

**ADMINISTRATIVE TRIBUNAL OF THE
INTERNATIONAL MONETARY FUND**

JUDGMENT No. 2019-2

Mr. “OO”, Applicant v. International Monetary Fund, Respondent

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ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

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Mr. “OO”, Applicant v. International Monetary Fund, Respondent

INTRODUCTION

1. On February 25, 2019, 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 Andrés Rigo Sureda and Jan Paulsson, met to adjudge the Application brought against the International Monetary Fund by Mr. “OO”, a former fixed-term staff member of the Fund.¹ Applicant was represented by Ms. Marie Chopra, James & Hoffman, PC. Respondent was represented by Ms. Diana Benoit and Ms. Juliet E. Johnson, both Senior Counsels in the IMF Legal Department.

2. Applicant challenges the non-conversion of his fixed-term appointment to an open-ended appointment. The Fund’s internal law governing during the relevant period provided that the decision to convert a fixed-term appointment may be taken only if the staff member “. . . meet[s] the performance requirements, demonstrate[s] potential for a career at the Fund, and meet[s] the Fund’s staffing requirement.” GAO No. 3, Rev. 7, Section 3.02.1.3. The Guidelines for Conversion of Fixed-Term Appointments elaborate: “Conversion to open-ended status depends on the following criteria: the departmental assessment of the staff member’s performance during the fixed-term appointment; the individual’s long-term potential for a successful career with the Fund; and the department’s and institution’s staffing needs.” In this case, the Fund decided that although Applicant met “performance” requirements, he did not meet the second two criteria for conversion, namely, “career potential” and “staffing need.”

3. Applicant challenges the Fund’s reliance on the latter two criteria, given the context of his recruitment through the Fund’s B-Level Diversity Hiring Initiative (Initiative). The Initiative provided central funding for a limited number of three-year, fixed-term appointments at the B-Level (i.e., managerial level) for staff members recruited from underrepresented regions of the world. The central funding covered the cost to a department of employing, for three years, an Initiative recruit in a job that was not part of the department’s complement of full-time equivalent (FTE) positions. In the circumstances, Applicant asserts, the Fund may not ground the non-conversion decision on either Applicant’s alleged lack of “career potential” or the Fund’s

¹ The case was initially assigned to a panel composed of Judge Catherine M. O’Regan, President, and Judges Jan Paulsson and Francisco Orrego Vicuña. In April 2018, the panel deliberated on the Application, but it did not render a final Judgment on the matter. In October 2018, the Tribunal learned of the death of Judge Orrego Vicuña. Following consultation with the other members of the Tribunal, and in the absence of any rule governing in the circumstances, the President decided to designate another member of the Tribunal to complete the panel to decide the case. The parties were so advised.

lack of “staffing need.” Applicant submits that these are “false” reasons for the contested non-conversion decision. The “real” reason for that decision, Applicant argues, is that the department into which he was recruited failed to “plan for his absorption,” an obligation that Applicant says arises from the terms of his recruitment through the Initiative and his “Effective” performance during the course of the fixed term.

4. Applicant additionally contends that he was not given a fair opportunity to demonstrate suitability for career employment, in particular, because his assignments purportedly did not match the terms of reference (TOR) on which he was hired. Applicant further submits that he was not put on notice of alleged shortcomings that figured in the assessment of his “career potential,” nor given an opportunity to remedy these alleged shortcomings. Applicant also contends that the non-conversion decision was discriminatory in treating him differently from staff not hired through the Initiative, as well as less favorably than others who were hired under the same Initiative.

5. Applicant seeks as relief: (a) rescission of the non-conversion decision and removal of all related records from his personnel file; (b) three years’ salary for lost employment; (c) compensation for losses of his pension and retirement benefits, including that he be placed on Leave Without Pay in the Interest of the Fund in order to continue making pension contributions until reaching early retirement age in 2020; (d) an additional one year’s salary for “appalling stress” and damage to his reputation and family; and (e) 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.

6. Respondent, for its part, maintains that in adopting the Initiative and providing supplementary budgetary resources to departments to finance the recruitment of B-Level staff from underrepresented regions for a three-year period, Management did not override the Fund’s rules governing the conversion of fixed-term appointments; the Fund was under no obligation to “absorb” Applicant at the conclusion of the fixed term. Moreover, the Fund submits, it did not abuse its discretion in grounding the non-conversion decision on two “equally sufficient and independent” reasons, namely, Applicant’s lack of “career potential” and the Fund’s lack of “staffing need.” The first reason, says the Fund, was supported by managers’ consistent assessments that Applicant lacked the leadership and managerial competencies required to succeed at the B-Level. The second reason was that there was no “staffing need” for a B-Level Advisor in Applicant’s Department at the time of the non-conversion decision. Respondent additionally maintains that Applicant was given fair notice of perceived shortcomings and adequate opportunity to demonstrate his suitability for open-ended employment. The Fund also denies Applicant’s contentions that the non-conversion decision was improperly motivated by bias on the part of his managers or that he was discriminated against as a consequence of his recruitment through the Initiative.

PROCEDURE

7. On June 16, 2017, Applicant filed an Application with the Administrative Tribunal. The Application was transmitted to Respondent on June 23, 2017. On June 26, 2017, pursuant to

Rule IV, para. (f), the Registrar circulated within the Fund a notice summarizing the issues raised in the Application. On August 7, 2017, Respondent filed its Answer to the Application.

8. Following the filing of the Fund's Answer and prior to its transmittal to Applicant, the Tribunal² took a series of preliminary decisions that were notified to the parties on August 23, 2017. These decisions were to grant Applicant's request for anonymity, to deny Applicant's requests for production of documents, and to issue a request to Respondent for documents and information. These matters are discussed more fully below.

9. On September 6, 2017, Respondent submitted its Response to the Tribunal's request for documents and information, which, together with the Fund's Answer, was transmitted to Applicant for his Reply. Applicant requested, and, following an opportunity for the Fund to comment on that request, was granted an extension of time to submit the Reply, which was filed on November 6, 2017. The Fund's Rejoinder was submitted on December 7, 2017.

A. Applicant's request for anonymity

10. In his Application, Applicant requested anonymity pursuant to Rule XXII³ of the Tribunal's Rules of Procedure, as well as an "interim order" on that request. Respondent supported Applicant's anonymity request and additionally asked that Applicant's managers also be afforded anonymity in the Tribunal's Judgment (*see* below). Respondent did not comment in its Answer on the question of the timing of the Tribunal's decision on Applicant's request for anonymity.

(1) Request for an interim decision

11. Applicant sought an "interim order granting his request in advance of [the Tribunal's] Judgment on the merits of his Application" so that he might elect to withdraw his Application in

² The Tribunal was composed of Judge Catherine M. O'Regan, President, and Judges Jan Paulsson and Francisco Orrego Vicuña.

³ Rule XXII (Anonymity) provides:

1. In accordance with Rule VII, Paragraph 2(j), an Applicant may request in his application that his name not be made public by the Tribunal.
2. In accordance with Rule VIII, Paragraph 6, the Fund may request in its answer that the name of any other individual not be made public by the Tribunal. An intervenor may request anonymity in his application for intervention.
3. In accordance with Rule VIII, Paragraph 5, and Rule IX, Paragraph 6, the parties shall be given an opportunity to present their views to the Tribunal in response to a request for anonymity.
4. The Tribunal shall grant a request for anonymity where good cause has been shown for protecting the privacy of an individual.

the event that anonymity were denied. As noted, the Fund did not express any view in this case on the question whether a decision on anonymity should be taken in advance of the Judgment on the merits.

12. The Tribunal has been presented once before with a request for an “interim” decision on anonymity so that an applicant might elect to withdraw his application if anonymity were denied. *See Mr. “HH”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2013-4 (October 9, 2013), paras. 8, 10-15. In that case, the Tribunal noted that Rule XXII is silent as to the timing of the Tribunal’s decision on anonymity. It does not expressly provide for such interim decisions; neither does it prohibit them. *Id.*, para. 12. In granting the request of Mr. “HH” for an “interim” decision, the Tribunal commented: “The benefit of deciding an anonymity request in advance of rendering a judgment on the merits—so as to permit the applicant to withdraw his application if anonymity is denied—is that, without such a mechanism, applicants who strongly value anonymity and whose anonymity requests have merit may be unnecessarily and inappropriately deterred from seeking recourse to this Tribunal.” *Id.*

13. In *Mr. “HH”*, the Tribunal also determined that it would take a “case-by-case approach” to deciding whether a decision on anonymity should be issued in advance of rendering a judgment on the merits, after affording the Fund an opportunity to respond. *Id.*, para. 13. (If an applicant does not expressly seek an interim decision, the Tribunal will ordinarily defer its decision on an anonymity request until it has had the opportunity to review the case on the merits. *Id.*, para. 14.) The Tribunal noted that this approach permits it to decide whether anonymity is appropriate in the light of the nature of the evidence to be brought out in the judgment; there may also be cases in which the Tribunal’s decision on the merits may bear upon the decision whether to grant anonymity. *Id.*

14. In *Mr. “HH”*, para. 15, the Tribunal concluded that the “potential outcome of the case on the merits was not regarded as dispositive of the anonymity request and the Tribunal was able to assess the nature of the evidence that would be relevant to its Judgment in the case.” Accordingly, the Tribunal acceded to the request of Mr. “HH” for an interim decision on anonymity. Similarly, in the instant case, the Tribunal was able to assess, following the filing of the Application and Answer, the nature of the evidence that would be brought out in the Judgment and to conclude that it was not necessary to await the Judgment on the merits of the case to decide the anonymity request.

(2) Request for anonymity

15. The Tribunal’s decision on the merits of Applicant’s anonymity request is informed by its decision in *Mr. “HH”*. Mr. “HH” too challenged the non-conversion of his fixed-term appointment. The Tribunal concluded that in order to protect the candor of the performance assessment process, Mr. “HH” should be afforded anonymity, given that the “core of the evidence reviewed in this Judgment . . . relates to Applicant’s job performance, which, in the view of his managers, fell short of that required for conversion to a career appointment with the Fund.” *Mr. “HH”*, paras. 42-43; *see also Ms. “JJ”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2014-1 (February 25, 2014), para. 14 (challenge to annual performance review); *Mr. “KK”, Applicant v. International Monetary Fund, Respondent*,

IMFAT Judgment No. 2016-2 (September 21, 2016), para. 16 (challenges *inter alia* to annual performance reviews); *Ms. “NN”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2017-2 (December 11, 2017), para. 29 (although annual performance assessment not at issue, managers’ perception of applicant’s performance was key factual element underpinning issues of the case). Applicant asks the Tribunal to “follow its practice of granting anonymity in non-conversion cases and cases where a staff member’s performance is at issue.”

16. Notably, Respondent emphasizes that what is at issue in the instant case is not Applicant’s “performance” but rather the assessment of his “career potential” as a B-Level staff member. Nonetheless, it states that the “assessment of Applicant’s career potential was contained in the fixed-term monitoring/annual performance review documentation, and the issues are discussed side by side.” The Fund accordingly supported Applicant’s anonymity request in order to protect the confidentiality of the performance assessment process.

17. Given that the assessment of Applicant’s “career potential” is based on the material in the fixed-term monitoring/annual performance review documentation and that the Tribunal has previously afforded applicants anonymity in cases in which the core of the evidence involves assessment of job performance, the Tribunal considered it would be appropriate to grant Applicant’s request for anonymity. On August 23, 2017, the parties were so notified.

18. Applicant has also requested that the Tribunal in its Judgment “to the extent possible, protect from disclosure any factual information which could lead to his identification.” When presented with similar requests in the past, the Tribunal has responded that it will endeavor to be “‘circumspect’ in its dissemination of personal information relating to an applicant and others, but that its circumspection ‘. . . must, as necessary, yield to the primary obligation on the Tribunal to give sufficient reasons for its decision.’” *Mr. “LL”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2019-1 (April 5, 2019), para. 23, quoting *Ms. “GG” (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2015-3 (December 29, 2015), para. 77. The Tribunal adopts the same approach in this Judgment.

B. Respondent’s request for anonymity of other persons

19. Respondent, for its part, has requested anonymity for “all of the managers who provided candid feedback to Applicant with respect to their assessment of his competencies and potential for success at the Fund.” The Tribunal, in accordance with its practice of maintaining the anonymity of persons other than applicants, will accede to that request as well. *See Ms. “GG” (No. 2)*, para. 76 and cases cited therein.

C. Applicant's requests for production of documents

20. Pursuant to Rule XVII,⁴ Applicant made five requests for production of documents. With respect to Requests Nos. 2-5, the Fund responded that it had provided Applicant with all emails and other documents responsive to those requests prior to the Grievance Committee hearing. The same requests had been included in the Grievant's Pre-Hearing Statement. As to Request No. 1, which Applicant made for the first time before the Tribunal, the Fund urged that it be denied on the ground that the requested document was irrelevant to the issues of the case.

21. The Tribunal denied each of Applicant's requests for production of documents. The parties were so notified on August 23, 2017. These decisions are elaborated below.

(1) Applicant's Request No. 1

22. Applicant's Request No. 1 sought the Vacancy Selection Form for a Division Chief (DC) vacancy for which Applicant unsuccessfully competed prior to his recruitment for the fixed-term appointment at issue in this case. Applicant does not challenge his non-selection for that earlier post. Rather, he sought production of the Vacancy Selection Form to "prove that the Fund deemed him suitable for a B-Level position at the Fund, including for a Division Chief vacancy, and will reinforce his arguments that he should have been seriously considered for Division

⁴ Rule XVII (Production of Documents) provides:

1. The Applicant, pursuant to Rule VII, Paragraph 2(h), may request the Tribunal to order the production of documents or other evidence which he has requested and to which he has been denied access by the Fund. The request shall contain a statement of the Applicant's reasons supporting production accompanied by any documentation that bears upon the request. The Fund shall be given an opportunity to present its views on the matter to the Tribunal, pursuant to Rule VIII, Paragraph 5.

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

3. The Tribunal may, subject to Article X, Section 1 of the Statute, order the production of documents or other evidence in the possession of the Fund, and may request information which it deems useful to its judgment, within a time period provided for in the order. The President may decide to suspend or extend time limits for pleadings to take account of a request for such an order.

(continued)

Chief vacancies in [his Department] which arose during his fixed-term employment and for which he was not even considered.”

23. The Fund responded that it does not dispute Applicant’s statements that he ranked second among the candidates for the earlier vacancy or that, based on the interview and testing for this position, he was “deemed suitable for a B-Level position at the Fund.” The Fund maintains that the Vacancy Selection Form for that earlier position is not, however, probative of any issue disputed in the instant case. The Fund has also produced documentation showing that during the course of his fixed-term appointment, Applicant did apply, but was not selected, for a different DC vacancy in his Department.

