BB"*, the applicant identified supervisory behavior that she characterized as "hypercriticism" (para. 81) and asserted that she "felt personally targeted" (para. 76). Ms. "BB" contended that her performance rating and merit increase were "adversely and unfairly affected by her working relationship" with the supervisor, including that she was "substantially overworked" and that the performance decisions represented "punishment" for having brought her situation to the attention of the HRD Director via the Ombudsperson. *Ms. "BB"*, para. 105. The Tribunal concluded that the applicant had failed to establish that the contested performance evaluation was "tainted by clear error or improper motive, including ill disposition on the part of her supervisors," given that the decision was "reasonably supported by the evidence." *Id.*, paras. 98, 108. *See also Ms. "C", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1997-1 (August 22, 1997), para. 41 (applicant failed to establish retaliatory motive for non-conversion of fixed-term appointment where documentation of the case supported view that applicant's interpersonal skills fell short of requirements for an indefinite appointment to the staff).

118. Applicant has alleged that improper motive tainted both his "Effective" ratings for FY2012 and FY2013 and the narrative comments that accompanied them. The Tribunal now turns to the question whether there is a reasonable and observable basis for each of these elements of the contested APR decisions. Although Applicant appears to challenge both the performance ratings and the narrative comments, the Tribunal considers that the narrative comments form an integral part of the APR decision and has dealt with Applicant's challenge on that basis.

(i) The "Effective" ratings

119. The governing APR Guidelines[14] establish three performance rating categories for Fund staff for the years FY2012 and FY2013: "Outstanding"; "Superior"; and "Effective." Each of the top two categories is reserved for not more than 15 percent of staff per department, leaving at least 70 percent of staff to be rated "Effective," which was the rating that Applicant garnered for each of the years in question.

120. It bears noting that staff members whose performance is considered "unsatisfactory" will not be placed in a performance level; rather, they will be deemed "Not Rated." *See* APR Guidelines.[15] Applicant's performance, in being rated "Effective," was not considered unsatisfactory.

121. The APR Guidelines state that "Effective" performance will "reflect mostly":

[14] These are set out *supra* at RELEVANT PROVISIONS OF THE FUND'S INTERNAL LAW.

[15] *See also* Staff Bulletin No. 09/08 ("Changes to the Annual Performance Review Process") (November 25, 2009), p. 2.

- High quality of work with some supervision/guidance.
- Timely completion of assignments.
- Depth or breadth in professional knowledge.
- Good collaboration with others.
- Willingness to contribute and learn.
- Cooperate with others, make expected contributions to the team or group.

122. The APR Guidelines explain that assignment of a performance level should be based on the staff member's: "(i) overall contributions against objectives and other assignments during the APR review period; (ii) key strengths and development areas displayed based on the Fund competencies; (iii) impact of contributions to the department and/or the Fund; (iv) complexity of work assignments relative to level; (v) workload; and (vi) performance relative to peers."

123. The Tribunal has observed that under this system, ". . . in which at least 70 percent of staff were to be allocated an 'Effective' rating, that rating category will necessarily describe a broad spectrum of performance." *Ms. "GG" (No. 2)*, para. 345. Furthermore, in an "environment in which upper ratings are highly rationed, it will be difficult for an applicant to show an abuse of discretion." *Id.*, para. 346.

124. In the instant case, the record shows that Applicant's managers were in agreement that his performance fell solidly within the "Effective" range. The Deputy Division Chief explained: "[W]e start from the position of assuming that everyone's effective and then argue above or below. And on the basis of the performance in the year, we just did not see a justification for anything other than effective. There wasn't even - - in my view, it wasn't even a close discussion around the margin between effective and superior." In that manager's view, Applicant ranked "in the bottom half" of the "Effective" category. (Tr. 145.) The SPM likewise testified that she regarded Applicant's performance as "[a]t the lower end" of the "Effective" group. (Tr. 105.) The Division Chief stated that there was "no question whatsoever that [Applicant] was effective, but absolutely nothing more than that effective in that year." (Tr. 337.)

125. When asked in the Grievance proceedings what qualities would merit a performance rating above "Effective," the Deputy Division Chief responded: "[I]t would really have to be something above and beyond what's expected. So that would be, for instance, a high profile exercise that was done with little guidance or some innovation that's improved work processes or taken [the Department] in a positive direction . . . ." (Tr. 133.) The Division Chief referred to "really standout accomplishments, standout efforts." (Tr. 307.)

126. The individual who headed Applicant's work unit in late 2012 and early 2013 testified that even in the absence of a Fund-wide restriction on the distribution of "Superior" and "Outstanding" performance ratings, he would have assessed Applicant's performance "on an absolute basis" as "Effective." (Tr. 623.) For Applicant to have achieved a higher rating, that manager would have "expected more independence" from him in carrying out his responsibilities. (Tr. 626.) Additionally, to be an exceptional performer in Applicant's area of work, he would need to have a "very good ability to abstract from all this noise in the data to see the big themes . . . . [I]t is an area where [Applicant] . . . could improve." (Tr. 627-628.)

127. In the view of the Tribunal, it is also significant that the assigned performance ratings of "Effective" are consistent with the tenor of the narrative comments included in the APRs. *See CD v. International Bank for Reconstruction and Development*, WBAT Decision No. 483 (2013), paras. 20, 26 (sustaining performance rating where the assessment "included feedback which supported" that rating). In this respect, the facts of Applicant's case differ from those of *Ms. "GG" (No. 2)*, in which, on the one hand, the applicant's APR had included "highly positive" narrative comments but, on the other hand, she did not receive one of the ratings reserved for the top 30 percent of performers. *Ms. "GG" (No. 2)*, para. 345. Even in those circumstances, however, the Tribunal was not able to conclude that the applicant had shown an abuse of discretion, given that the "Effective" rating category will "necessarily describe a broad spectrum of performance," that "[m]ultiple factors are to be weighed in assessing both 'absolute' and 'relative' performance and assigning a particular APR rating," and that the Tribunal "will ordinarily not be in a position to second-guess managers' assessments of the relative strengths and weaknesses of various staff members." *Id.*

128. In the instant case, Applicant has not pointed to any fact in the record to support a claim that managers failed to take account of contributions that would have placed him above an "Effective" level of performance. To the contrary, the evidence supports the conclusion that there was a reasonable and observable basis for his "Effective" ratings for FY2012 and FY2013.

(ii) The narrative comments

129. The narrative comments[16] that support Applicant's "Effective" ratings include both positive and negative observations on Applicant's performance. The Tribunal observes that the fact that the narrative assessments on Applicant's FY2012 and FY2013 APRs include shortcomings as well as strengths is fully consistent with the governing APR Guidelines, which advise: "[E]ven outstanding performers would be expected to have comparative development areas on which they could focus for performance enhancement or in preparation for future assignments." That it was the practice of Applicant's Department to follow this guidance was confirmed in the Grievance Committee testimony of one of Applicant's supervisors: "Even, I must say, for those who got an outstanding rating, there was clear language [in their APRs] as to what the . . . relative developmental areas would have been." (Tr. 628-629.)

130. The further question is whether the shortcomings identified in the narrative comments are substantiated in the record of the case, that is, is there a reasonable and observable basis for them?

131. What emerges from both the documentary and testimonial evidence of the case is that Applicant was perceived by multiple supervisors over time as falling short in "seeing the big picture" and drawing broader insights from data. Respondent correctly points out that these key elements of the shortcomings identified in the contested APRs are consistent with Applicant's evaluations over the course of his Fund career. *See Ms. "JJ"* paras. 70, 92 (performance areas

[16] These are summarized *supra* in FACTUAL BACKGROUND.

identified as needing improvement were "consistent with those identified in previous APRs" and "APRs are themselves an important form of feedback"; denying challenge to APR decision).

132. Having reviewed the record of the case, the Tribunal finds that the narrative assessments reflected the input of multiple reviewers and bore none of the indicia of irrationality or arbitrariness that might support a claim of improper motive. The Tribunal concludes that, as with Applicant's "Effective" ratings for FY2012 and FY2013, the comments supporting those ratings find a reasonable and observable basis in the record of the case.

(c) The Tribunal's conclusions on Applicant's allegations of improper motive in the APR decisions

133. Having considered the Division Chief's role in the FY2012 and FY2013 APR decisions and the cogency of the evidence supporting them, the Tribunal concludes that Applicant has not met his burden of showing that these decisions were improperly motivated by the Division Chief's alleged hostility towards him.

134. The Tribunal now turns to the remaining grounds on which Applicant seeks to impugn his APR decisions.

(3) Did the Fund fail to evaluate Applicant's work in a fair and balanced manner?

135. Applicant alleges that he was held to a standard of perfection that his co-workers were not and that the assessment of his performance suffered because his managers disfavored the type of work to which he was assigned and in which he had expertise. Additionally, Applicant contends that he was disadvantaged in the APR process because he lacked peers with whom he properly could be compared. In short, Applicant contends that his FY2012 and FY2013 APR decisions should be rescinded because his work was not evaluated in a fair and balanced manner.

(a) Was Applicant held to unreasonable standards to which others were not?

136. Applicant alleges that his managers applied "unofficial standards" to his work and "discriminated against" him, requiring that he demonstrate "absolute perfection" in his assignments. Applicant contends, furthermore, that he was held to "insincere and mutually conflicting personal definitions of superior performance" and that the performance standards applied to him were "entirely out of sync" with less stringent demands placed on others. Moreover, Applicant claims that a few errors, although representing only a small fraction of his work product, had a disproportionate effect on the evaluation of his performance and therefore deprived him of a fair and balanced assessment.

137. Respondent disputes that Applicant was held to unreasonable performance standards, in particular, that perfection was required of him in all of his assignments.

138. Applicant contends that he had a unique work program within his unit and that a unique standard of performance, absolute perfection, was required for him to rise above average. The Tribunal observes that the nature of Applicant's work responsibilities may have made the accuracy of his work products more salient to the evaluation of his performance than it was to

the evaluation of the performance of some of the other staff members with whom he competed within his Department for APR ratings. This difference, however, does not mean that he was rated unfairly. The tailoring of assessment criteria to the nature of the work performed is a core responsibility of managers. The Tribunal has recognized that the "precise weighting to be given to the assessment of each area of work is an issue upon which the Tribunal will respect the decision of the relevant managers, as it is primarily 'a managerial, and not a judicial, responsibility,' Commentary on the Statute, p. 19, so long as overall the assessment is fair and balanced." *Ms. "JJ"*, para. 87.

139. In the view of the Tribunal, Applicant has not brought to light evidence that he was unfairly held to a standard of perfection in the assessment of his performance so as to establish that the contested APR decisions failed to provide fair and balanced evaluations of his performance.

(b) Was the assessment of Applicant's performance improperly affected by his managers' alleged bias against the type of work to which Applicant was assigned and in which he had expertise?

140. Closely related to Applicant's contention that he was unreasonably held to a standard of perfection is his allegation that the evaluation of his performance was prejudiced by his managers' alleged disfavor for the type of work to which he was assigned and had expertise. That the nature of his assignments and expertise differed from that of others in his unit forms the basis for Applicant's assertion that he lacked peers with whom his performance properly could be compared.

141. Respondent, for its part, maintains that Applicant's managers appreciated the particular skill set that was central to his work and praised his performance in that area.

142. It is clear that comparison with peers is an important component of the performance assessment process. *See Ms. "GG" (No. 2)*, para. 347 (assignment of a performance level is "necessarily a product of comparative assessment in the award of the highest ratings"). At the same time, comparative assessment is not the only determinant of an APR decision. *See* Staff Bulletin No. 09/08, p. 1 ("Changes to the Annual Performance Review Process") (November 25, 2009) ("The relative performance level determination will continue to consider *both absolute performance* (such as contributions against objectives and other assignments, plus competencies displayed), *and relative peer comparisons* (such as relative effectiveness in the position, complexity/difficulty level of the assignments, impact on divisional/departmental results, and workload.)"). (Emphasis added.)

143. The APR Guidelines list "performance relative to peers" as one of six criteria for determination of a performance level, the first being "overall contributions against objectives and other assignments during the APR review period." In addition, in calling for the identification of "comparative strengths" and "comparative developmental areas," the APR Guidelines are explicit that "[t]hese should *not be based on a relative comparison with peers*, but rather a comparative assessment of the staff member's competencies in relation to their current role and/or future assignment." (Emphasis added.)