24. It is not disputed that Applicant placed second in the earlier competition and that his impressive showing in that selection process led to his later recruitment.⁵ The question is whether documentation of the earlier selection process is probative of any issue before the Tribunal. Applicant’s argument is that the requested document would provide evidence to rebut the Fund’s assertion that he lacked potential for a B-Level career, thereby supporting his allegation that the Fund used lack of “career potential” as a pretext for the non-conversion decision. The Fund counters that a candidate’s strong showing in an earlier selection process does not demonstrate how that individual will perform in another job. The Fund submits that it is the assessment, during the course of Applicant’s fixed-term appointment, of his potential for a career with the Fund that is at issue in the instant case.

25. On August 23, 2017, the Tribunal denied Applicant’s Request No. 1 on the ground that the requested document would not be further probative of the issues of the case, in light of the Fund’s admission that Applicant ranked second in the earlier competition and that this was a basis for his recruitment through the Initiative. Documents already in the record, for example, Applicant’s human resources test results associated with the earlier vacancy selection process and correspondence that followed it, seeking to recruit Applicant to other positions at the Fund, also support Applicant’s contention that, prior to his hire, the Fund regarded him as suitable for a B-Level position. The issues of the case concern the assessment of Applicant’s “career potential” during his fixed-term appointment, as well as the Fund’s “staffing need” at the time of the non-conversion decision.

(2) Applicant’s Request No. 2

26. Applicant’s Request No. 2 sought “[a]ll documents dated before October 2012 which constitute guidelines given to managers who were considering recruiting staff through the B-Level Diversity Hiring Initiative and/or the extent to which such hires were expected or required to compete for open positions.” Applicant submits that this Request relates to his contention that the “reason he was not converted . . . (after the central funding provided to [his Department] through the Diversity Hiring Initiative had ended), is in part because the Fund failed to make clear to hiring managers the expectation that those staff hired under the Initiative should be given

⁵ See *infra* FACTUAL BACKGROUND.

equal opportunities with other staff, should be mentored if necessary, and that staff should be trained to recognize the advantages of increasing diversity.” Applicant additionally states: “Guidelines which the Fund may – *or may not* – have given to managers . . . regarding the Diversity Initiative will demonstrate the extent to which the Fund met its obligation in this regard or whether the failure was entirely that of the individual managers. *It may well be that there are no such documents at all; if so, the Fund should so state.*” (Emphasis added.)

27. The Fund responded that it does not have “so-called ‘guidelines’ regarding recruitment of staff under the Diversity Hiring Initiative, because . . . these individuals were recruited as regular fixed-term appointees.” It has included with its Answer background materials relating to the Initiative.

28. In cases in which the Fund asserts that it has no documents responsive to a request under Rule XVII, and the applicant has not proffered evidence suggesting that such documents exist, the Tribunal has denied the request on the ground that the applicant has not shown that he has been denied access to the requested documents. *See, e.g., Mr. “LL”, para. 12.*

29. On August 23, 2017, the Tribunal denied Applicant’s Request No. 2 on the ground that Applicant had not proffered evidence suggesting that the Fund had in its possession responsive documents.

(3) Applicant’s Request No. 3

30. Applicant’s Request No. 3 sought “[a]ll documents, including but not limited to emails, memoranda, notes of meetings or telephone conferences, or correspondence, dated between May 2011 and October 2012, that discuss the business needs of [Applicant’s Department] that resulted in the recruitment of [Applicant].” Applicant asserted that he requested documents relating to the Fund’s business needs at the time of his hire so that the Tribunal may assess “whether there were indeed changed business needs at the time of his non-conversion, or whether this was a fabricated justification” for the challenged decision.

31. The Fund responded that it previously had provided Applicant with “all documents and communications regarding the development of the Terms of Reference for the B-Level Advisor position, which established the business need for this role.”

32. On August 23, 2017, the Tribunal denied Applicant’s Request No. 3 on the ground that Applicant had not proffered evidence suggesting that the Fund had in its possession additional documents responsive to the request.

(4) Applicant’s Request No. 4

33. Applicant’s Request No. 4 sought “[a]ll documents, including but not limited to emails, memoranda, notes of meetings or telephone conferences, or correspondence, dated between October 29, 2012 and July 15, 2015, which discuss or estimate [Applicant’s] career potential at the Fund. If no such documents exist, the Fund should so state.” Applicant asserted that he “does not know what investigation [his Department] management took—if any—to enable them to

make [the] determination” that he lacked the “career potential” necessary for conversion to an open-ended appointment.

34. The Fund responded that the determination that Applicant lacked the requisite “career potential” was based on “managerial assessments of his leadership and strategic competencies that were conducted during the Fixed-Term Monitoring Process” and that it has previously provided “all documentation, both informal (email communications) and formal assessments reflecting Applicant’s lack of career potential.” The record of the case includes documentation of Applicant’s fixed-term monitoring process.

35. On August 23, 2017, the Tribunal denied Applicant’s Request No. 4 on the ground that Applicant had not proffered evidence suggesting that the Fund had in its possession additional documents responsive to the request.

(5) Applicant’s Request No. 5

36. Applicant’s Request No. 5 sought “[a]ll documents which discuss or demonstrate the change in business needs which made [Applicant] ineligible for conversion to a regular open-ended position in the Fund, including information on the specifics of the change(s) and the date(s) of such change(s).” This Request additionally stated: “If no such documents exist, the Fund should so state.” This request was to seek support for Applicant’s argument that the Fund’s reasons for the non-conversion decision—including that the Department had no need for a B-Level Advisor at the time of that decision—are without foundation.

37. The Fund responded that it had “provided Applicant all documents and communications that addressed the lack of a staffing need for a B-Level Advisor in his position at the time” of the contested non-conversion decision. Additionally, Respondent stated that this point was addressed in testimony before the Grievance Committee.

38. On August 23, 2017, the Tribunal denied Applicant’s Request No. 5 on the ground that Applicant had not proffered evidence suggesting that the Fund had in its possession additional documents responsive to the request.

D. Tribunal’s requests to Respondent for documents and information

39. On August 23, 2017, the Tribunal, pursuant to Rule XVII, para. 3, issued to Respondent the following requests for documents and information, which it deemed useful to its consideration of the issues of the case:

1. Please provide any additional documents that governed the fixed-term appointment and conversion process during the period of Applicant’s employment. Did the Fixed-Term Monitoring Guidelines, referred to in *Mr. “HH” v. IMF*, Judgment No. 2013-4, para. 88, govern during Applicant’s employment? If so, please provide these.

2. Please explain, and provide any additional documents showing, the Fund's policies and practices governing the recruitment of individuals through the B-Level Diversity Hiring Initiative ("Initiative") to the extent that these differed from policies and practices governing recruitment of staff generally.
3. With respect to his opportunity for conversion to an open-ended appointment, Applicant alleges that he was treated differently from others recruited through the Initiative insofar as others either "stayed in the same position or transferred laterally. No others had to compete for another position." . . . Did the requirement that Applicant compete for a new position in order that his fixed-term appointment be converted to an open-ended appointment (a) differ from the policies and practices applied to others recruited through the Initiative? (b) differ from the policies and practices applied to other fixed-term staff members generally?

40. The Fund submitted its Response on September 6, 2017. Together with the Fund's Answer, this submission was transmitted to Applicant for his Reply.

E. Oral proceedings

41. Article XII of the Tribunal's Statute provides that the Tribunal shall ". . . decide in each case whether oral proceedings are warranted." Rule XIII, para. 1, of the Rules of Procedure provides that such proceedings shall be held ". . . if . . . the Tribunal deems such proceedings useful." Neither party has requested oral proceedings in this case.

42. The Tribunal had the benefit of the transcript of oral hearings held by the Fund's Grievance Committee, at which Applicant and eight (current and former) senior officials of his Department testified. The Tribunal is ". . . authorized to weigh the record generated by the Grievance Committee as an element of the evidence before it." *Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1996-1 (April 2, 1996), para. 17.

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

FACTUAL BACKGROUND

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

A. The Fund's B-Level Diversity Hiring Initiative

45. Applicant's challenge to the non-conversion of his fixed-term appointment arises in the context of the Fund's B-Level Diversity Hiring Initiative (Initiative), which was announced to the staff in November 2010. A key objective of the Initiative was to recruit external candidates from underrepresented regions by offering departments specialized funding from central

resources for a limited time. In a Message to the staff of November 3, 2010 on “Measures to Increase Diversity at the Fund,” the Deputy Managing Director noted that “we still have some way to go to meet the benchmark of 22 percent for the share of senior staff from underrepresented regions by 2014 (namely, Africa, East Asia, the Middle East, and Transition Countries).” Among the steps announced was that “[f]or underrepresented regions, a number of concrete measures—such as strengthened career development support and additional budget for external hires—will be introduced to level the playing field and maximize the potential of existing staff to advance to senior levels, and to facilitate recruitment of top-quality external candidates.”

46. This announcement echoed findings and recommendations transmitted to Fund Management by the Director of the Human Resources Department (HRD). (Memorandum from HRD Director to Deputy Managing Director, “Measures to Improve Diversity at the Fund,” October 18, 2010.) That Memorandum noted: “For underrepresented regions, the proposed strategy also aims to support career development and promotions of internal candidates, while recognizing that achieving the respective 2014 benchmarks will require additional external recruitment.” It proposed a “two-pronged strategy that (i) maximizes the potential of internal diverse candidates for advancement to the B-level, and (ii) strengthens external recruitment of B-level staff from underrepresented regions.”

47. The following specific measures were proposed: shortlisting of diverse staff (i.e., including at least one “competitive diverse candidate,” i.e., a national of an underrepresented region or a woman, in the shortlist of candidates for A15-B3 vacancies); strengthened career development support (to “maximize the potential of our high-potential diverse A14/A15 staff, so that they can compete successfully for B-level vacancies,” including a pilot mentoring program and enhanced feedback from the Review Committee and hiring departments to shortlisted but unsuccessful candidates); additional budget for external hires (*see below*); and strengthened external sourcing capacity (expanding HRD sourcing capability to maintain a pipeline of B-level candidates from underrepresented regions).

48. Central to the instant case was the following undertaking, which provided the budgetary resources to hire Applicant on a three-year fixed-term appointment:

Additional budget for external hires. This measure is designed to provide an incentive to hiring departments, facilitate the recruits’ onboarding and integration, and mitigate the impact on promotion prospects of internal non-diverse staff (since, with additional slots for the external recruits, more internal staff can still be promoted into “regular” vacancies). A department that recruits a B1-B3 staff from an underrepresented region will receive a budget adjustment for the FTE [Full Time Equivalent] cost, for a period of 3 years. The cost would be about \$4½ million a year The budget would be distributed on a first-come/first-serve basis to the hiring departments, based on the date of the vacancy selection submitted to the RC/SRC [Review Committee/Senior Review Committee].

As further explained in an HRD intranet notice, the Initiative budget provided for “up to four external hires a year (Fund-wide).” The way the program worked was that a “department that recruits a B1-B3 staff [member] from an underrepresented region will receive an additional B-level position, with a corresponding budget adjustment equal to the salary cost of the external recruit, for a 3-year period.” (HRD intranet notice “Measures to Improve Diversity at the Fund.”)

B. Applicant’s recruitment

49. Applicant, a national of a country underrepresented among the Fund’s staff, came to the attention of senior managers in one of the Fund’s departments when he applied as an external candidate for a Division Chief (DC) vacancy in his area of expertise. Although another candidate was selected for that post, Applicant ranked second in the competition. The Department Director and another senior official (who oversaw activities in the relevant area of the Department) followed up by letter to tell Applicant that they thought he was an “impressive candidate” and that they were “keen to find a way to engage [him] here at the Fund.” The officials proposed “two possible options for [Applicant’s] consideration”: (i) a Grade A15 Deputy Division Chief (DDC) position, i.e., as deputy to the DC position for which Applicant had just competed unsuccessfully, a position falling within the branch of the Department dedicated to work in Applicant’s area of expertise; or (ii) a Grade B1 Advisor position in the Department’s Front Office, a position involving a mix of work falling under the direction of the Department Director and the senior official overseeing activities in Applicant’s specialty area. The Advisor position was to be created and funded through the B-Level Diversity Hiring Initiative; it was this position that Applicant ultimately accepted.

50. The recruitment letter advised that, given the Fund’s salary structure, the DDC position at Grade A15 (the highest grade of the non-managerial ladder) and the Advisor position at Grade B1 (the entry level of the managerial ranks) would not differ in terms of remuneration. The “real difference,” Applicant was told, “will be in job content with some difference in tenure as well.” In terms of job content, the DDC position was described as “operational,” while the Advisor position was to be “more strategy and projected based.”

51. As for selection procedures, the letter explained that for appointment to the DDC post, Applicant would have to compete with other candidates but “would not require any additional interviews or tests.” By contrast, Applicant’s appointment to the Advisor position would not be subject to a competition; however, the Department would be “obliged to submit a request” to the Fund’s Review Committee for managerial appointments.

52. Regarding the future of the two positions, the senior Department officials advised Applicant: The DDC position would be “ongoing’ after a probationary period of 3 years (this is standard for Fund staff appointments).” By contrast, the Advisor position would be “. . . of a limited duration – up to 3 years with the expectation of absorption into the department. During that time, you would be able to apply for other positions.” Applicant was further advised that the “Advisor position is funded from a special resource pool created to increase the IMF’s amount of diverse B-Level staff at the leadership levels.”

53. The recruitment letter additionally stated: “We know you were specifically interested in [a] . . . Division Chief position [in Applicant’s area of expertise]. We expect that another vacancy at that level will arise in the next 12 to 18 months and that you will be a stronger candidate if you have increased exposure to the IMF that either of these options would afford.” (*Id.*) Terms of Reference (TOR) for each post were appended.

54. Applicant responded promptly to the Department’s outreach, stating that, having reviewed the options, he would like to be considered for the DDC position. Approximately a month later, however, Applicant contacted the same official by email to say that, although he remained interested in the DDC post, he also had an interest in the Advisor job and wondered if its responsibilities might be revised. In the intervening time, a series of communications had taken place.

55. The Department’s Senior Personnel Manager (SPM) explained in her Grievance Committee testimony that the Assistant Senior Personnel Manager (ASPM) had reached out to Applicant to “see whether or not he could explain exactly what these [grade] levels mean and whether he could persuade [Applicant] to reconsider and look at the B-level position -- advisor position.” (Tr. I, 41, 97.) The SPM testified that the Department sought to persuade Applicant to take the Advisor post because it would “count towards the department’s B-level [diversity] benchmark levels” and was also a more senior position. The SPM emphasized that “diversity leadership is what we were trying to address overall.” (Tr. I, 40-41, 95-96.)

56. Applicant, for his part, testified as to how communications with Department and HRD officials persuaded him to pursue appointment to the Advisor position. (Tr. III, 89.) In particular, he said that he understood it to be advantageous to take the Advisor position because “you get hired on a B level at this position, and this basically – this is basically a mechanism where you could transfer to other positions later.” (Tr. III, 93.) According to Applicant, the way it was explained to him was that “we have already evaluated you. You are suitable for a B-level position. We are hiring you on a B-level position. The moment an opportunity becomes available, you will be transferred there.” (Tr. III, 94.)