144. In the view of the Tribunal, Applicant has not shown that either his particular skill set or the nature of his work responsibilities was disfavored by managers or that perceptions of his performance attainments were unfairly influenced by differences between his area of expertise and that of other staff members in his unit. Furthermore, the Tribunal concludes that, in the absence of evidence of irrationality or ill motive, it is within the ambit of managerial discretion to decide who may be considered "peers" for purposes of performance assessment decisions. The Tribunal has emphasized that "[m]ultiple factors are to be weighed in assessing both 'absolute' and 'relative' performance and assigning a particular APR rating." *Ms. "GG" (No. 2)*, para. 345. The Tribunal will ". . . ordinarily not be in a position to second-guess managers' assessments of the relative strengths and weaknesses of various staff members." *Id.*

145. For these reasons, the Tribunal concludes that Applicant has not shown that the Fund failed to evaluate his work in a fair and balanced manner.

(4) Were Applicant's FY2012 and FY2013 APR ratings unfairly affected by the application of the Fund's policy of limiting the number of staff members eligible for ratings above the "Effective" level?

146. Applicant further alleges that his APR ratings for FY2012 and FY2013 were unfairly affected by the application of the Fund's rules limiting the number of staff members eligible for ratings above the "Effective" level. As described above, the governing APR Guidelines impose a constraint on the percentage of staff in each department who will be awarded a "Superior" or "Outstanding" rating in a given year. Each of those top two categories is reserved for not more than 15 percent of staff per department, leaving at least 70 percent to be ranked as "Effective."

147. Applicant states that he does not challenge the "policy" underlying the evaluation system but rather its application in the circumstances of his case. Applicant alleges that "arbitrary caps" were imposed in his particular Division, resulting in an "unduly small allocation of rankings above 'Effective'." Applicant also characterizes the method for allocation of performance ratings as magnifying the effects of the Division Chief's alleged hostility towards him: "[R]ankings were not deduced from a framework with a set number of slots, . . . but rather defined inductively through subjective individual assessments, with managerial jockeying between units for the limited set of higher rankings." Applicant's challenges to the implementation of the rating system amount to a claim that the assignment of his performance levels for FY2012 and FY2013 was not carried out in accordance with fair and reasonable procedures.

148. Respondent, for its part, maintains that the evidence does not support Applicant's contention that he was unfairly denied a "Superior" or "Outstanding" rating as a result of an "arbitrary cap" on these ratings. The Fund asserts that "[b]ecause the distribution of ratings is done at a department-wide level, there may be some variation year-to-year *within* a division or unit as to the number of staff who receive a rating higher than 'Effective,' but at the department level, the fixed percentages are observed." (Emphasis in original.) Moreover, the Fund submits, as to Applicant's ratings, the evidence showed "it wasn't even a close discussion around the margin between effective and superior." (Tr. 145.) "In sum," maintains the Fund, "Applicant's APRs were properly determined through fair and reasonable procedures, and there was nothing arbitrary about the APR process whatsoever."

149. In assessing Applicant's claim, it is important to recall that the governing APR Guidelines state that "up to" 15 percent of a department's staff may be rated "Outstanding"; likewise, "up to" 15 percent may be rated "Superior." Accordingly, these rules do not specify that a full 30 percent of staff must always be rated above the "Effective" range. The Tribunal has previously observed that under this system "upper ratings are highly rationed." *Ms. "GG" (No. 2)*, para. 346. Moreover, it is clear that the constraint on the percentage of upper ratings applies on a Department-wide, rather than a Division-wide, basis. *See* APR Guidelines ("Departments determine the relative performance level for their eligible A1-B3 staff based on the three-level scale and distribution ranges . . . ").

150. The record shows that the process for assigning APR ratings in Applicant's Department tracked a prescribed framework, beginning with supervisors' assessments, followed by "bilateral" meetings between the Department's Front Office and each Division Chief in order to discuss staff members' individual performance, and culminating in the Departmental roundtable at which the performance levels were finally determined.

151. Applicant seeks to show that there was something procedurally defective in the way that APR ratings were allocated in his Department and that he suffered accordingly. However, in the view of the Tribunal, he has not brought to light any such procedural defect.

152. The Tribunal has decided above that there was a reasonable and observable basis for the "Effective" ratings Applicant received for FY2012 and FY2013.[17] It was uniformly the view of Applicant's managers that his performance level for the relevant APR years was properly assigned to that rating category. The evidence also includes testimony that even in the absence of a constraint on the percentage of "Superior" and "Outstanding" performance ratings, Applicant's performance would have been assessed "on an absolute basis" as "Effective." (Tr. 623.)

153. Applicant's contention that he was unfairly relegated to the "Effective" category due to an arbitrary limit on higher ratings in his Division is not sustained. In the view of the Tribunal, the record supports the conclusion that the prescribed process for the allocation of performance ratings was followed in Applicant's case, and he has not shown that he was unfairly disadvantaged by it. Accordingly, the Tribunal concludes that Applicant has not established that his managers failed to carry out the assignment of his performance ratings for FY2012 and FY2013 in accordance with fair and reasonable procedures.

(5) The Tribunal's conclusions on Applicant's challenges to his FY2012 and FY2013 APR decisions

154. Applicant posits an array of theories by which to discredit his APR decisions for FY2012 and FY2013. For the reasons elaborated above, the Tribunal concludes that none of these arguments has been substantiated on the record. Applicant has not shown that his FY2012 and FY2013 APR decisions were (i) improperly motivated by the alleged hostility of his Division Chief, (ii) not determined in a fair and balanced manner, or (iii) unfairly affected by the

[17] *See supra* Was there a reasonable and observable basis for Applicant's "Effective" ratings for FY2012 and FY2013?

application of the Fund's policy limiting the number of staff eligible for ratings above the "Effective" level. Having reviewed the documentation of the case, the Tribunal finds cogent evidence of a reasonable and observable basis for the contested APR decisions. What is persuasive is the consistency of the assessments, the deliberative process by which they were undertaken, and that the ratings and comments were drawn from multiple reviewers. Accordingly, Applicant has not established that "wrongful structural obstacles" vitiated the fair evaluation of his performance. Nor has he shown that no sustainable APR decisions could have been reached in the circumstances of his case. His claim that these decisions represent an abuse of discretion is therefore denied.

155. Having concluded that Applicant has not established that his FY2012 and FY2013 APR decisions were "arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or carried out in violation of fair and reasonable procedures," Commentary on the Statute, p. 19, the Tribunal turns to Applicant's additional claims.