57. Following these communications, Applicant called the senior Department official involved in the recruitment, who oversaw work in Applicant’s area of expertise. That official reported to other managers that Applicant “wondered if there is scope to change the job specs to be more of an advisor rather than a project manager.” The official responded to Applicant that they could be “flexible about the duties.” Notably, Applicant’s newfound interest in the Advisor post caused the senior official to comment by email to the Department Director and SPM: “I remain concerned that having him work as an advisor will not give us a good handle on his capacity to operate as a Division Chief.”

58. Negotiations ensued to revise the TOR for the Advisor job. The SPM later communicated by email to Applicant: “[W]e have made some minor but fundamental changes. . . . [T]he description now emphasizes the primary role of [work in Applicant’s area of expertise] as opposed to the (now secondary) emphasis on responsibilities in other areas of the department, and the projects under your portfolio will entail the implementation of the strategic plan rather than mostly the development or conceptualization of the plan.”

59. Despite the SPM's characterization of the revised TOR as representing "fundamental changes," including to "emphasize[] the primary role" of work in Applicant's area of expertise, a comparison of the original and revised TOR reveals that the changes amounted to little more than a reversal in the order of the paragraphs. Both the original and revised TOR indicated that the Advisor position was to support projects under both the Department Director and the senior Department official who oversaw work in Applicant's area of expertise. Moreover, the revised TOR (just as the original TOR), stated that the "major project under his portfolio" would be a project that was for the most part outside of Applicant's specialty area. In his Grievance Committee testimony, Applicant acknowledged that the responsibilities of the Advisor position represented a 50/50 split of his assignments between his area of expertise and other activities of the Department: "[W]hat I was told is that this advisor position, as you saw in the terms of reference, has two parts. It has the ["major project"], and it has [the area of his expertise] assignments. And I was told that I will be working 50 percent of my time on this ["major project"] program, and the other 50 percent will be on [the area of expertise] assignments. And what I was told is that I should look at this as an opportunity where I can expose my abilities, not just on the [area of his expertise] side of the department, but also on the non-[area of his expertise] side of the department." (Tr. III, 92.) He also acknowledged that the Department Director had told him that the "major project," although not tailored to Applicant's particular expertise, was nonetheless a "very important program for the department, a huge initiative, something . . . that is important for the Fund altogether." (*Id.*)

60. Following agreement on the revised TOR, the SPM proposed to the Fund's Review Committee for managerial appointments Applicant's appointment as a B-Level Advisor in the Department's Front Office, via a memorandum titled "B Level Diversity Hire." Referencing the HRD Director's Memorandum of October 18, 2010, "Measures to Improve Diversity at the Fund," the SPM stated that the Department sought to "access the provision made by the Fund to reach our B level diversity benchmarks by 2014." In support of Applicant's candidacy, the SPM identified both his area of subject matter expertise and his years of managerial experience outside of the Fund. The SPM noted that Applicant's performance on the human resources assessment tool (completed in connection with his application for the earlier DC vacancy) had demonstrated "great breadth and depth of leadership experience," including "[a]daptability, motivating performance as well as negotiating and influencing" and "impressively high leadership capabilities." The SPM's memorandum to the Review Committee concluded: "We believe [Applicant] has the potential to perform in a number of different roles; we expect to have a vacancy at the division chief level in the next 20 to 30 months. Thus prospects for absorption are encouraging and we are confident that we will be able to also satisfy this required aspect of the diversity funding when the time comes."

61. A few weeks later, HRD communicated to Applicant a "Conditional Offer of Employment and Summary of Terms" for a "three-year fixed term" appointment. This communication attached the Fund's Guidelines for Conversion of Fixed-Term Appointments,⁶ advising that the Guidelines "detail the factors that the Fund takes into consideration in making a

⁶ These are reproduced *infra* at RELEVANT PROVISIONS OF THE FUND'S INTERNAL LAW.

determination to convert an appointment from fixed term to open ended.” Approximately a month later, Applicant received and endorsed his letter of appointment. He commenced employment a few months thereafter.

62. In advance of Applicant’s arrival, the SPM announced the appointment through a Department-wide email. The announcement identified Applicant’s nationality and stated that his recruitment was the “result of the successful outcome of our participation in the Fund’s B-Level Diversity Program,” which “offers central Fund resources specifically for external hires from any of the four underrepresented regions.” The announcement referred to Applicant’s many years of “global field and managerial experience” in his area of expertise and indicated “two of the areas of major focus” for Applicant upon his arrival at the Fund. The two areas were the “major project” identified in the TOR, as well as another. In her Grievance Committee testimony, the SPM explained that she felt it was important to be “transparent” about the fact that Applicant was hired through the Initiative. (Tr. I, 135, SPM.) She also observed that “after the announcement went out, there was sort of questioning . . . – well, managers told me the staff had been questioning why, what was this – they didn’t see the need for this job. It wasn’t a real job.” (Tr. I, 133, SPM.)

C. Applicant’s placement and supervision within the Department

63. The Department into which Applicant was hired had two broad areas of responsibility. A different senior official led each branch of the Department. The Department’s organizational chart depicts Applicant’s Front Office Advisor position as residing between the two branches. Uniquely, Applicant was assigned to perform duties in both areas of the Department. (Tr. II, 84, senior official.) This approach mirrored the statement in Applicant’s TOR that the position supported both the Department Director and the senior official who oversaw work in Applicant’s area of expertise.

64. In his Grievance Committee testimony, the Department Director explained how the Department’s division of authority affected Applicant’s supervision. “[F]rom a personnel perspective,” he said, Applicant reported through the ladder leading to the Department Director. (Tr. II, 195, Department Director.) Nonetheless, when it came to assignments on the side of the Department reflecting Applicant’s area of expertise, managers from that branch supervised the work. (Tr. II, 125, 135, Deputy senior official.) Applicant’s formal performance assessments were completed by supervisors reporting to the Department Director (i.e., “Supervisor 1” for the first 16 months of Applicant’s appointment and “Supervisor 2” thereafter), with input from managers within the other branch who supervised Applicant on particular assignments. Responsibility for the non-conversion decision was allocated in a similar manner. (Tr. II, 213, 215, Department Director.) (*See below.*)

65. Notably, by the time Applicant began his employment, the senior Department official who oversaw the branch of the Department tasked with work in Applicant’s area of expertise—and had been instrumental in his recruitment—had retired and a new senior official had taken charge of that program. The new official testified that she did not think she had ever seen Applicant’s TOR. Nor was the new official aware, she testified, of an expectation that Applicant would be “absorbed” into the Department at the end of the fixed term or of discussions on that

topic. (Tr. II, 45-47.) This left the new official with “some frustration” that Applicant had been assigned to work in the Department and with no clear idea of the assignments Applicant would be performing: “I felt that because I wasn’t involved in . . . what actually brought [Applicant] here . . . and the deliberation around what he would do, what the expectations were in bringing him there, and in what he would do, and that he wasn’t in [the area of the Department headed by that official].” (Tr. II, 83-84.) “If there is this big push to do [that area of work],” she said, “why wasn’t he in [that area of work]?” (Tr. II, 84.) Following her predecessor’s retirement, the official observed, “[t]here really wasn’t anybody who seemed to know exactly what the plan was [for Applicant’s work in the area under the official’s supervision and in which Applicant had expertise].” (*Id.*) The SPM, for her part, observed that the new senior official was “not happy . . . [and] felt that she had inherited something . . . she was not a party to.” (Tr. I, 137.) The senior official also noted that she was faced with having to “come up with initiatives that had enough substance for a B level person to be in charge of” (Tr. II, 85.)

D. Applicant’s first year

(1) Applicant’s assignments in first year

66. Applicant began work in late October 2012. During the first year of his appointment, Applicant was assigned to work principally on the “major project under his portfolio,” as described in his TOR, a project that did not directly engage his subject matter expertise. Applicant’s work objectives, however, also included “managerial and operational” responsibilities that were to come from the other side of the Department, that is, the branch tasked with work in Applicant’s area of expertise.

67. Supervisor 1 testified that he met with Applicant on a weekly basis and recognized that “there is a lot that one acquires over the course of one’s career that you are missing when you come in at a senior-level position” and that he considered that it was a “very important part of [his] job” to make sure Applicant “had the resources or any questions that were raised [by him], I would try to answer.” (Tr. I, 153-154.)

68. As a staff member on a three-year fixed-term appointment, Applicant’s performance was assessed at six-month intervals, culminating in a decision at the 30-month mark as to whether to convert the fixed-term appointment to an open-ended appointment. Performance assessments were taken in July (Annual Performance Review (APR)) and December (Mid-Year Review) of each year.

69. In June 2013, about six weeks before the finalization of Applicant’s first (i.e., 6-month) performance assessment, Supervisor 1 approached the senior official and deputy who oversaw the Department’s work in Applicant’s area of expertise, seeking to discuss Applicant’s FY2014 objectives: “It is critical,” Supervisor 1 wrote, “that we integrate [Applicant] more into the workings of the department . . . I am unable to spend the amount of time with [Applicant] that should be and I would like to make sure that there is regular interaction from the [area of Applicant’s expertise] side of the house.”

(2) Applicant's 6-month assessment - FY2013 APR (July 2013)

70. In July 2013, Supervisor 1 submitted Applicant's Fixed-Term performance monitoring/FY2013 APR, which provided a largely positive assessment. Under "Comparative Strengths," Applicant was said to have "good managerial qualities in a number of areas," including "good communication skills," which he used to "draw out important subtexts and understand how a project will succeed." He was also seen to "gather and integrate facts from varied sources and bring to bear his analytical skills." (Fixed-Term Performance Monitoring/FY2013 APR.)

71. As for "Comparative Developmental Areas," Applicant was advised to "focus on competencies such as driving for successful outcomes" and "being diligent in achieving agreed upon milestones." Supervisor 1 concluded: "I have every confidence that [Applicant] is capable of delivering in this regard." Supervisor 1 also noted that, in their July 2013 performance discussion, he and Applicant had "talked candidly about identifying an assignment that would present a wider array of his skills." Applicant's "Relative Performance Level," which is to reflect a "department's assessment of performance relative to that of peers during the assessment period," was rated "Effective."

(3) Applicant's 12-month assessment - FY2014 Mid-Year (December 2013)

72. In December 2013, Supervisor 1 provided Applicant with his FY2014 Mid-Year Review, which was to be treated "more as a one year evaluation." In describing Applicant's "Strengths," the assessment reported that Applicant's "collegial style" had been effective in building relationships with several different stakeholder groups. Issues had arisen that "called on his skills in collaboration and communication to be tested." Supervisor 1 found Applicant's "analytical abilities to be solid." This was so in "areas where he has a strong background . . . and in areas that are new to him. He is able to identify problems and develop solutions as needed." (FY2014 Mid-Year Review.)

73. As for "Areas for development," the assessment noted that Applicant had been "reticent to jump in where others have greater seniority or more history with a project" and recommended that he should "assert himself and his ideas." Additionally, it was recommended that Applicant "find additional ways to exhibit his oral and written capabilities."

74. The review assessed performance on three objectives. It reported that Applicant had made "solid progress" on the first two, both of which related to the "major project under his portfolio." That project had been his "primary focus . . . during the course of the first year at the Fund," with Applicant spending the "majority of his time" on it. The third objective, which was to "provide managerial and operational support throughout the reporting period," referred to work in the branch of the Department responsible for activities in Applicant's area of expertise. Supervisor 1 noted that Applicant had ". . . not had the opportunity to deliver as he had originally hoped. This is largely because . . . colleagues [in this area of the Department's work] have not engaged him in specific and deliverable assignments. We are attempting to rectify this for the remainder of FY14." Applicant, for his part, also expressed dissatisfaction with his role thus far

at the Fund. These expressions became more pronounced in the second year of Applicant's appointment.

E. Applicant's second year

75. During Applicant's second year, managers in the branch of the Department that oversaw work in his area of expertise proposed an assignment for him. As elaborated below, Applicant took issue with the process of design of the project, as well as the actual design (in particular, his reporting line), questioning elements of the project as "against professionalism and . . . best practices." Ultimately, the proposed assignment was withdrawn and a different one was provided from that side of the Department.

76. It was also during this period, in February 2014, that Applicant's initial supervisor (Supervisor 1) retired and a different supervisor (Supervisor 2) assumed responsibility for managing Applicant "from a personnel perspective" and for completing his performance appraisals. (Tr. II, 195, Department Director.) The drafting of Applicant's 18-month performance assessment (FY2014 APR) became a source of controversy during Applicant's second year. Additionally, during the year, Applicant applied, but was not shortlisted, for a DC vacancy in the Department. These developments are described below.

(1) Efforts to expand Applicant's assignments and disagreement over proposed assignment

77. In a series of meetings in fall 2013, Applicant expressed to managers his dissatisfaction at not yet being provided assignments in his area of expertise, as agreed in his TOR. On November 4, 2013, Applicant wrote to the senior official and deputy who oversaw work in that branch of the Department, seeking a "meeting . . . at the earliest possible to clarify my role and agree on the assignments I will be working on [in that area]." Applicant later described that meeting in an email to Supervisor 1: "I expressed to them my concerns about the fact that I have not yet started any [assignments in my area of expertise] . . . [and] that they do not seem interested in providing me with important assignments that are up to the role."

78. However, by September 2013, discussions about expanding Applicant's role were already beginning to bear fruit. Proposed descriptions for two new assignments were circulated among managers. Both of these assignments emanated from the side of the Department that focused on Applicant's subject matter expertise. One of those proposed assignments was soon to become the subject of controversy between Applicant and managers. That controversy extended through the winter of 2013–2014.

79. On March 14, 2014, Applicant wrote directly to the deputy in the branch of the Department responsible for work in Applicant's area of expertise, copying the senior official, as well as Supervisor 2, to register his dissatisfaction with the proposed assignment: "I am extremely concerned that I am being asked to endorse and assume responsibility for decisions that were not thoroughly vetted and that are against professionalism and . . . best practices." Additionally, Applicant asserted: "As for the reporting line, I previously expressed strong

objections on the proposal as it was not in accordance with my terms of reference and does not give me the autonomy and independence required for working with all stakeholders”

80. More generally, Applicant complained in that correspondence about a “piecemeal approach of defining what I am supposed to do at the Fund rather than clarifying my overall role and responsibilities,” maintaining that he had “not been given assignments that are appropriate for the role for almost a year and a half now” Applicant sought “agreement on all my assignments based on the terms of reference against which I was employed.”

81. Applicant’s expressions of dissatisfaction were not well received by managers. The deputy to the senior official who oversaw work in Applicant’s area of expertise reported to that official by email that he thought the fact that Applicant “continues to be dissatisfied with the assignments” was “rather surprising . . . because he continues to be given some of the highest visibility assignments we have”

82. The tenor of the disagreement, especially as to the particular proposed assignment, became heated. The deputy commented in an email to other managers: “[I] [w]as thinking that perhaps it is better to let this cool down over the weekend. I have to admit that I was not very happy with his continued resistance to the proposed reporting relationship which has been discussed several times now, nor with his choice of words and in particular ‘against professionalism.’” The deputy additionally observed that Applicant considered that “expectations that were set with him” had included “be[ing] part of the senior management team” and “working on strategic, cost-cutting issues.” The deputy reported that he had tried to convey to Applicant that he should look at “this and other assignments as opportunities to prove his value to the organization.” The disputed assignment, in the deputy’s view, was to include “strategic decisions that have yet to be made,” as well as a presentation that “offer[ed] an opportunity for visibility with management.” The deputy additionally had sought to explain to Applicant the rationale for the proposed reporting line.

83. Ultimately, despite the fact that the senior official and deputy did not consider Applicant’s concerns to be well-founded, they decided he would not be involved in the disputed project and would be given an alternate assignment.

84. In his Grievance Committee testimony, the deputy took the view that Applicant’s biggest concern about the proposed assignment was “with the reporting relationship”; in the deputy’s assessment, that concern “did not reflect well” on Applicant. (Tr. II, 96, 98.) The deputy thought that the disputed assignment would have provided Applicant with a valuable opportunity to showcase his skills, as it involved work on a “critical task.” (Tr. II, 100.) As for Applicant’s assertion that participation in the project would have required him to “assume responsibility for decisions that were not thoroughly vetted and that were against professionalism and . . . best practices,” the deputy responded that “from our perspective, they were vetted and in fact developed in cooperation with the consultant who was actually top notch in that area.” (Tr. II, 105.)

85. The senior official overseeing work in Applicant’s area of expertise characterized Applicant’s objections to the proposed assignment as a “philosophical disagreement.” (Tr. II,

19.) As such, Applicant's differing views "would've added more to the conversation about what we should do." The senior official allowed that she shared some of the same concerns about the direction of the project. In her view, Applicant's "involvement would've added more because he had a different perspective than the people that were already working on it." (Tr. II, 20.) Ultimately, however, the discord around the assignment, including that Applicant "[c]ould never get past the reporting relationship" issue, meant that they were "pushing a very heavy rock uphill, and it didn't make sense to continue to pursue that." (Tr. II, 21-22.) In the view of the senior official, Applicant's rejection of the assignment resulted in a "missed opportunity for [Applicant] to show his leadership and initiative." (Tr. II, 28.)

(2) Application for DC position

86. Two DC vacancies arose in the Department during the course of Applicant's fixed term. In March 2014, less than eighteen months into his fixed-term appointment, Applicant applied for one of these positions. He was not shortlisted. Applicant did not apply for the other vacancy when it arose. (Tr. I, 44-47, SPM.) Applicant testified that he did not apply for the second vacancy because the senior official who oversaw work in Applicant's area of expertise, as well as his direct supervisor, both made clear to him that he didn't "stand a chance" of being selected because he lacked the relevant professional background. (Tr. III, 202-203.) (Tr. II, 29-33, senior official.)

(3) Applicant's 18-month assessment - FY2014 APR (July 2014)

87. A few months after the proposed new assignment had been withdrawn, and as part of the lead up to Applicant's 18-month performance assessment in July 2014, the SPM contacted HRD to report that Applicant was "not doing well at all." The SPM sought guidance as to how Department concerns about Applicant's suitability for conversion to open-ended status should be communicated in the upcoming FY2014 APR.

88. The drafting of Applicant's FY2014 APR soon became a source of contention, with Applicant seeking to negotiate its terms with Supervisor 2. Of particular concern to Applicant was reference in the Draft APR to the possibility that his fixed-term appointment might not be converted at the end of the term. A draft stated: "Looking forward, *in order for [Applicant] to become open-ended*, he would have to significantly improve and deliver in the areas noted above." (Emphasis added.) Another draft indicated: "Looking forward, *especially when considering any conversion decision from fixed term to open ended staff*, it will be extremely important for [Applicant] to have demonstrated that he can deliver in the areas noted above." (Emphasis added.)

89. Ultimately, in the final version of the FY2014 APR, the issue of possible non-conversion was tempered as follows:

Looking forward, *[Applicant] needs to improve and deliver in the areas noted above*. In particular, he will need to exhibit the leadership to ensure that new issues are resolved as soon as possible. This will require renewed impetus within the ["major

project”] program on prioritization of emerging challenges, adapting tactics and new approaches to ensure successful outcomes, and motivating others to achieve desired objectives. [The Department] is providing opportunities for [Applicant] to demonstrate leadership on the [“major project”] program and other initiatives *All of these areas will be important performance inputs for the coming Fixed-Term conversion decision.*

(Fixed-Term Performance Monitoring/FY2014 APR.) (Emphasis added.)

90. The FY2014 APR identified as “Comparative Developmental Areas” both “Strategic Vision” and “Negotiating and Influencing.” In connection with the first, it was noted that Applicant is “adept at identifying issues” but could improve this competency by “working more proactively with others to address issues rapidly and avoid having a pause with progress of the [“major project”].” As to the second, Applicant should “. . . move beyond trying to resolve differences solely through discussing needs and the existence of obstacles. In particular, he should give greater attention to resolving differences by proposing mutually beneficial solutions and explain how his ideas and proposals meet others’ needs and concerns.”

91. In the category “Managerial Assessment,” the following comment appeared in relation to “Managing Performance of Teams”: “[Applicant’s] managerial role requires that he manages delivery of teams that report to different structures with competing demands. He discerns the needs and goals of colleagues and his [“major project”] team members and will greatly benefit from translating this knowledge into a clear sense of purpose and direction for team members, building consensus, and resolving issues.”

92. Supervisor 2 additionally reported: “[Applicant] and I discussed the APR on several occasions and he expressed concern about the write up which he saw as overly negative. He flagged the challenges that he faced as a new staff member being put in charge of the [“major project”], but without a direct reporting line over the staff implementing the program. I acknowledged the challenges that he has faced and emphasized the importance of strong leadership and vision in his role moving forward” As in 2013, the 2014 APR rated Applicant’s Relative Performance Level as “Effective.”

93. As a follow up to the performance discussion, on July 25, 2014, Supervisor 2 provided Applicant with two work objectives: the [“major project”]; and “managerial and operational support.” The latter referred to work in the branch of the Department relevant to Applicant’s expertise. As a “Development Objective,” Applicant was advised to “[i]mprove leadership and managerial skills.”

(4) Applicant’s 24-month assessment - FY2015 Mid-Year (December 2014)

94. Applicant’s FY2015 Mid-Year Review, completed by Supervisor 2 in December 2014, reported that he had discussed with Applicant “performance expectations and messaging and [Supervisor 2] welcomed the satisfactory progress with [Applicant’s “major project”].” With regard to an assignment Applicant had undertaken through the other branch of the Department,

Supervisor 2 reported that they had discussed the “importance of ensuring nuanced and contextual messaging . . . , including how best [Applicant] could ensure this at the earliest possible stage in any similar future assignments.” (FY2015 Mid-Year Review.)

F. Applicant’s third year

(1) Non-Conversion Decision (March - August 2015)

95. In a meeting of March 11, 2015, as the 30-month mark of Applicant’s appointment approached, the SPM and Supervisor 2 informed Applicant that his fixed-term appointment would not be converted to an open-ended appointment. (Tr. I, 130, SPM.) That meeting was followed by the Department’s notification to HRD, the negotiation and drafting of the written Non-Conversion Decision, and its finalization in August 2015. In his Grievance Committee testimony, the Department Director stated that he was responsible for taking the decision, along with Supervisor 2 and the SPM who were “all on the same page.” (Tr. II, 213.) The senior Department official who oversaw work in the other area of the Department, as well as that official’s deputy, were said not to have been “directly involved in that key decision of conversion or not conversion” but provided input. (Tr. II, 215.) The SPM also testified that she oversaw conversion decisions within the Department. (Tr. I, 81.)

96. The SPM’s notes made in preparation for the March 11, 2015, meeting (*see* Tr. I, 51-52, SPM) tracked the three criteria for conversion set out in the Fund’s internal law. The first point reflected “staffing need”: “Currently there is no assignment in [the Department] to match [Applicant’s] skill sets.” As to Applicant’s “performance,” this was described as “adequate in terms of what [Applicant] was asked to do.” As to “potential,” Applicant was said not to have “developed, blossomed or excelled to the level we expected. We see [Applicant’s] potential here in [the Department] and at the Fund as limited.” The SPM’s notes also stated that, during the course of the term, Applicant had “proved not to be competitive,” having applied unsuccessfully for a Division Chief vacancy in the Department.

97. The SPM’s notes also included some comments concerning how Applicant had performed on particular assignments. Some of these comments were later to appear in the final Non-Conversion Decision. As to Applicant’s “major project”: “[H]e should have demonstrated more initiative on the program and helped to clarify roles and responsibilities in order to reduce friction and ensure better coordination. He has been too reluctant to provide direction when necessary and to get involved in the . . . operations aspects.” With regard to an assignment on the other side of the Department: “While the funding approach was eventually approved . . . , he could have led this engagement more vigorously. Finalizing the presentation . . . and getting agreement on the funding required a lot of assistance and guidance from other B level staff in [the Department].”

98. Following the March 2015 meeting, the SPM advised HRD by email of the Department’s decision not to convert Applicant’s fixed-term appointment on the grounds that “we have no real position and the performance lacked luster throughout the FT [fixed term]. We looked at 3 criteria: *Performance, Staffing Needs & Potential for a Career.*” (Emphasis in original.) In response, an HRD official stated: “It is important to document performance gaps. It sounds that

one would need this information so as to substantiate the decision in addition to the business need for the job.” The SPM replied: “He is part of the centralized B-Level Diversity Program (so we only got 3 years of funding for his Fixed-Term[.]) We do not have a position for him.” HRD again requested documentation “highlighting his performance gaps.”

99. Approximately six weeks thereafter, the SPM provided Applicant with the Draft Non-Conversion Decision. Mirroring the requirements of the Fund’s internal law as set out in GAO No. 3 and the Guidelines for Conversion of Fixed-Term Appointments,⁷ the Decision form provided the following four options to check as possible reasons for non-conversion, with instructions to “check all that apply”: “Performance”; “Career potential”; “Change in business need”; and “Offered but declined appointment.” In Applicant’s case, “Career potential” and “Change in business need” were checked.

100. Applicant took issue with the Non-Conversion Decision as drafted. He wrote to the SPM and managers to say that one of his “primary concerns” was that the box for “Career potential” had been checked “with no explanation”: “I understood that the primary reason for non-conversion of my appointment is due to the unavailability of a position. Therefore, I expect that the checkbox for ‘Change in Business Needs’ will be the only box checked.” Applicant additionally stated that he was “completely surprised” at criticism of aspects of his work performance, which he asserted had not previously been brought to his attention. “To the contrary,” asserted Applicant, “I only received positive feedback on my performance in handling this task.” Applicant added that he was perplexed by the comment about the involvement of other B level staff in one of the assignments: “I believe that one of my greatest successes was my ability to obtain buy-in and motivate support from other B level staff Given what the task entails, I honestly do not see how it could be accomplished without [that] buy-in and support”

101. In an earlier email, Applicant had told the SPM that the Department Director had “assured [him] that [he] will not be attacked on [his] performance given the fact that no position is available.” On May 4, 2015, however, the SPM reported to Supervisor 2 that “[b]oth [the Department Director] & I feel that it would be best to remain with two boxes ticked on reasons for the decision” In addition, the SPM suggested buttressing the “career potential” rationale as follows: “Given [Applicant’s] specialized career stream profile, he has limited opportunities to demonstrate fungibility or find other positions in the Fund. In addition, regarding his potential, despite his effective performance, we did not see initiative or leadership potential to move two grades up in the foreseeable future to the level of an Assistant Director at the B3 [level].” This language was incorporated in the final Non-Conversion Decision. The final Non-Conversion Decision, which was signed by Applicant on August 10, 2015, also pointed to “missed opportunities to demonstrate initiative” and a lack of “proactive leadership” on Applicant’s part.

102. In his Grievance Committee testimony, the Department Director summed up the rationale for the non-conversion decision: “[T]he performance [on] the tasks assigned was respectable and

⁷ See *infra* RELEVANT PROVISIONS OF THE FUND’S INTERNAL LAW.

okay. We felt that the potential to have a long-term career with a sort of further rising in the . . . ranks of the Fund, . . . an ability to expand responsibility, to – tackle bigger, larger work tasks, lead more people was limited. . . . And third, there was . . . no position at the end of the fixed term. In other words, there was no business need.” (Tr. II, 188.) The Department Director further explained: “[W]e didn’t have a job, so it was not like one day we woke up and said now we can make a decision on this conversion or non-conversion. It was more like . . . if an appointment in another position doesn’t happen until then, that’s the irreversible logic . . .” (Tr. II, 216.) He “never imagined” that the position Applicant occupied would become an FTE position in the Department. (Tr. II, 216.) Referring to the “major project” on which Applicant was engaged, the Department Director testified that the “work that [Applicant] did was largely project work. . . . So with a project ramping down, . . . there’s less of a need for B level oversight.” (Tr. II, 227.)

103. Supervisor 2, for his part, explained the non-conversion decision in the following terms: “[C]areer-wise, [Applicant] was not a B-level staff member at the Fund He did not have the potential.” (Tr. III, 26.) In particular, Supervisor 2 cited lack of “strategic vision” and “negotiating and influencing.” (*Id.*) “[A]s a B-level staff member, I think one needs to see the bigger picture and propose solutions This requires understanding the broader context, connecting the dots between the various stakeholders and incentives and a sort of proactive approach” (*Id.*, 27.) Supervisor 2 testified that, with Applicant, he was “providing more guidance than I would ordinarily expect.” (*Id.*, 31.)

104. The senior official in charge of the area of the Department tasked with work in Applicant’s area of expertise testified that what was important, in her view, was whether Applicant had demonstrated “initiative and leadership that you would expect from a B level person” and that he had not done so. Also, “if he was going to stay and be in [the area of the Department related to his expertise], we didn’t have a job. We had no slot, no position vacant, no – nothing.” (Tr. II, 34-35.) With regard to Applicant’s conduct in relation to the disagreement over the proposed assignment, the senior official observed: “[I]t’s an opportunity to demonstrate what you can do and to put your best foot forward and not – not spending months stewing over the reporting relationship. And even in the philosophical disagreement, then be a voice at the table presenting your opinions and your rationale” (Tr. II, 35.) The senior official’s deputy likewise expressed the view that “there was general agreement that he was not delivering at the level that was expected from a B level staff,” in particular, that Applicant was lacking in leadership qualities. (Tr. II, 116-117.)

105. It is not disputed that during the course of Applicant’s fixed-term appointment, the Department did not make any effort to create a new, ongoing position for him. The SPM testified that this was because of a “change in business needs.” (Tr. I, 129.) The senior official in charge of the activities in Applicant’s area of expertise testified that, in the event Applicant had met their requirements for conversion, there might have been a process to present a proposal to HRD to create a new position, but that she had not been involved in such a situation. (Tr. II, 81-83.) The Department Director, who had participated in Applicant’s recruitment, testified that, from the beginning, he never envisaged Applicant’s position becoming part of the Department’s FTE positions. (Tr. II, 216.) He noted that to create a position, the Department would have had to have a “commensurate amount of work at that level, but we would also have to have the money”

and that the “trend . . . for [the Department] in terms of staffing was always downward.” (Tr. II, 190.)