B. Did the Fund fail to respond effectively to Applicant's complaints about his working conditions?

156. As considered above, the principal ground on which Applicant has sought to impugn his APR decisions is that they were improperly motivated by harassment and retaliation on the part of the Division Chief. The Tribunal has rejected that contention. A further question arises: Has Applicant raised as a separate claim for relief that he was subject to a hostile work environment to which the Fund failed effectively to respond?

157. Applicant has had a number of opportunities to state his claims before this Tribunal. In each of his written pleadings, he has closely linked his contentions of harassment and retaliation to the challenge to his APR decisions. This is so, even after Applicant was called upon to address in an Additional Written Statement the issues of the case in the light of the Tribunal's Judgment in *Ms. "GG" (No. 2)*, in which an applicant prevailed on a claim that she was subject to a hostile work environment while nonetheless failing in her contention that her APR decision was tainted by the same pattern of unfair treatment.

158. The Tribunal observes that Applicant seeks, in addition to the rescission and removal of his contested APRs, relief for "moral and intangible damages." In seeking such relief, however, Applicant again tethers his allegations of harassment and retaliation to his challenge to the APR decisions. *See* Application, pp. 62-63 (seeking "moral and intangible damages, to compensate for the Fund's many, repeated and severe infringements of [Applicant's] rights *in connection with* his APRs for FY12 and FY13, *including* harassment and retaliation"). (Emphasis added.) *See also* Application, p. 1 (seeking relief ". . . in connection with the wrongful evaluation of his performance in FY12 and FY13, and with *related abuses that affected the assessment of his performance* during those times"). (Emphasis added.)

159. Applicant requested oral proceedings in part because it would be ". . . useful for the Tribunal to hear and question the parties' counsel when determining the 'real issue in the case and . . . the object of the claim.'" (Applicant's submission of May 10, 2016, quoting *McNeill v. International Bank for Reconstruction and Development*, WBAT Decision No. 157 (1997), para. 26 (internal citations omitted).) Having heard the oral arguments of the parties, the Tribunal is

satisfied that the gravamen of Applicant's complaint is that the APR decisions represented an abuse of discretion. Notably, in the oral proceedings, the two parties differed in characterizing the dispute: While Applicant focused on the question of abuse of discretion, Respondent chose instead to concentrate on rebutting a possible claim that the Fund had failed to respond effectively to a hostile work environment. Respondent mounted a similar defense in its written Rejoinder.

160. Based on Applicant's written and oral submissions, the Tribunal concludes that Applicant (who has been represented by counsel throughout the proceedings) has subordinated any claim for relief on the basis of a hostile work environment to his challenge to his FY2012 and FY2013 APR decisions. His challenge to the APR decisions has failed.

161. The fact that Applicant has not raised, or has not prevailed on, a separate hostile work environment claim is not the end of the matter, however. The Tribunal's jurisprudence recognizes that the Fund's duty to respond appropriately to good faith complaints of harassment inheres ". . . whether or not the Tribunal ultimately concludes that the staff member has been the object of impermissible harassment." *Ms. "GG" (No. 2)*, para. 266. *See Mr. "DD"*, para. 100 (although Tribunal concluded that applicant had not been subject to harassment, it considered "whether . . . liability may be found on the ground that Fund managers failed to take effective action in response to a supervisory situation that Applicant maintained gave rise to great distress and a threat to his health"); *Ms. "BB"*, para. 88, 93 (although "questionable" whether applicant had substantiated claim of harassment, Tribunal concluded that "responsive actions of the Fund mitigate any liability it could be found to have for the inappropriate supervision of Applicant"). It is also pertinent to recall that in cases alleging a pattern of unfair treatment constituting a hostile work environment, it is the Fund's failure to act that is the actionable claim. *Ms. "GG" (No. 2)*, paras. 264, 447.

162. Accordingly, although the Tribunal finds that Applicant has not clearly stated a hostile work environment claim independent of his challenges to the APR decisions, the Tribunal turns now to the question whether the Fund failed to meet its duty to respond effectively to Applicant's complaints about his working conditions.

163. Applicant contends that he complained promptly to the SPM about the Division Chief's alleged hostility towards him. In particular, he submits that he raised with her on June 6, 2011, the incidents of April 27 and June 3, 2011, in which he perceived the Division Chief's conduct to have been physically threatening, but that her response was inadequate. Applicant alleges that the SPM "actively enabled and abetted" the Division Chief's inappropriate conduct by failing to reprimand or "rein in" the Division Chief, to report his hostile conduct to the Ethics Office, or to oversee or coordinate Applicant's work program.

164. Respondent counters that it acted promptly and effectively to address Applicant's concerns about his working conditions once it was placed on notice of them. The Fund maintains that actions to alleviate these concerns ". . . began before Applicant ever raised the issue of alleged harassment or hostile work environment with the senior management team of his Department—and once he did raise these serious concerns with those officials, further action was taken quickly." In particular, Respondent submits that Applicant was ". . . removed from the

direct oversight of [the Division Chief] early in the timeline, and he was subsequently given the opportunity to transfer to another work unit entirely, under new and supportive managers."

165. The following questions arise: When did Applicant bring the difficult relationship between himself and the Division Chief to the attention of Fund officials positioned to assist? Did Fund officials take effective action in response?

166. The parties dispute the extent to which the discussion of June 6, 2011, between Applicant and his SPM put the Fund on notice that he believed that the Division Chief posed a physical threat to him. Applicant testified that, following the incidents of April 27 and June 3, 2011, he was "walking into the office afraid." (Tr. 819.) At the meeting of June 6, 2011, he says, he "told [the SPM] what had happened" (Tr. 820), that is, he told her about both incidents. (Tr. 1046-1047.) He also discussed with her "stress" and "workload," but "one of the main reasons" he went to see her, he testified, was that he felt he was "being threatened and [was] worried for [his] safety." (Tr. 820.) Applicant stated that the SPM promised to look into the matter but did not respond. (*Id.*)

167. The SPM, for her part, denied in her Grievance Committee testimony that Applicant had raised with her in the meeting of June 6, 2011, the matter of the Division Chief's allegedly "yelling or harassing or any kinds of behavior like that." (Tr. 63.) By the SPM's account, "What he told me about his relationship with [the Division Chief] was that . . . he'd been upset because [the Division Chief] had been what he perceived to be disrespectful, . . . had raised his voice [and] . . . wasn't considerate of his feelings . . . ." (Tr. 1252.) The SPM denied that Applicant told her that he felt "physically threatened" (Tr. 1253) or "harassed or bullied" (Tr. 1273-1274).