(2) Conclusion of fixed-term appointment

106. In August 2015, following the finalization of the Non-Conversion Decision, Applicant was provided with an FY2015 Performance Review. That review noted among “Comparative Strengths”: “Building collaborative relationships. Establishes good relationships with stakeholders and with staff in other departments” Under “Comparative Developmental Areas,” the following were cited: “Advocacy, engagement and influence. Overcoming road blocks by gaining agreement and commitment from others.” The “Overall Assessment” echoed much of the text of the Non-Conversion Decision itself. As in 2013 and 2014, Applicant’s Relative Performance Level was rated as “Effective.” (Fixed-Term Performance Monitoring/ FY2015 APR.)

107. In October 2015, Applicant’s fixed-term appointment was allowed to lapse at the end of its three-year term. Applicant was granted a one-year contractual appointment to “lighten the blow” (Tr. II, 231-232, Department Director) and facilitate his transition out of the Fund. (Tr. I, 55-56, SPM.)

CHANNELS OF ADMINISTRATIVE REVIEW

108. Following notification of the non-conversion of his fixed-term appointment, Applicant submitted a Request for Administrative Review to the HRD Director on January 5, 2016. On February 18, 2016, the HRD Director declined to rescind the non-conversion decision. On April 11, 2016, Applicant filed a Grievance with the Fund’s Grievance Committee, contesting the non-conversion of his fixed-term appointment to an open-ended appointment.

109. The Grievance Committee considered the Grievance in the usual manner, on the basis of oral hearings and the briefs of the parties. On March 21, 2017, the Grievance Committee issued its Recommendation and Report, recommending that Applicant’s Grievance be denied. The Grievance Committee rejected Applicant’s argument that the B-Level Diversity Hiring Initiative altered the operation of the Fund’s rules governing conversion of fixed-term appointments. The Committee concluded that the evidence supported as a basis for the contested non-conversion decision that Applicant lacked “career potential” with the Fund. Accordingly, it decided that it was not necessary to reach the question whether the non-conversion decision was also supported by a “change in business need.” The Grievance Committee rejected Applicant’s contentions that the Fund failed to give him notice of perceived deficiencies in his performance and opportunity to remedy them. Nor, in the view of the Committee, was the non-conversion decision influenced by bias, discrimination or improper motive. The Grievance Committee nonetheless observed that the management of Applicant’s Department “did not handle [his] employment at the Fund very well,” including a “long delay in finding an assignment” for Applicant on the part of the senior Department official who oversaw work in Applicant’s area of expertise, as well as the Department’s lack of responsiveness to Applicant’s request for a mentor or coach as he navigated the Fund environment.

110. On April 24, 2017, Fund Management notified Applicant that it had accepted the Grievance Committee's recommendation that his Grievance be denied.

111. On June 16, 2017, Applicant filed his Application with the Administrative Tribunal.

SUMMARY OF PARTIES' PRINCIPAL CONTENTIONS

A. Applicant's principal contentions

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

1. The non-conversion decision was arbitrary because it was based on false justifications that the Fund's "staffing need" had changed and that Applicant lacked "career potential."
2. The real reason for Applicant's non-conversion was that his Department did not meet its obligation under the B-Level Diversity Hiring Initiative to "plan for his absorption" as an open-ended staff member.
3. The non-conversion decision was discriminatory because Applicant was treated differently from other B-Level staff members as a consequence of his recruitment through the B-Level Diversity Hiring Initiative. Applicant was also treated less favorably than other staff members hired through the same program. The decision was improperly affected by his managers' bias against him.
4. The non-conversion decision was affected by significant procedural defects, including: failure to provide Applicant with a fair opportunity to demonstrate suitability for career employment with the Fund; lack of adequate warning of alleged performance deficiencies and a reasonable opportunity to improve; unfair assessment of performance on various assignments; and failure to provide appropriate assistance with career development.
5. Applicant seeks as relief:
 - a. rescission of the non-conversion decision and removal of all related records from Applicant's personnel file;
 - b. three years' salary for lost employment;
 - c. compensation for losses of his pension and retirement benefits, including that Applicant be placed on Leave Without Pay in the Interest of the Fund in order to continue making pension contributions until reaching early retirement age in 2020;
 - d. an additional one year's salary for "appalling stress" and damage to

Applicant's reputation and family; and

- e. legal fees and costs, which the Tribunal may award, in accordance with Article XIV, Section 4 of the Statute.

B. Respondent's principal contentions

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

1. The decision not to convert Applicant's fixed-term appointment to an open-ended appointment represented a reasonable exercise of managerial discretion, supported by two equally sufficient and independent reasons: (i) lack of "career potential" on the part of Applicant; and (ii) lack of "staffing need" on the part of the Fund.
2. After providing Applicant with ample opportunity to prove his suitability for career employment, including timely notice of deficiencies, Applicant's managers properly exercised their discretion in concluding that he did not have the "career potential" to succeed at the B-Level at the Fund.
3. A second and independent ground for the non-conversion decision was that there was not an ongoing need for a B-Level Advisor position in Applicant's Department at the time of the decision.
4. The non-conversion decision was not improperly motivated by bias against Applicant on the part of his managers. Nor was he discriminated against as a consequence of being hired through the B-Level Diversity Hiring Initiative.
5. The B-Level Diversity Hiring Initiative did not override the provisions of the Fund's internal law governing fixed-term appointments. In particular, the Initiative did not create an obligation on the Fund to "absorb" Applicant at the end of his fixed-term appointment.

RELEVANT PROVISIONS OF THE FUND'S INTERNAL LAW

114. 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.⁸

⁸ The Tribunal's practice is to reproduce the relevant provisions of the Fund's internal law that governed the issues of the case. The Fund's internal law changes over time and the provisions reproduced herein are not necessarily those in force as of the time of this Judgment.

A. GAO No. 3 (Employment of Staff Members), Rev. 7 (May 1, 2003), Section 3

115. GAO No. 3, Rev. 7, Section 3, governed the types of appointments to the staff of the Fund during the period of Applicant's employment. Sections 3.02.1.2 and 3.02.1.3 refer to the conversion of fixed-term appointments to open-ended appointments:

Section 3. Types of Staff Positions and Appointments

This section sets forth the Fund's employment framework and the policies governing (a) staff positions, (b) staff appointments, and (c) benefits entitlements for the different categories of employment.

3.01 Types of Staff Positions

Staff members may be appointed to fill either a regular staff position or a term position.

3.01.1 Regular positions. Regular positions are for an indefinite period.

3.01.2 Term positions. Term positions are positions for a limited period of time and are subject to a sunset clause. They shall be designated by management, on the advice of the department concerned, and in consultation with the Human Resources Department and the Office of Budget and Planning.

3.02 Types of Staff Appointments

3.02.1 Open-ended appointments

3.02.1.1 Open-ended appointments are for:

- (i) functions that carry out the mission of the Fund (positions directly involved in consultations and negotiations with member countries and those that perform other key ongoing functions essential to the basic operation of the Fund); and
- (ii) functions that support the mission of the Fund and

- (a) for which the Fund wishes to build expertise and the skills requirements are not likely to change significantly over several years, or
- (b) that require institutional knowledge and continuity.

3.02.1.2 Before being offered an open-ended appointment, staff shall be hired initially on a fixed-term appointment for a specified period of time to test their suitability for career employment. Persons holding fixed-term appointments shall be designated as fixed-term staff members.

3.02.1.3 If fixed-term staff members meet the performance requirements, demonstrate potential for a career at the Fund, and meet the Fund's staffing requirement, their appointment may be converted from fixed-term to open-ended status at the expiration of the fixed-term appointment. Persons holding open-ended appointments shall be designated as regular staff members.

3.02.1.4 Staff recruited to fill senior level positions (Grades B3–B5) shall receive three- to five-year fixed-term staff appointments. After completion of the initial fixed-term appointment, these appointments may be renewed without limit for fixed-term periods up to five years up to mandatory retirement age, or converted to open-ended appointments.

3.02.1.5 Staff who rejoin the Fund may, at the discretion of the Fund, be offered an open-ended appointment without first having to complete successfully a fixed-term appointment, provided that they were regular staff at the time they separated from the Fund. This provision shall not apply to former staff members who are appointed to B3–B5 positions.

3.02.2 *Limited-term appointments*

3.02.2.1 Limited-term appointments shall normally be used in the following cases:

- (i) The organization and/or functions of a department are under review; consequently, the skills needed for

some of its functions are likely to change significantly over a few years; or the long-term need for some positions is not certain; or

- (ii) The function supports the mission of the Fund and is likely to continue, but the Fund does not wish to build expertise in the function, or the skills required to fulfill the function are expected to change significantly; or
- (iii) The function is required for a limited period or fewer positions will be required to support a function after initial startup costs. In these cases, some or all of the administrative budget positions are authorized for a limited period (term positions).

3.02.2.2 Limited-term appointments shall be for a period of up to three years and may be extended once up to a cumulative period of five years in that position. Limited-term appointments shall not carry any expectation of conversion to open-ended appointments in the position. Persons holding limited-term appointments shall be designated as limited-term staff members.

...

(Emphasis added.)

B. Guidelines for Conversion of Fixed-Term Appointments (2006)

116. The Fund's Guidelines for Conversion of Fixed-Term Appointments governed the conversion of fixed-term appointments during the period of Applicant's employment and were transmitted by HRD to Applicant as an attachment to his conditional offer of employment.

Guidelines for Conversion of Fixed-Term Appointments

It is the Fund's **policy to maintain a strong cadre of its staff on an open-ended basis**, through "regular" staff appointments. Initially, however, new staff are hired on a fixed-term basis for three years.

These guidelines are intended to ensure that staff members on a fixed-term appointment gain an accurate understanding of the meaning of their fixed-term status and a realistic view of their prospects of being converted to a “regular” open-ended appointment upon expiration of their fixed term.¹

Included is an overview of the normal departmental processes for providing fixed-term staff with relevant and timely feedback, and for developing a consistent and reliable basis for making assessments on possible conversions.

1. Intentions and expectations regarding fixed-term staff

The mutual objective during the fixed-term appointment is to enable the staff member to perform at full capacity as quickly as possible, not just to maximize the contribution to the Fund’s work but also to provide an opportunity for the staff member to demonstrate potential for the future.

The Fund’s legal obligation does **not** go beyond the fixed-term appointment, unless and until a formal written commitment to a conversion to open-ended status has been made by the Fund’s Human Resources Department (HRD) in accordance with the procedures outlined below. No supervisor or other Fund official has the authority to commit the Fund outside these procedures.

2. Considerations in the Fund’s decision whether to convert to open-ended status

Conversion to open-ended status depends on the following criteria:

- the departmental assessment of the staff member’s performance during the fixed-term appointment;
- the individual’s long-term potential for a successful career with the Fund; and
- the department’s and institution’s staffing needs.

There must be a clearly positive assessment of performance and potential for taking the important step of committing the Fund to providing a career opportunity for the individual. However, the short- and long-term staffing needs of the Fund are of paramount importance in this process. The Fund’s personnel requirements can change substantially over time. Therefore, staffing requirements at the time of possible conversion may not justify a positive decision

that would otherwise have been warranted if the decision was solely made on the grounds of performance and potential.

3. Overview of monitoring and decision-making process

The supervisor should endeavor to provide suitable assignments, clear expectations, appropriate guidance, and timely feedback. However, the fixed-term staff member must be prepared to seek and accept this assistance from the supervisor(s). The human resources team in the staff member's department and staff in HRD are also available to assist upon request, should the staff member or the supervisor find this necessary.

The monitoring process is as follows.

- Within the first three months, key responsibilities and objectives will be established during a performance planning discussion. This discussion is timed to allow supervisors to establish work assignments and objectives in relation to divisional/departmental workload and goals.
- Six to seven months after the performance planning discussion, a feedback session will take place and the supervisor will provide brief feedback to the individual on performance. This session will include a discussion on actions and objectives identified in the performance planning discussion and can lead to the inclusion of new or revised objectives.
- During the twelfth month, a detailed performance assessment will be conducted. The following detailed performance assessment will take place in the context of the Fund's annual performance review (APR) cycle that is at least six months after the twelfth month review. Depending on when the staff member joins the Fund, the period between these two detailed performance assessments may be greater than nine months. In this case, the staff member will also have a mid-point performance assessment halfway between the two detailed performance assessments.
- At the thirty-month point (i.e. six months before the end of the fixed-term appointment), there will be another detailed assessment to allow the supervisor and the department to make an informed career employment assessment. Performance will be assessed as either (1) meeting required standards, or (2) not meeting required standards in one or more key areas of

responsibility. In addition, the department will assess the staff member's potential for a career in the Fund and whether the individual's skills and experience meets staffing needs. HRD will review the department's assessment in relation to the relevant criteria, as well as broader institutional staffing needs. Based on these assessments, the fixed-term staff member (1) will be offered conversion to an open-ended appointment, or (2) will not be offered a conversion to an open-ended appointment and the fixed-term appointment will be allowed to lapse.

If a conversion is offered, HRD will subsequently issue a change of appointment letter to the staff member. The conversion to an open-ended appointment becomes legally binding once the change of appointment letter has been issued and the open-ended appointment becomes effective at the end of the fixed-term appointment.

Human Resources Department
September 2006

¹ These guidelines do not apply to individuals on secondments, where the clear expectation is that conversion will not be possible, or to categories for which separate rules apply (i.e., Grade B3–B5 staff recruited externally, participants in the Economist Program, Research Assistants participating in the two-year Research Assistant Program, limited-term appointees, and staff on part-time employment).

(Emphasis in original.)

C. Fixed-Term Monitoring Guidelines

117. The conversion of fixed-term appointments was also governed during the relevant period by the Fixed-Term Monitoring Guidelines, which provided as follows:

Staff recruited on fixed-term appointments are subject to the fixed-term monitoring process. The guidelines below are provided to assist managers in this process. HR Teams in departments are also available to offer guidance.

Please note that fixed-term staff recruited at Grades B3-B5 or to the Economist Program (EPs) and limited-term appointees, including staff on secondment, are not covered by these guidelines.

....

The Fixed-Term Monitoring Process

The fixed-term period is intended to provide the Fund with adequate time to assess both the business need for the position, as well as the staff member's long term potential for a career in the Fund. Specific objectives of the fixed-term monitoring process are to:

assist managers in evaluating the performance of new staff in their current role and their potential for a long-term career in the Fund;

help new staff perform at Fund standards by ensuring that they receive clear work objectives and structured feedback that helps convey the Fund's expectations; and

help the Fund in making an informed career employment decision towards the end of the fixed-term period.

Fixed-term appointment for staff in Grades A1 to B2 are for a three-year term and it is not possible to extend fixed-term appointments beyond 36 months ^{1/}. At the 30th month of the staff member's appointment, the Fund will make a decision to either convert the staff member to regular status or to let the employment relationship lapse at the end of the fixed-term period. This career employment decision is based on a combination of several factors: the staff member's performance, potential for a long-term career at the Fund and staffing needs.

The Fixed-term monitoring process involves the following specific stages:

Stage*	Timing	Purpose
Objectives Setting	Within 2-3 months	To enter objectives (under the 6-month Objective Plan in Talent Plus' Objectives tab).
6-month Review	6 months after the hiring date	To document the staff member's early progress and adjust work objectives, if necessary.
First Full Review	During the regular APR cycle	To provide the staff member with a detailed performance assessment, add or revise work

		objectives for the coming year and document the staff member's merit information for performance over the fiscal year.
Second Full Review	During the regular APR cycle	To provide the staff member with a second detailed performance assessment, adjust revised work objectives if necessary, and document the staff member's merit information for performance over the fiscal year.
Career Decision Review	At the 30 th month mark	To arrive at a career employment decision after assessing the staff member's performance and potential over the full fixed-term period and considering staffing needs.
End of Fixed-term	End of 36-month	Conversion or separation.

*As the FT process has been streamlined, the Mid-point Review is no longer required. However, departments may use a Memorandum for files to record any performance-related themes at any point.

^{1/} For staff in the Economist Program (EP), please go to the Clearance for Graduation section under the Performance tab in the EP website.

Staffing Needs

Throughout the process, the manager should remain mindful of changes that may impact the division's staffing requirements and a staff member's fixed-term appointment. At any point, staffing needs may be influenced by a variety of factors, including changing skill requirements, reorganizations, staff reduction, outsourcing, or consolidation of functions. Such staffing changes and/or requirements may not justify recommending the conversion of a staff member's appointment to open-ended status, even if this would have been warranted on the basis of performance and potential only.

Mobility

Fixed-term staff are expected to remain in the same department, and will normally retain the same position, for the duration of the appointment. Fixed-term staff are eligible to apply for inter-

departmental vacancies provided the conversion decision has already been finalized by the department and HRD. Decision point is no earlier than the 30th-month in the fixed-term appointment; and effective date of appointment is 36 months.

In exceptional cases, where it is clearly in the Fund's interest to reassign the staff member to a different department before conversion to open-ended status, the staff member will be offered a new fixed-term appointment and the fixed-term monitoring process will begin anew. Such arrangements require agreement between the staff member and the two departments involved; and the endorsement of HRD through TAM.

....

CONSIDERATION OF THE ISSUES

118. The Application presents the following principal question for decision by the Administrative Tribunal. Is Applicant's challenge to the Fund's decision not to convert his fixed-term appointment to an open-ended appointment well-founded?

119. In answering that question, the following issues must be addressed: (A) Did the B-Level Diversity Hiring Initiative, or the terms of Applicant's recruitment through that Initiative, constrain the Fund's discretionary authority under the rules governing the conversion of fixed-term appointments? (B) What standard of review governs Applicant's challenge to the non-conversion of his fixed-term appointment? (C) Did the Fund abuse its discretion in deciding not to convert Applicant's fixed-term appointment on the ground that he did not demonstrate "career potential" with the Fund? (D) Did the Fund abuse its discretion in deciding not to convert Applicant's fixed-term appointment on the ground of lack of "staffing need" on the part of the Fund? (E) Was the non-conversion of Applicant's fixed-term appointment improperly motivated by bias or discrimination? (F) Did the Fund treat Applicant fairly in relation to his appointment under the Initiative, given the purposes of the Initiative?

A. Did the B-Level Diversity Hiring Initiative, or the terms of Applicant's recruitment through that Initiative, constrain the Fund's discretionary authority under the rules governing the conversion of fixed-term appointments?

120. The Tribunal must address at the outset Applicant's contention that the Fund's B-Level Diversity Hiring Initiative, and/or the terms of his recruitment through that Initiative, constrained the Fund's discretionary authority under the rules governing the conversion of fixed-term appointments such that the Fund could not ground the non-conversion decision in his case either on Applicant's lack of "career potential" or on the Fund's lack of "staffing need." Applicant asserts that these two criteria are "pre-determined" under the Initiative ". . . because the hiring Department has to make a commitment up-front to absorb the person in order to get the central funding." Applicant submits that the Department had "at the very least – an obligation to plan for

the absorption of [Applicant] into the department. Instead, it accepted three years' central funding without taking on any of the obligations that came with that funding." Applicant also contends that he accepted the appointment "based at least in part on this expected outcome." In effect, Applicant argues that, given his "Effective" performance and the terms of his recruitment through the Initiative, he had an enforceable expectation of conversion.

121. Respondent, for its part, maintains that Applicant's recruitment through the Initiative did not alter the Fund's discretionary authority to take the non-conversion decision under any of the three criteria set out in the applicable internal law: "performance," "career potential," or "staffing need." Nor, in the view of the Fund, did the Initiative, or the terms of Applicant's recruitment, require the Fund to create a position for Applicant at the conclusion of his fixed term. The Fund points out that Applicant's conditional offer of employment attached the Guidelines for Conversion of Fixed-Term Appointments and advised that the Guidelines "detail the factors that the Fund takes into consideration in making a determination to convert an appointment from fixed term to open ended." The Guidelines confirm that the Fund's "legal obligation does **not** go beyond the fixed-term appointment" (emphasis in original) and prescribe the three criteria for conversion.

122. Applicant cites the Fund's FY2013 Diversity and Inclusion Annual Report, p. 12, published during the period of his fixed-term appointment, which described the Initiative as follows: "[T]he Fund's B-level Diversity Hiring Initiative . . . makes four vacancies available to departments each year (for three years) to hire competitive senior-level candidates from underrepresented regions. After three years in this program, each *department is expected to absorb the staff that they have hired through this program, assuming standard performance expectations have been met.*" (Emphasis added.) Relying on this passage, Applicant asserts: "Unlike Section 3.02.1.3 [of GAO No. 3], the Diversity Hiring Initiative lists only one requirement for conversion – not three." (Emphasis in original.)

123. The Fund responds that the FY2013 Diversity and Inclusion Annual Report's "after-the-fact mention" of the Initiative was "not a decision by Fund Management to amend the program," the "legal basis" of which was the "October 18, 2010 [HRD Director's] Memorandum to Management, . . . which did not request or discuss making any changes to the Fund's terms and conditions for fixed-term appointments." That Memorandum, the Fund points out, described the Initiative as "consistent with the Fund's legal framework."

124. The Fund does acknowledge, however, two differences between recruitment of candidates through the Initiative and recruitment of other fixed-term appointees. First, "individuals recruited through the Initiative did not have to compete for an advertised vacancy." Second, Initiative recruits were "recruited for positions that could be created for them using the central funding available through the Initiative"; this was a "difference[] with other fixed-term staff," who are "initially hired into a 'Full Time Equivalent' or 'FTE' position that is financed by the department's own budget. The existence of the FTE in the department's budget presumes that the position is of an ongoing and long-term nature."

125. When the SPM was asked in the Grievance Committee proceedings about the significance of the statement in the FY2013 Diversity and Inclusion Annual Report, she

responded: “The expectation, as I said before, is that the department would find a means by which to absorb the individual.” (Tr. I, 90.) The SPM described this expectation in terms of a “hope” that with “time and exposure . . . the diverse candidate who had come on this temporary specialized funding, centralized funding would gain traction in the Department . . . [and this] would motivate the department to then see what, if any, opportunities existed that the candidate could *apply to*.” (Tr. I, 40, SPM.) (Emphasis added.) In their Grievance Committee testimony, Applicant’s managers confirmed their understanding that, in order to be converted, a fixed-term staff member recruited through the Initiative would either need to be selected for a vacancy during the fixed term or a new position would need to be created. The Department Director who was directly involved in Applicant’s recruitment testified that, in the course of their three-year terms, Initiative recruits would need to “compete for the openings.” (Tr. II, 234-235.) He also indicated that, from the beginning, he “never imagined” Applicant’s Advisor post becoming part of the Department’s FTE positions, given financial and other constraints. (Tr. II, 190, 216.)

126. In addition to the FY2013 Diversity and Inclusion Annual Report, Applicant cites documentation of his own recruitment in support of the view that the Department had an obligation to “plan for his absorption.” Applicant submits that the recruitment letter sent by Department officials created an expectation of conversion. That letter stated: “The Advisor position would be of a limited duration - up to 3 years with the *expectation of absorption* into the department. During that time you would be able to apply for other positions.” (Emphasis added.)

127. In the view of the Tribunal, that statement must be read in context. The recruitment letter contrasted the Advisor position, which was funded through the Initiative, with the DDC position. Among the differences was that the DDC position was to be “‘ongoing,’ after a probationary period of 3 years (this is standard for Fund staff appointments).” By contrast: “The Advisor position would be of a limited duration - up to 3 years with the expectation of absorption into the department. During that time you would be able to apply for other positions.” Accordingly, the “ongoing” aspect of the DDC position was flagged as a difference with the Advisor position. Additionally, the “expectation of absorption” for the Advisor position was qualified by the reference to “apply[ing] for other positions” as the mechanism for such “absorption.” In the view of the Tribunal, although the recruitment letter could have been clearer, it did not of itself create an enforceable expectation that Applicant’s fixed-term appointment would be converted in the absence of his meeting the criteria specified in the Fund’s internal law.

128. Applicant additionally refers to the SPM’s memorandum to the Fund’s Review Committee, requesting Applicant’s appointment pursuant to the Initiative. That communication stated: “We believe [Applicant] has the potential to perform in a number of different roles; we expect to have a vacancy at the division chief level in the next 20 to 30 months. *Thus prospects for absorption are encouraging and we are confident that we will be able to also satisfy this required aspect of the diversity funding when the time comes.*” (Emphasis added.) When questioned about this statement in the Grievance Committee proceedings, the SPM explained: “[T]he requirement was - - after we have given you this money centrally, the onus is upon you, as a department, to then see how to absorb this person. So the requirement is that the money will dry up. The onus is then on the department to find a way.” (Tr. I, 59.)

129. Applicant cites his own testimony for the proposition that he was given to understand, during the recruitment phase, that his hiring through the Initiative established that he had already met the threshold of having the requisite “career potential” for open-ended employment. Applicant testified that, following communications with Department and HRD officials, he understood it to be advantageous to opt for the Advisor position because “you get hired on a B level at this position, and this basically – this is basically a mechanism where you could transfer to other positions later.” (Tr. III, 89, 93.) According to Applicant, the way it was explained to him was that “we have already evaluated you. You are suitable for a B-level position. We are hiring you on a B-level position. The moment an opportunity becomes available, you will be transferred there.” (Tr. III, 94.)

130. In the view of the Tribunal, the assertion that Applicant’s “career potential” would not be tested during the course of the fixed term is not supported by the record of the case. The fact that Applicant, unsurprisingly, may have been seen as having potential for a career with the Fund at the time he was recruited did not exempt him from the requirement to demonstrate “career potential” during the course of the fixed term, consistent with the rules governing conversion of fixed-term appointments. There is nothing in the terms of the Initiative, or in the communications accompanying Applicant’s recruitment, that persuades the Tribunal of a contrary interpretation. The Tribunal concludes that whatever “onus” there may have been on a department to “find a way” (Tr. I, 59, SPM) to retain an Initiative recruit as a staff member at the end of the fixed term will arise only if the appointee meets the “performance” and “career potential” criteria for conversion of the fixed-term appointment.

131. At the same time, the Tribunal observes that there is an uneasy fit between the terms of the Initiative and the usual fixed-term appointment process. Applicant’s recruitment through the Initiative differed in two fundamental ways from that process: No competition was held for the Advisor position into which Applicant was hired. Nor was that position part of the Department’s complement of FTE positions; as such, it was not an “ongoing” position and was set to expire with the conclusion of the Initiative funding at the end of Applicant’s three-year fixed term. This was an essential premise of the Initiative, whereby funding was requisitioned from central resources and three-year positions were created in a manner that would “mitigate the impact on promotion prospects of internal non-diverse staff (since, with additional slots for the external recruits, more internal staff can still be promoted into ‘regular’ vacancies).” (Memorandum from HRD Director to Deputy Managing Director, “Measures to Improve Diversity at the Fund,” October 18, 2010.)

132. The Tribunal has said that when it is “presented with a question of interpretation of the Fund’s internal law, [it] will seek to interpret the various rules of the Fund in a manner that ensures they are consistent with one another.” *Mr. E. Verreydt, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2016-5 (November 4, 2016), para. 70: *Mr. “LL”*, para. 210. The Tribunal does not find, as Applicant contends, that the terms of his

recruitment through the Initiative meant that the Fund was not permitted to base a non-conversion decision on the usual criteria.⁹

133. For the reasons set out above, the Tribunal concludes that the Fund's discretionary authority to decide whether to convert Applicant's fixed-term appointment to an open-ended appointment was not constrained by his recruitment through the B-Level Diversity Hiring Initiative, either as a matter of Fund law or as a matter of expectation created. Having concluded that the terms of the Initiative and Applicant's "Effective" performance in the Advisor position did not create an enforceable expectation of conversion, the Tribunal turns to the question whether the non-conversion decision represented an abuse of discretion.

B. What standard of review governs Applicant's challenge to the non-conversion of his fixed-term appointment?

134. The Tribunal consistently has held that the conversion of a fixed-term appointment is an individual decision taken in the exercise of managerial discretion and, as such, is reviewable for abuse of that discretion. *Mr. "HH"*, para. 94. Accordingly, Applicant's challenge will succeed only if he shows that the decision not to convert his fixed-term appointment 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,¹⁰ p. 19. The Tribunal has also observed that the abuse of discretion standard is a "flexible one that this Tribunal has tailored in a manner appropriate to the nature of the case presented." *Mr. "HH"*, para. 94 (internal quotations omitted).

135. It is settled jurisprudence that the "Fund's discretionary authority to decide upon a staff member's suitability for conversion is necessarily constrained by principles of fair treatment and by the applicable internal law." *Mr. "HH"*, para. 98. Accordingly, the Tribunal will pay close attention to the rules that the Fund itself has established to regulate its discretionary authority.

136. The Fund's internal law governing during the relevant period provided that the decision to convert a fixed-term appointment to an open-ended appointment may be taken only if the staff member ". . . meet[s] the performance requirements, demonstrate[s] potential for a career at the Fund, and meet[s] the Fund's staffing requirement." (GAO No. 3, Rev. 7 (May 1, 2003), Section 3.02.1.3.) The Guidelines for Conversion of Fixed-Term Appointments (2006) state in similar language:

Conversion to open-ended status depends on the following criteria:

⁹ The Tribunal considers below the issue of fair treatment in the context of Applicant's recruitment through the Initiative, rather than through the usual fixed-term appointment process. *See infra* Did the Fund treat Applicant fairly in relation to his appointment under the Initiative, given the purposes of the Initiative?

¹⁰ 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).

- the departmental assessment of the staff member’s performance during the fixed-term appointment;
- the individual’s long-term potential for a successful career with the Fund; and
- the department’s and institution’s staffing needs.