168. In its oral proceedings, the Tribunal probed with the parties' counsel the question of what the record of the case showed as to the content of the exchange between Applicant and the SPM on June 6, 2011. In the view of the Tribunal, the documentary and testimonial evidence supports the conclusion that Applicant and the SPM explored a range of issues in the meeting of June 6, 2011. Although notes that Applicant prepared in advance of the meeting indicate that he may have sought to raise a concern that the Division Chief posed a "violent threat" to him, his notes following the meeting are consistent with the SPM's testimony that the emphasis of the June 6, 2011, meeting was on mobility possibilities, including a particular opportunity within the Department. According to those post-meeting writings, the two also discussed the SPM's monitoring of Applicant's workload and his need for time away from the office for medical appointments.

169. In the view of the Tribunal, whatever precisely was the content of the exchange between Applicant and the SPM in June 2011, what is significant is that the SPM understood as a result of that meeting that Applicant had significant workplace concerns connected to a difficult supervisory relationship. The record shows that from June 2011 onward, the SPM, and later the Department Director, took steps to respond to these concerns by seeking out new working relationships for Applicant.

170. The SPM testified that following the meeting of June 6, 2011, she "went outside the department [on] a very confidential basis . . . to find opportunities that would be a whole fresh start." (Tr. 1283.) "When that wasn't materializing," she testified, she "looked for other

opportunities within the department." (*Id.*) In connection with supporting mobility assignments, the SPM additionally asked the Division Chief to make amendments to the narrative comments on Applicant's APR. (Tr. 68.) He responded by email in August 2011 that he had revised the APR "to address the concern [Applicant] apparently expressed to [the SPM] that the existing language would hurt his chances for mobility," so that the "tone is more positive." The SPM also indicated that her efforts to place Applicant in another supervisory relationship were hindered by Applicant's circumspection about trying out new opportunities. (Tr. 1283.)

171. Applicant, for his part, confirmed that, following the meeting of June 6, 2011, things "cooled down." (Tr. 988.) In Applicant's words: "[M]y understanding of responsibility was to go to [the SPM]. I did that, and indeed it cooled down for a little while. . . . The next thing happened months later, in December [2011]." (*Id.*)

172. It is also notable, given Applicant's effort to impugn the SPM for not bringing the Division Chief's allegedly harassing conduct to the attention of the Fund's Ethics Office, that Applicant himself did not report the incidents of April and June 2011 (along with the incident of December 2011) to the Fund's Ethics Office until March 6, 2013, that is, nearly two years later. Nor, Applicant testified, did he recall telling anyone within the Fund other than the SPM about these alleged confrontations (Tr. 973) until filing the Ethics complaint. Whatever Applicant's own perceptions may have been of his contentious interactions with the Division Chief, the Fund cannot be found responsible for failing to take measures in response to concerns of which it was not fully apprised. *See Mr. "DD"*, para. 105 ("Fund is not liable for failure to carry out . . . transfer earlier than it did," given that "Applicant himself did not reveal to Fund officials the extent of the psychological problems that he believed to be visited upon him by his supervisor.").

173. Despite the responsive steps that followed the meeting of June 6, 2011, by mid-December 2011, further measures were seen as necessary to respond to tensions in Applicant's work environment, particularly following mid-fiscal year performance feedback. Accordingly, in early 2012, to "take personality differences off the table" (Tr. 486), the Deputy Division Chief assumed direct supervisory responsibility of Applicant. Some six months later, in summer 2012, Applicant began reporting additionally to a second manager in a separate unit.

174. The SPM also testified that Applicant had told her that the Division Chief was "impatient and got frustrated" and that she, in turn, talked with the Division Chief about "ways to manage that." She stated that she also discussed providing Applicant with a "different supervisor-subordinate relationship" as well as opportunities to move to another unit, given that the "[Division Chief]/[Applicant] relationship had really broken down." (Tr. 73-74.)

175. By October 2012, tensions once again escalated. Applicant decided to move forward with his challenge to the FY2012 APR decision through the formal channels of review, and the documentation of the case shows that managers also had ground to believe that the scope of Applicant's workplace complaints might range beyond that challenge. In response, the SPM met with Applicant on October 24, 2012. According to the SPM's written account of that meeting, sent to the Division Chief and unit head, Applicant complained of "unreasonable expectations and a hostile work environment." The SPM discussed with Applicant mobility prospects she had explored on his behalf, including the possibility of a formal transfer to the unit with which he had been working informally. The SPM reported that Applicant saw this move as an "improvement

over the current situation," and she concluded that the "sooner we do the transfer the better." On November 19, 2012, the SPM and the Department Director met together with Applicant. The SPM reported that the Department Director advised Applicant that they ". . . wanted to provide [him] with a new environment with responsibilities that suited his skill set. That it was in all our interests for [him] to succeed." In December 2012, Applicant formally transferred to that unit.

176. The Tribunal has emphasized that the "Fund's internal law looks to the responsibility of managers to refrain from misconduct and to respond effectively to it, 'including stopping harassment in the areas under their supervision.'" *Ms. "GG" (No. 2)*, para. 270 (quoting Harassment Policy, para. 18.) "Fund staff must be able to rely on their supervisors and Department Directors to maintain a workplace free of hostile working conditions." *Id.* In the instant case, unlike in the cases of *Mr. "F"* and *Ms. "GG" (No. 2)*, the Tribunal does not find that the Fund failed to respond effectively to complaints by a staff member about his working conditions. Rather, managers did meet Applicant's complaints and concerns about a supervisor-supervisee relationship that gave rise to considerable distress. These measures are consistent with the responsibilities of managers under the Fund's internal law, as interpreted by this Tribunal. In particular, the SPM took steps to distance Applicant from the supervisory relationship that he identified as the source of the difficult working conditions. *See Ms. "BB"*, para. 93 ("responsive actions of the Fund [including providing the applicant the opportunity to report to different supervisors and later to transfer temporarily to another department] mitigate any liability it could be found to have for the inappropriate supervision of Applicant").

177. In *Ms. "BB"*, para. 93, the Tribunal observed: "[T]he fact that the Fund felt it appropriate to take these actions of itself indicates that the Fund recognized that there was a problem requiring a response. It does not necessarily demonstrate a conclusion by the Fund as to the apportionment of responsibility for it." So too here, without deciding that Applicant has substantiated a hostile work environment claim, the Tribunal is able to conclude that the Fund recognized problems in the supervisory situation to which Applicant was subject and took effective action in response.