137. The Guidelines for Conversion of Fixed-Term Appointments emphasize that there must be a “clearly positive assessment of *performance and potential* for taking the important step of committing the Fund to providing a career opportunity for the individual.” (Emphasis added.) Furthermore, the Tribunal has recognized that a “fixed-term appointee has no entitlement to the continuation of his employment beyond the term of the appointment, and the burden of proof rests squarely with the applicant in challenging a decision not to convert his fixed-term appointment to regular staff.” *Mr. “HH”*, para. 97 and cases cited therein.

138. In adjudging previous challenges to the non-conversion of fixed-term appointments, the Tribunal has emphasized that the contested decision was a “performance-based” decision, *Mr. “HH”*, para. 96, and that the “determination of the adequacy of professional qualifications is a managerial, and not a judicial, responsibility,” *Ms. “T”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2006-2 (June 7, 2006), para. 36; *Ms. “U”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2006-3 (June 7, 2006), para. 36, quoting Commentary on the Statute, p. 19.

139. The instant case differs, however, from past non-conversion cases. Here, the Fund has not grounded the non-conversion decision on failure to meet “performance” requirements. Rather, it seeks to justify the decision on the two additional criteria stated in the written law, namely, lack of “career potential” on the part of Applicant and lack of “staffing need” on the part of the Fund. Applicant’s case accordingly presents the Tribunal for the first time with the question how to apply the abuse of discretion standard in reviewing a non-conversion decision that has been taken on the ground that the fixed-term appointee, although meeting “performance” standards, has failed to demonstrate “career potential” with the Fund.

140. The Tribunal observes that there is a close relationship between “performance” and “career potential” in the Fund’s internal law governing conversion of fixed-term appointments. The fixed-term monitoring process is to “assist managers in evaluating the performance of new staff in their current role *and* their potential for a long-term career in the Fund.” (Fixed-Term Monitoring Guidelines.) (Emphasis added.) Likewise, the Tribunal’s jurisprudence recognizes that the admonition that deference to managerial discretion is “particularly significant with respect to decisions which involve an assessment of an employee’s qualifications and abilities” and that the “determination of the adequacy of professional qualifications is a managerial, and not a judicial, responsibility,” Commentary on the Statute, p. 19, is a principle that applies beyond the narrow range of challenges to annual performance reviews. *See Mr. “HH”*, para. 95 and cases cited therein.

141. When an applicant disputes lack of “career potential” as a ground for the non-conversion of a fixed-term appointment, the Tribunal will review that challenge in a manner that is similar—but not identical—to that by which it reviews a challenge to a non-conversion decision based on failure to meet “performance” requirements. In deciding challenges to “performance”-based non-conversion decisions, the Tribunal has emphasized that the fixed-term appointee must be “afforded adequate opportunity to demonstrate performance consistent with suitability for career employment.” *Mr. “HH”*, para. 98; *Ms. “T”*, para. 38; *Ms. “U”*, para. 38. This includes that the appointee is “evaluated periodically, given adequate warning of performance deficiencies and a reasonable opportunity to remedy them.” *Id.*

142. The Tribunal recognizes that there is a difference between the assessment of “performance,” which will necessarily be a backward-looking exercise, and the assessment of “career potential,” which requires managers to project the fixed-term appointee’s future trajectory. To the extent that the assessment of “career potential” will rely in part on the evaluation of the individual’s “performance” to date, that aspect of the assessment is reviewable under the standards applicable to other performance-based decisions. Insofar as the projection of “career potential” calls upon managers to make a judgment about the staff member’s likely future contribution to the Fund, it will be informed by managerial expertise, including knowledge of the institution. As such, it will be entitled to a considerable degree of deference by the Tribunal. *See Ms. “J”, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2003-1 (September 30, 2003), para. 99* (“degree of deference—or depth of scrutiny—may vary according to the nature of the decision under review, the grounds upon which it is contested, and the authority or expertise that has been vested in the original decision maker”). With respect to non-conversion decisions, the Tribunal has observed that “[w]hen managers take such a decision . . . with deliberation and in the absence of improper motive, it is not for the Tribunal to substitute its judgment for their considered determination.” *Mr. “HH”*, para. 96, citing *Ms. “T”*, para. 53; *Ms. “U”*, para. 53.

143. Taking account of these principles and the nature of Applicant’s claims in this case, the Tribunal will ask: Did the Fund provide Applicant with assignments that afforded him a fair opportunity to demonstrate “career potential” with the Fund? Did the Fund provide Applicant with adequate notice of the alleged shortcomings that would figure in the assessment of his “career potential” and an opportunity to remedy them? Was there a reasonable basis for the decision that Applicant lacked the requisite “career potential” for conversion of his fixed-term appointment?

C. Did the Fund abuse its discretion in deciding not to convert Applicant’s fixed-term appointment on the ground that he did not demonstrate “career potential” with the Fund?

144. The Fund has cited as one of two independently sufficient grounds for the decision not to convert Applicant’s fixed-term appointment to an open-ended appointment that he did not demonstrate “career potential” with the Fund. Applicant advances the following challenges to that rationale: (i) Applicant’s recruitment through the Initiative established that he had already met the threshold of having the potential required for a career with the Fund, a contention that

the Tribunal has dismissed above;¹¹ (ii) the Fund did not afford Applicant a fair opportunity to demonstrate “career potential,” in particular, because his assignments allegedly did not match the TOR on which he was hired; (iii) the Fund did not give Applicant adequate notice of alleged shortcomings that figured in the assessment of his “career potential,” nor provide an opportunity to remedy them, including that the Fund did not explain by what standards Applicant’s “career potential” would be assessed and held him to an unreasonable standard of having to show potential to be promoted two grades up from the grade level at which he was hired; and (iv) the appreciation of Applicant’s potential for a career with the Fund was improperly affected by bias against him by his managers and as a consequence of being hired through the Initiative.¹²

145. Respondent, for its part, defends its grounding of the non-conversion decision on lack of “career potential” as follows. The Fund maintains that during his fixed-term appointment Applicant failed to demonstrate the “leadership and managerial competencies” to succeed as a B-level staff member. The view was “overwhelming and consistent,” says the Fund, that Applicant “lacked the leadership, initiative, and collaborative problem-solving skills that are required for success at the B-level at the Fund,” and this view represented the collective judgment of several senior managers on several different projects over the span of Applicant’s appointment. The Fund further submits that it provided Applicant with “high profile, complex projects” on which he could demonstrate his skills, but that he “sabotaged” one significant opportunity and failed to show sufficient improvement in others “despite clear and early feedback.” The Fund also states that it had advised Applicant nine months prior to the non-conversion decision that the “prospects for conversion were poor, and that he would need to make substantial improvements, which he failed to do.”

(1) Did the Fund provide Applicant with assignments that afforded him a fair opportunity to demonstrate “career potential” with the Fund?

146. Applicant contends that his managers did not provide him with assignments that afforded a fair opportunity to demonstrate “career potential” with the Fund. He cites as his Department’s “most significant failure” that it allegedly did not “provide him with the . . . assignments [in his area of expertise] he had been promised when he negotiated the terms” of his appointment. Applicant also argues that he was not given “appropriate opportunities to demonstrate his capability as a B Level manager,” in particular, as a “Division Chief in [his Department].” Furthermore, Applicant submits, “Management’s reluctance to invest him with the appropriate authority made it extremely difficult for [him] to assert himself and to be treated with the respect he needed to carry out his assignments.”

¹¹ See *supra* Did the B-Level Diversity Hiring Initiative, or the terms of Applicant’s recruitment through that Initiative, constrain the Fund’s discretionary authority under the rules governing the conversion of fixed-term appointments?

¹² The issue of bias and discrimination is treated separately *infra* at Was the non-conversion of Applicant’s fixed-term appointment improperly motivated by bias or discrimination?

147. Respondent, for its part, maintains that it provided “high profile, complex projects on which Applicant could demonstrate his skills.” In particular, “Applicant was given a full opportunity to demonstrate his leadership skills on the project that was intended to occupy 50 percent of his time,” namely, the “major project under his portfolio” as described in his TOR. The delay in Applicant’s attaining assignments from the branch of the Department reflecting his area of expertise, submits the Fund, resulted from Applicant’s own “intransigence.” The discord that ensued when a significant project was proposed from that side of the Department served to “demonstrate[] [Applicant’s] inability to lead, negotiate, and collaborate with other B-level managers on an important [area of expertise] project.”

148. The Fund’s internal law governing conversion of fixed-term appointments states that, during the fixed term, the “supervisor should endeavor to provide suitable assignments, clear expectations, appropriate guidance, and timely feedback.” (Guidelines for Conversion of Fixed-Term Appointments.) The Guidelines also recognize that the “mutual objective during the fixed-term appointment is *to enable the staff member to perform at full capacity as quickly as possible*, not just to maximize the contribution to the Fund’s work but also *to provide an opportunity for the staff member to demonstrate potential for the future*.” (Emphasis added.) Additionally, the Tribunal has recognized that “[a]mong the indicia of adequate supervision is that the fixed-term appointee is ‘. . . exposed to the types of tasks which would have been required of him as a permanent employee’” *Ms. “T”*, para. 42, quoting *Salle v. International Bank for Reconstruction and Development*, WBAT Decision No. 10 (1982), para. 33.

149. The following question arises. Did Applicant’s managers provide him with suitable and timely assignments on which to establish his competencies for open-ended employment? In light of the parties’ contentions, the Tribunal must consider whether Applicant’s assignments were consistent with his TOR and whether, in any event, his responsibilities provided the requisite opportunity to demonstrate “career potential” with the Fund.

150. The parties vigorously dispute the extent to which Applicant was given assignments in his area of subject matter expertise and whether his responsibilities were consistent with his TOR. Applicant contends that “for over half of [his] three-year assignment he had no . . . projects [in his area of expertise] at all, no work in the most important field of his expertise and of his Terms of Reference.” (Emphasis in original.) Applicant submits that “[Department] management violated the terms of his contract by repeatedly denying [him] the work and exposure he had been promised.” The Fund counters that “. . . it is fair to say that fifty percent of Applicant’s thirty-month appointment was [area of expertise] related, precisely as initially discussed with Applicant.”

151. In assessing these claims, it is important to observe what the TOR accepted by Applicant actually stated. The assignment that was to be the “major project under his portfolio” was one that did *not* fall within the branch of the Department tasked with work in Applicant’s area of subject matter expertise. The identification of Applicant’s “major project” was the same in the revised TOR that Applicant accepted as in the original TOR attached to the recruitment letter he had earlier received from Department managers.

152. Applicant submits that he “. . . only agreed to accept the B-1 Level Advisor position after ‘fundamental changes’ had been made to the terms of reference which now emphasized ‘the primary role of [area of expertise] work.’” The Tribunal observes that in forwarding to Applicant the revised TOR, the SPM stated that the Department had made “some minor but fundamental changes,” such that the “description now emphasizes the primary role of [work in Applicant’s area of expertise] as opposed to the (now secondary) emphasis on responsibilities in other areas of the department.” Nonetheless, although the revised TOR reversed the order in which assignments were listed, it continued to identify as the “major project under his portfolio” the assignment that did not directly engage Applicant’s subject matter expertise. In the view of the Tribunal, the actual terms stated in the TOR and accepted by Applicant, rather than their characterization by the SPM, are decisive.

153. Moreover, Applicant’s testimony reveals that he recognized that the responsibilities of the Advisor position represented a 50/50 split of his assignments between his area of expertise and other activities of the Department: “[W]hat I was told is that this advisor position, as you saw in the terms of reference, has two parts. It has the [“major project”] and it has [area of his expertise] assignments. And I was told that I will be working 50 percent of my time on this [“major project”] program, and the other 50 percent will be on [area of expertise] assignments.” (Tr. III, 92.)

154. A question is (a) whether Applicant’s assignments beyond the “major project” reflected a 50 percent allocation of work from the branch of the Department relevant to his expertise and (b) when Applicant began to receive work from that branch. Having reviewed the record of the case, the Tribunal is persuaded that for at least the first year of Applicant’s three-year appointment his time was dedicated almost exclusively to the “major project.” A further question is whether that fact requires the Tribunal to conclude that the Fund did not afford Applicant assignments offering him a fair opportunity to demonstrate the “career potential” required for conversion of his fixed-term appointment. These issues are considered below.

155. The Tribunal observes that the Fund itself, through the interventions of Supervisor 1, recognized that it was important for Applicant to have the opportunity to display his skills in the context of assignments flowing from the branch of the Department relevant to his subject matter expertise. Early in Applicant’s tenure, Supervisor 1 raised with the senior official and deputy of that branch the issue of Applicant’s integration. Before finalizing Applicant’s first (i.e., 6-month) performance assessment, Supervisor 1 wrote to these managers to express his view that it was “critical” that they “integrate [Applicant] more into the workings of the department,” including “regular interaction from the [area of Applicant’s expertise] side of the house.” At the time of Applicant’s 12-month review, Supervisor 1 noted that Applicant had “. . . not had the opportunity to deliver as he had originally hoped. This is largely because . . . colleagues [in that branch of the Department] have not engaged him in specific and deliverable assignments.” Applicant himself also took steps to seek out what he considered to be more appropriate assignments, complaining to managers that he had “not been given assignments that are appropriate for the role for almost a year and a half now” and seeking “agreement on all [his] assignments based on the terms of reference against which [he] was employed.”

156. As to Applicant's contention that he was not given "appropriate opportunities to demonstrate his capability as a B Level manager," in particular, as a "Division Chief in [his Department]," the Tribunal notes the following. During Applicant's recruitment, Department managers indicated their understanding that it would be important for Applicant to undertake responsibilities consistent with demonstrating capacity for appointment to a DC position, which, from the start, was the path envisioned for Applicant's conversion to open-ended status. *See* recruitment letter ("We know you were specifically interested in [area of his expertise] Division Chief position. We expect that another vacancy at that level will arise in the next 12 to 18 months and that you will be a stronger candidate if you have increased exposure to the IMF that either of these two options would afford.") *See also* SPM's memorandum to Review Committee ("We believe [Applicant] has the potential to perform in a number of different roles; we expect to have a vacancy at the division chief level in the next 20 to 30 months.") It is also notable that one of the senior officials involved in Applicant's recruitment expressed to other managers his "concern[] that having him work as an advisor will not give use a good handle on his capacity to operate as a Division Chief."

157. The Fund advances the argument that Applicant was "given a full opportunity to demonstrate his leadership skills on the project that was intended to occupy 50 percent of his time," namely, the "major project under his portfolio" as described in his TOR. Applicant testified that he was told that he should look at that assignment as an ". . . opportunity where I can expose my abilities, not just on the [area of his expertise] side of the department, but also on the non-[area of his expertise] side of the department." (Tr. III, 92.) He also acknowledged that the Department Director had told him that the "major project," although not an assignment tailored to his area of expertise, was nonetheless a "very important program for the department, a huge initiative, something . . . that is important for the Fund altogether." (*Id.*) The significance of the "major project" to the overall assessment of Applicant's "career potential" was highlighted by the testimony of the Department Director, who explained that the "work that [Applicant] did was largely project work" and that with that major project "ramping down, . . . there's less of a need for B level oversight" and hence less need for Applicant's continued employment. (Tr. II, 227.)