178. Having weighed the evidence, the Tribunal is satisfied that the Fund took responsive actions commensurate with the notice it had of Applicant's workplace complaints. These responsive steps accordingly took place in stages. After Applicant pertinently raised the allegation of a "hostile work environment" with the SPM on October 24, 2012, she and the Department Director facilitated his transition to a "new environment." Accordingly, in the view of the Tribunal, Applicant's assertion that the SPM failed to respond to his complaints about his working conditions or that she "enabled" or "abetted" the Division Chief in engaging in inappropriate conduct, does not withstand scrutiny.

C. Did the Fund fail to fulfill any duty arising from HSD's recommendation that Applicant's work schedule be modified in response to a health condition?

179. Applicant contends that his managers overworked him and ignored the medical limitation on his hours of work, which commenced August 29, 2012. Applicant additionally asserts that the Fund's "reckless failure to manage his time in a sustainable way, notwithstanding his formal medical restriction," wrongfully affected the assessment of his performance.

180. Respondent, for its part, maintains that Applicant has not established any failure by the Fund with respect to the management of his workload. Nor did Applicant's managers fail to heed the restriction on his working hours as communicated by HSD. Furthermore, maintains Respondent, Applicant has not shown that issues relating to workload unfairly affected the assessment of his performance.

181. The record is unambiguous that Applicant raised with the SPM concerns about his workload, at least from the time of the meeting of June 6, 2011.[18] The record also shows that managers took steps, even before HSD's notification at the end of August 2012, to lighten Applicant's load, although they did not necessarily agree that his workload was, as he contends, excessive.

182. The SPM testified that at the June 6, 2011, meeting, Applicant had raised the issue of being "overworked" and that she talked to the Division Chief about it. (Tr. 63.) In the SPM's view: "I didn't think his load was too heavy for [his grade level] but I realized that [Applicant] was under pressure to even do what he was being asked to do, that perhaps we should give him a bit of slack in light of the overtime . . . and the difficulties he was having even doing that." (Tr. 81-82.) A year later, in June 2012, in light of workload concerns that Applicant expressed in anticipation of his transition to a new assignment, the SPM coordinated with the Division Chief and the unit head under whom Applicant would be working. (Tr. 82-83.) The SPM "found it unusual that [she] would need to intervene" in such circumstances. (Tr. 84.) In her opinion, Applicant's workload was "manageable" although "above average." (*Id.*) The SPM additionally testified that she talked with managers "half a dozen" times about reduction of Applicant's workload and that "expectations had [been] reduced . . . [and] some of the work was shifted to others." (Tr. 89.)

183. As detailed above,[19] from August 29, 2012, HSD communicated to Applicant's managers its endorsement of the recommendation of Applicant's treating physicians for a "modified work schedule," according to which Applicant would "work to a 40 hour week for a period of 3 months." The work schedule modification was renewed in December 2012 "for an indefinite term," given the "chronic nature of his medical issues." That notice advised: "There is clear concern expressed by his care providers that failure to adhere to the above would put [Applicant's] recovery and progress at risk."

184. The same work schedule modification was confirmed again in March 2013, in a notification from HSD to Applicant's next supervisor. Later, following a six-week medical leave, Applicant was cleared to participate in CWS: "By definition as long as [Applicant] continues with the CWS work schedule as defined (80 hours over 2 weeks), he can resume his respective duties." The note from HSD concluded: "Micro management of his daily hours to meet this requirement can be facilitated between [Applicant] and his management team."

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[18] *See supra* CONSIDERATION OF THE ISSUES: Did the Fund fail to respond effectively to Applicant's complaints about his working conditions?

[19] *See supra* FACTUAL BACKGROUND: Applicant's health condition and recommended modification of his work schedule.

185. Applicant's Division Chief responded promptly to HSD following the initial notification: "We will of course make the necessary accommodations." He then forwarded HSD's recommendation to the unit head under whom Applicant was principally working, noting that "we need to discuss how to manage this jointly, given that I have temporarily outsourced [Applicant] to work almost exclusively on the . . . project under your supervision."

186. The record also shows that Applicant and the Deputy Division Chief exchanged email communications about squaring the work schedule modification with his upcoming assignments. In September 2012, Applicant wrote to the Deputy Division Chief: "[I]t appears to me that the 3 very big Fundwide projects . . . in which I currently participate or am slated to begin my participation will require hours far in excess of the amount recommended by my doctors and [HSD]." He noted: "I continue to be open to conversations about how we may follow the doctors' work hour recommendations while ensuring successful completion of the 3 projects and my other slate of work items." The Deputy Division Chief replied the same day, clarifying expectations for Applicant's role on the three projects. He stated that Applicant's involvement was to be "rather modest" on one project, that they had "spoke[n] about workload earlier in the summer," and that Applicant's responsibilities had already been limited. The Deputy Division Chief closed: "As a final remark, please remember that we ([Division Chief] / [Deputy Division Chief] and [unit head]) are available to clarify any of your perceived workload contradictions, hence you should feel free to approach us for help with prioritizing your tasks if necessary."

187. With regard to the 40-hour restriction, the SPM testified: "We discussed it in the senior management team with the department head. . . . [W]e wanted to make absolutely sure that this was abided by." (Tr. 1267.) In particular, said the SPM, the work schedule modification was discussed with the Division Chief and with the unit head to "make sure that both of them understood this and that both of them coordinated together"; it was also the subject of "periodic discussion" among senior managers. (Tr. 1268.)

188. According to the Division Chief, the way that he accommodated Applicant's work schedule modification was by "taking off of [Applicant's] portfolio work that he wasn't getting to and that might get in the way of that 40-hour week and assigning it to others or postponing it." (Tr. 395.) He also acknowledged: "[W]e don't have time sheets here in the Fund. So I wasn't actively responsible for making sure that he works for 40 hours. I was relying on [Applicant] to tell me if he was in danger of exceeding a 40-hour week and then we would take accommodations." (Tr. 395.)

189. Consistent with the SPM's testimony that the easing of Applicant's workload had been ongoing since before the notification from HSD, the Division Chief, in a note initially apprising the unit head of the work schedule modification, stated that he had ". . . already made big accommodations to [Applicant] (without his asking or acknowledging) by transferring or postponing his other responsibilities . . . ." Likewise, the Division Chief testified that even before the 40-hour restriction had been put into place, "[w]e had already lightened his load so that what he did could be more likely delivered and we reallocated within the division." (Tr. 399-400.)

190. Accordingly, the record shows that implementation of the medical restriction may be understood as a continuation of efforts already underway on the part of Applicant's managers to relieve him of some of the workload pressures that apparently caused him distress in the months

preceding the notification from HSD. In any event, by the end of August 2012, the Fund was on notice that a work schedule beyond 40 hours per week was deemed incompatible with Applicant's health.

191. The parties dispute how responsibility should properly be apportioned for ensuring that the medical restriction was given effect. Applicant contends that he had to "uncomfortably and defiantly mandate that the Department adhere to its agreement so as to protect [his] health and prevent further physical damage." In the Tribunal's oral proceedings, counsel for Applicant referred to a failure to protect Applicant in the light of his medical needs. Respondent, for its part, maintains that the onus is on the staff member to apprise managers of possible violations of a medical restriction: "The responsibility to keep managers informed in the event of a health-related restriction, including during time spent teleworking from home, must indeed rest with the staff member."

192. Counsel for Respondent asserted in the oral proceedings that the Fund has a policy of giving reasonable accommodation to medical needs and that, in Applicant's case, it had understood the notification from HSD as such a request for accommodation. At the same time, counsel also indicated that because the 40-hour workweek was the Fund's standard work schedule, the restriction gave no cause to make fundamental changes in Applicant's work responsibilities. In addition, implementation of the "modified work schedule" was complicated by the use of flexible working arrangements. In the oral proceedings, the Fund identified the question as whether the Fund was effective in its measures to honor HSD's request.

193. The Tribunal probed with counsel what ground might be found in the record of the case for Applicant's assertion that the Fund had failed to honor the medical restriction. In his written pleadings, Applicant raised three instances, arising during fall 2012, in which he contends that managers made demands on him that either caused him to work beyond the 40-hour limit or put him in the position of having to remind them of the requirement. Applicant also kept his own detailed time records but, by his own account, he did not share those records with his managers to advise them of instances when he believed that the medical restriction on his working hours had been infringed. (Tr. 1018-1021.) Nor did the SPM recall any instances of his coming forward to say there was a violation of the 40-hour week. (Tr. 111.)

194. In the circumstances, the Tribunal does not find ground to conclude that Applicant has prevailed on a claim that the Fund failed to fulfill any duty arising from HSD's recommendation that his work schedule be modified to accommodate his health condition. Although Applicant contends that he was overworked, the record shows that managers were taking steps to lighten his workload even before they were advised by HSD that he was to "work to a 40 hour week." Once that restriction was put in place, the evidence shows that Applicant's managers did communicate amongst themselves and with Applicant as to how to implement the working hours restriction in the context of Applicant's multiple work responsibilities and reporting relationships. In the view of the Tribunal, given the nature of Applicant's responsibilities, as well as the Fund's flexible work arrangements (including CWS and teleworking) of which Applicant availed himself, it was reasonable for managers to have responded to the medical restriction on his working hours by making adjustments to his workload. Applicant failed to raise with managers any substantial deviation from the limitation imposed.

195. In the view of the Tribunal, rather than establishing that Applicant's managers displayed "utter disregard" for the medical restriction on his working hours, the record supports the Fund's assertion that those managers in fact "attempted to coordinate his workload amongst themselves and with Applicant." Applicant's allegation that his managers failed to abide by HSD's recommendation that his work schedule be modified in response to his health condition is therefore not sustained.

196. Having concluded that the Fund did not fail to fulfill any duty arising from HSD's restriction on Applicant's hours of work, it follows that the Tribunal does not sustain Applicant's contention that his managers' "failure to manage his time in a sustainable way, notwithstanding his formal medical restriction," wrongfully affected the evaluation of his performance. That medical restriction, in any event, applied only in the period covered by the FY2013 APR; Applicant contends that the alleged infringement of the work hours' limitation "impacted heavily and negatively" on that APR decision. In the oral proceedings, Applicant's counsel suggested that Applicant's performance might have been assessed as being at a lower level because he was working to a standard 40-hour week rather than longer hours.

197. In the view of the Tribunal, Applicant has not shown that either an excessive workload or a diminution in his workload due to the medical restriction wrongfully affected the appreciation of his performance. The Tribunal is mindful of its findings that the "Effective" rating embraced a wide range of performance, that the narrative comments supporting Applicant's ratings were fair and balanced, and that there is cogent evidence of a reasonable and observable basis for the contested decisions. In short, Applicant has not persuaded the Tribunal that the APR outcomes would have been different in the absence of the workload-related issues that he raises. *See CD v International Bank for Reconstruction and Development*, WBAT Decision No. 483 (2013), paras. 30-31 (although performance review omitted "significant fact" that "despite her illness and subsequent injury, the Applicant continued to work from home," failing to give her "credit for her demonstrated dedication to her work and her Unit," on balance the review process was not arbitrary or unfair "because there would still have been a basis" for contested performance rating).

198. In the light of the evidence, the Tribunal concludes that Applicant has not substantiated a claim that the Fund failed to fulfill any duty arising from HSD's recommendation that his work schedule be modified in response to a health condition. Nor does the Tribunal find that Applicant's workload was mismanaged or that his performance assessments were unfairly affected by issues related to his workload.

199. At the same time, the Tribunal is troubled that the Fund has not identified any written protocol for handling restrictions advised by HSD on working hours (or for other forms of reasonable workplace modifications) when a staff member's health condition requires. In its oral submissions in this case, the Fund acknowledged that when HSD intercedes on behalf of a staff member to advise managers that a medical condition requires a modification of working hours, this triggers a duty of reasonable accommodation. The precise contours of this duty, however, have not been spelled out in the written internal law of the Fund.

200. This case illustrates some of the difficulties that may arise in the absence of a transparent policy governing the reasonable accommodation of medical conditions, including in cases of

staff members who report to multiple managers and those who utilize flexible work arrangements. This is not the first case in which Respondent has referred to an (unwritten) duty to make reasonable workplace accommodations of staff members' medical needs. Nor is it the first in which the Tribunal has noted this particular gap in the Fund's written law. In *Ms. V. Shinberg, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-2 (March 5, 2007), the Tribunal observed that the written law addresses the Fund's obligations with respect to staff members who become disabled so as to warrant separation on medical grounds, and it also sets out responsibilities in the case of work-related injuries covered by the Fund's Workers' Compensation policy. Nonetheless, the Tribunal noted, "Respondent has not cited any pertinent internal regulation" governing the duty it had acknowledged in its pleadings to provide injured staff "'to the extent possible, the required work accommodations recommended by medical personnel.'" *Id.*, paras. 72-73 and note 25.

201. The precise contours of the respective responsibilities of staff and managers in relation to the reasonable accommodation of health conditions is a matter for the policy-making organs of the Fund to consider in the first instance, consistent with general principles of fair treatment in the workplace. The Tribunal has observed in a variety of contexts the value of written policies to avoid arbitrariness and promote transparent understanding of rights and responsibilities. *See generally Ms. "EE", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2010-4 (December 3, 2010), para. 178.

202. The Tribunal notes that the Fund's sister institution, the World Bank, has codified the "reasonable accommodation" standard as part of its written internal law. *See BY (No. 2) v. International Bank for Reconstruction and Development*, WBAT Decision No. 481 (2013), paras. 38-39. The World Bank Administrative Tribunal (WBAT) has observed that the "provision of reasonable accommodations for persons with disabilities is widely required in the employment legislation of many countries in order to prevent discrimination on grounds of disability and to promote equal opportunity." *Id.*, para. 40.

D. Did elements of the Grievance Committee's consideration of Applicant's case represent failures of fair process?

203. Applicant's final contentions relate to the hearing of his case by the Fund's Grievance Committee. Applicant challenges several elements of the Grievance Committee's process. First, Applicant seeks to impugn the Grievance Committee's decision denying his request that the Fund disclose the results of the Ethics process associated with Applicant's formal Ethics complaints against his Division Chief. Second, Applicant challenges the Grievance Committee's rulings regarding the questioning of a Fund witness (the SPM) as to alleged "coaching" by Fund counsel. Third, Applicant complains that the Grievance Committee should not have sought medical records during the liability phase of the Grievance proceedings.

204. Respondent urges the Tribunal to reject Applicant's complaints relating to the Grievance Committee process on the grounds that they fall outside of the Tribunal's jurisdictional competence and, in any event, are without merit.

205. This Tribunal has recently reaffirmed that it will not entertain challenges to the Grievance Committee's decisions as to the production of documents and admissibility of evidence. These

decisions do not constitute "administrative acts" within the terms of Article II of the Tribunal's Statute. *See Ms. "GG" (No. 2)*, para. 424 and cases cited therein. The Tribunal has authority under its Statute and Rules of Procedure to order the production of evidence in its own forum, so that "'. . . any lapse in the evidentiary record of the Grievance Committee may be rectified, for purposes of the Tribunal's consideration of the case.'" *Id.*, para. 425, quoting *Mr. "DD"*, para. 166. At the same time, the Tribunal has also confirmed that because it is authorized to weigh the record generated by the Grievance Committee as an element of the evidence before it, *D'Aoust*, para 17, it may consider whether there is any cause to discount that record. *Ms. "GG" (No. 2)*, para. 427.

206. As to Applicant's first contention, Applicant availed himself of the opportunity to seek production of the Ethics documents before the Tribunal, pursuant to Rule XVII of the Tribunal's Rules of Procedure. The Tribunal has denied that request.[20]

207. As to Applicant's second contention, Applicant requested that the same witness be called to testify as part of the Tribunal's oral proceedings in this case. The Tribunal concluded that the issue of "coaching" by the Fund of the SPM's Grievance Committee testimony, on which Applicant sought her further testimony, had been raised in the Grievance proceedings and the Tribunal did not consider it material to the disposition of the case.[21] To the extent that Applicant also requests that the "Tribunal issue guidance on the scope (or absence) of privilege with respect to witness-coaching, and especially as regards cases where a witness is recalled after coaching to recant earlier testimony," he raises a systemic issue relating to the Fund's dispute resolution system. The Tribunal has held that such matters are for the consideration of the policy-making organs of the Fund, consistent with ensuring that "all steps in the administrative review and Grievance Committee processes are fair to staff members." *Ms. "GG" (No. 2)*, para. 430.

208. As to Applicant's third contention, the Tribunal confirms that it will not revisit the Grievance Committee's evidentiary decisions.

209. Finally, having perused the extensive record of the case, the Tribunal concludes that Applicant has not raised any ground for the Tribunal to give less than the usual weight to the record of the Grievance Committee proceedings.

CONCLUSIONS OF THE TRIBUNAL

210. For the reasons elaborated above, the Tribunal has concluded as follows: First, Applicant has not established that his APR decisions for FY2012 and FY2013 represent an abuse of discretion. In particular, Applicant has not shown that "wrongful structural obstacles," including the alleged hostility of his manager, vitiated the fair evaluation of his performance; the Tribunal finds cogent evidence of a reasonable and observable basis for the contested APR decisions. Second, the Tribunal has considered whether the Fund failed to respond effectively to Applicant's complaints about his working conditions; the Tribunal concludes that Applicant has not substantiated such claim. Third, Applicant has not shown that the Fund failed to fulfill any

[20] *See supra* PROCEDURE: Applicant's requests for production of documents.

[21] *See supra* PROCEDURE: Applicant's request for oral proceedings.

duty arising from HSD's recommendation that his work schedule be modified in response to a health condition; nor does the Tribunal find that Applicant's workload was mismanaged or that his performance assessments were unfairly affected by issues related to his workload. Fourth, Applicant has not raised any ground for the Tribunal to give less than the usual weight to the record of the Grievance Committee proceedings in this case. Accordingly, the Application must be denied.[22]

[22] Applicant filed a Revised Request for Costs on July 19, 2016. Rule XI provides, on an "exceptional" basis, that the President of the Administrative Tribunal may admit additional pleadings. Given the Tribunal's conclusion that the Application is denied and, accordingly, that Applicant is not entitled to any relief, the President decided that there were no exceptional circumstances to warrant the admission of Applicant's Revised Request for Costs.

DECISION

FOR THESE REASONS

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

The Application of Mr. "KK" is denied.

Catherine M. O'Regan, President

Jan Paulsson, Judge

Edith Brown Weiss, Judge

/s/
Catherine M. O'Regan, President

/s/
Celia Goldman, Registrar

Washington, D.C.
September 21, 2016