158. Based on the record before it, the Tribunal concludes that Applicant faced significant challenges in acquiring exposure to the types of assignments that might have best afforded him the opportunity to demonstrate potential for a career as a B-Level manager in the Fund. Applicant uniquely reported to both sides of the Department. The side responsible for work in Applicant's area of expertise was slow to engage him, delaying the opportunity for a work program that would be consistent with the 50/50 split envisioned by the TOR. The senior official—who was new to managing that branch—was unprepared for the fact that Applicant was to take a role in that part of the Department and, consequently, was unprepared to offer assignments that would test Applicant's "career potential" in the context of managing projects within his area of subject matter expertise. The official additionally testified that she was faced with having to "come up with initiatives that had enough substance for a B level person to be in charge of . . ." (Tr. II, 85.)

159. In the view of the Tribunal, concern that Applicant may not have been adequately “exposed to the types of tasks which would have been required of him as a permanent employee” *Ms. “T”*, para. 42 (internal quotations omitted), is mitigated by the following factors. First, Applicant opted for an Advisor position that was to entail a mix of work, rather than for the DDC vacancy in the branch of the Department associated with his subject matter expertise; in accepting the Advisor position, Applicant also selected a job that was “more strategy and projected based” as opposed to “operational.” (*See* recruitment letter.) Second, the nature of the shortcomings that were seen to prevent Applicant from establishing his “career potential” were deficiencies in the application of managerial acumen (*see* below), not directly related to the issue of employment in the area of his expertise. Third, when managers responded to Applicant’s requests for assignments on that side of the Department, he was seen to have handled the opportunity they presented in a manner that reflected adversely on the very attributes of leadership and initiative in which he was assessed to be lacking (*see* below).

160. Accordingly, the fact that Applicant may have had limited opportunity to demonstrate his capabilities in the context of assignments within the branch of the Department dedicated to work in his area of subject matter expertise prior to the taking of the non-conversion decision is not, in the view of the Tribunal, dispositive of the question whether he was afforded a fair opportunity to demonstrate potential for a career with the Fund. Having regard for the record as a whole, the Tribunal is not able to conclude that the Fund, in making assignments to Applicant in the course of his fixed term, failed to afford him a fair opportunity to demonstrate the “career potential” required for conversion of his fixed-term appointment.

- (2) Did the Fund provide Applicant with adequate notice of the alleged shortcomings that would figure in the assessment of his “career potential” and an opportunity to remedy them?

161. Applicant contends that the Fund did not provide him with adequate notice of alleged shortcomings that figured in the assessment of his “career potential,” nor an opportunity to remedy them. Applicant submits that the “alleged performance issues that were used by the Fund to justify the Non-Conversion Decision were raised for the very first time in the Decision itself” and “c[a]me as a complete surprise” to him. “Because [he] had no prior notice of performance problems which allegedly led to his non-conversion,” says Applicant, “he had no opportunity to remedy them.” Applicant also asserts that the Fund did not explain the standards by which his “career potential” would be assessed and held him to an unreasonable standard of having to show potential to be promoted two grades up from the grade level at which he was hired.

162. Respondent, for its part, maintains that Applicant received “clear and early feedback” but failed to show sufficient improvement. Furthermore, submits the Fund, it advised Applicant nine months prior to the non-conversion decision that the “prospects for conversion were poor, and that he would need to make substantial improvements, which he failed to do.”

163. As noted above, Applicant’s case differs from past challenges to non-conversion decisions considered by this Tribunal because the Fund has not grounded the contested decision on Applicant’s failure to meet “performance” requirements but rather on his failure to demonstrate “career potential.” (The Fund also cites as a separate ground for the decision a lack

of “staffing need” on the part of the Fund.¹³) Accordingly, the Tribunal must consider for the first time the issue of differentiating between “performance” and “career potential” in the context of deciding whether a fixed-term appointee has been given adequate notice that he is falling short of the requisite standards for conversion of his fixed-term appointment.

164. Applicant asserts that “there was no explanation as to how his career potential had been assessed.” Respondent, for its part, maintains that Applicant’s “career potential” was assessed alongside “performance” through the fixed-term monitoring process. When Applicant requested in the course of these proceedings “[a]ll documents . . . which discuss or estimate [Applicant’s] career potential at the Fund,” the Fund responded that the determination that Applicant lacked “career potential” was “based on managerial assessments of his leadership and strategic competencies that were conducted during the Fixed-Term Monitoring Process.” Likewise, in supporting Applicant’s request for anonymity, the Fund invoked the Tribunal’s jurisprudence granting anonymity to protect the candor of performance assessment processes; the Fund maintained that the “assessment of Applicant’s career potential was contained in the fixed-term monitoring/annual performance review documentation, and the issues are discussed side by side.”

165. The Tribunal has observed above that there is a close relationship between “performance” and “career potential” in the Fund’s internal law governing conversion of fixed-term appointments. The fixed-term monitoring process is to “assist managers in evaluating the performance of new staff in their current role *and* their potential for a long-term career in the Fund.” (Fixed-Term Monitoring Guidelines.) (Emphasis added.) To the extent that the assessment of “career potential” will rely in part on the evaluation of the fixed-term appointee’s “performance” to date, that aspect of the assessment of “career potential” will be reviewable by the Tribunal according to the standards applicable to other performance-based decisions, including that the appointee is to be “evaluated periodically, given adequate warning of performance deficiencies and a reasonable opportunity to remedy them.” *Mr. “HH”*, para. 98; *Ms. “T”*, para. 38; *Ms. “U”*, para. 38.

166. At the same time, GAO No. 3 and the Guidelines for Conversion of Fixed-Term Appointments identify demonstrating “career potential” as a criterion separate from—and additional to—meeting “performance” requirements. Accordingly, the fact that a fixed-term appointee has garnered “Effective” ratings on performance assessments will not substitute for a decision that the appointee has met the “career potential” requirement for conversion of the fixed-term appointment. This is especially so given that, under the Fund’s performance assessment system, the “Effective” category will “necessarily describe a broad spectrum of performance” and will include both positive and negative observations on performance. *Ms. “GG”* (No. 2), para. 345; *Mr. “KK”*, para. 123.

¹³ See *infra* Did the Fund abuse its discretion in deciding not to convert Applicant’s fixed-term appointment on the ground of lack of “staffing need” on the part of the Fund?

167. The Tribunal has recognized that unlike the assessment of “performance,” which will necessarily be a backward-looking exercise, the assessment of “career potential” will require managers to project the fixed-term appointee’s future trajectory. Insofar as that projection calls upon managers to make a judgment about the staff member’s likely future contribution to the Fund, it will be informed by managerial expertise and institutional knowledge. As such, it will be entitled to a considerable degree of deference by the Tribunal.

168. The Tribunal is mindful of the importance of rules-based systems to avoid arbitrariness. See *Ms. “T”*, para. 46 (“Tribunal has emphasized ‘the importance of performance evaluation systems in avoidance of arbitrariness and discrimination’”) (internal citations omitted); *Ms. “NN”*, para. 95 (“transparent, rules-based vacancy selection process protects against arbitrariness and discrimination”). The fixed-term monitoring process is designed to provide a “consistent and reliable basis for making assessments on possible conversions.” (Guidelines for Conversion of Fixed-Term Appointments.) The nature of the judgment on “career potential,” however, will necessarily be a multifaceted one, which will engage a broad discretion.

169. In assessing whether a fixed-term appointee has been given adequate notice of “performance” shortcomings that will reflect adversely in an assessment of “career potential,” what is important is that the fixed-term appointee is given notice (a) of observed shortcomings and (b) that these may figure in the decision whether the appointment will be converted to open-ended status. The question is whether that was done here.

170. In Applicant’s case, it appears that the assessment of “career potential” relied heavily on “performance” concerns. Although these concerns were not seen to have been so severe as to warrant rating Applicant’s performance below the “Effective” range, they anchored the determination that his “career potential” was insufficient to support the conversion of his fixed-term appointment. Invoking the Tribunal’s standard of review for challenges to annual performance reviews, the Fund maintains that “. . . [Applicant’s] managers’ assessments had a ‘reasonable and observable’ basis in his assignments,” quoting *Mr. “KK”*, para. 116. In the words of the Fund, “testimonial evidence from these senior [Department] managers based on several different projects over the span of Applicant’s appointment was overwhelming and consistent – Applicant lacked the leadership, initiative, and collaborative problem-solving skills that are required for success at the B-level at the Fund.”

171. The record of Applicant’s fixed-term performance monitoring evidences managers’ concerns. In Applicant’s 18-month assessment, i.e., the FY2014 APR, the following observations stand out. As for “Strategic Vision,” although termed “adept at identifying issues,” Applicant was told he could improve by “working more proactively with others to address issues rapidly and avoid having a pause with progress of the [‘major project’].” As for “Negotiating and Influencing,” Applicant was advised to “. . . move beyond trying to resolve differences solely through discussing needs and the existence of obstacles . . . [and] . . . give greater attention to resolving differences by proposing mutually beneficial solutions and explain how his ideas and proposals meet others’ needs and concerns.” With regard to “Managing Performance of Teams,” Applicant was informed that he would “greatly benefit from translating this knowledge into a clear sense of purpose and direction for team members, building consensus, and resolving issues.”

172. Importantly, Applicant's FY2014 APR connected these performance-based concerns with the question whether his fixed-term appointment would be converted to an open-ended appointment at the 30-month mark. That 18-month review put Applicant on notice that an "Effective" performance rating did not insulate him from the possibility of non-conversion.

173. The Draft FY2014 APR, submits the Fund, gave Applicant "clear notice of the risk of non-conversion" some eight months before the conversion decision. Accordingly, says the Fund, "Applicant was on notice of these important areas for improvement, and he had the opportunity to address them." Applicant counters that the Fund cannot defend the non-conversion decision on the basis of a draft performance assessment whose particular criticisms were modulated in the final assessment. Applicant asserts: "[Supervisor 2]'s agreement to remove much of the offending language in his first draft is irrefutable evidence that he recognized that he had been unjust, and the earlier language cannot possibly be considered notice when it was withdrawn."

174. The Tribunal observes that even after the text of the FY2014 APR had been revised in response to Applicant's protests, the final version retained a reference to the possibility of non-conversion, albeit tempered as a result of the negotiation: "*Looking forward, [Applicant] needs to improve and deliver in the areas noted above. . . . All of these areas will be important performance inputs for the coming Fixed-Term conversion decision.*" (Emphasis added.) Moreover, the drafting and negotiating process itself should have alerted Applicant to the seriousness of his managers' concerns as these related to the upcoming decision on conversion. See Ms. "T", para. 41 ("periodic appraisals, both formal and informal, of Applicant's performance demonstrated—or should have demonstrated—to Ms. "T" that the Fund retained doubts about the prospects of her conversion to an appointment of indefinite duration").

175. In providing a fixed-term appointee with timely notice of shortcomings that may bear on the decision whether to convert the fixed-term appointment, it will be important for the Fund to identify those performance elements that may raise the possibility of non-conversion, whether on the basis of "performance" or "career potential." In the view of the Tribunal, the Fund did that here by highlighting, as part of the 18-month assessment, the issue of the upcoming conversion decision when identifying competencies that required improvement. In the circumstances of this case, the Tribunal is satisfied that, at a juncture when Applicant still had the opportunity to make improvements, he was advised that shortcomings in demonstrating managerial leadership and initiative put the conversion of his fixed-term appointment at risk.

176. In the view of the Tribunal, in communicating with Applicant about the strengths and weaknesses of his "performance," his managers necessarily also communicated with him about his "career potential." Although those performance concerns were not seen as sufficiently grave as to render Applicant's performance rating less than "Effective," managers reasonably relied upon these substantiated performance assessments in reaching their "considered determination," Mr. "HH", para. 96, that Applicant had not established his suitability for open-ended employment with the Fund.

177. Applicant also takes issue with the following statement, which was included in the Non-Conversion Decision: "[R]egarding his potential, despite his effective performance, we did not see initiative or leadership potential to move two grades up in the foreseeable future to the level

of an Assistant Director at the B3 [level].” Applicant challenges this standard, asserting that “[n]obody had ever suggested to him that in order to have a career in the Fund, he had to prove that he was likely to receive a double promotion – nor was the Fund able to produce a single document that might indicate that this was a criterion for conversion.” (Emphasis in original.)

178. The Tribunal notes that the Fund has not cited any provision of its written law prescribing a “two grades up” promotion standard for demonstrating “career potential” under the fixed-term conversion process. In its pleadings before the Tribunal, the Fund appears to have abandoned the specificity of such a requirement, instead characterizing the language used in Applicant’s Non-Conversion Decision as “shorthand” for showing potential to rise in the ranks of the Fund.

179. In his Grievance Committee testimony, the Department Director drew the distinction between meeting “performance” standards and demonstrating “career potential” by referring to the ability to rise in the ranks and to take on expanded responsibilities: “[T]he performance [on] the tasks assigned was respectable and okay,” said the Department Director. “We felt that the potential to have a long-term career with a sort of further rising in the . . . ranks of the Fund, . . . an ability to expand responsibility, to – tackle bigger, larger work tasks, lead more people was limited.” (Tr. II, 188.) In the view of the Tribunal, in taking the measure of Applicant’s “career potential,” a task that called upon managers to make a judgment about his likely future contribution to the institution, it was not unreasonable to consider Applicant’s possibilities for future promotion.

180. It was also not unreasonable, in the view of the Tribunal, for Applicant’s managers, in assessing his potential for a successful career at the B Level, to have taken account of the manner in which he responded to a significant assignment proposed by the branch of the Department that oversaw work in his area of expertise. The Fund submits that Applicant’s response “demonstrated an inability to lead, negotiate, and collaborate with other B-level managers on an important [area of expertise] project.” His managers views concerning that controversy are captured in the record of the case. In her Grievance Committee testimony, the senior official observed that the proposed assignment should have been an “opportunity to demonstrate what you can do and to put your best foot forward and not – not spending months stewing over the reporting relationship.” (Tr. II, 35.) Applicant’s rejection of the assignment resulted in a “missed opportunity for him to show his leadership and initiative.” (Tr. II, 28.) “[E]ven in the philosophical disagreement,” the senior official testified, “then be a voice at the table presenting your opinions and your rationale” (Tr. II, 35.)

181. Based on the foregoing evidence, the Tribunal cannot conclude, as Applicant urges, that the “alleged performance issues that were used by the Fund to justify the Non-Conversion Decision were raised for the very first time in the Decision itself” and “c[a]me as a complete surprise” to him, or that “[b]ecause [he] had no prior notice of performance problems which allegedly led to his non-conversion, he had no opportunity to remedy them.” To the contrary, the record supports the conclusion that Applicant was on notice (a) of the deficits in managerial leadership and initiative in which he was seen to need to improve and (b) that these shortcomings, although not determinative of a less than “Effective” performance rating, placed the conversion of his fixed-term appointment at risk.

(3) Was there a reasonable basis for the conclusion that Applicant lacked the requisite “career potential” for conversion of his fixed-term appointment?

182. The ultimate question is whether managers had a reasonable basis for the conclusion that Applicant lacked the requisite “career potential” for conversion of his fixed-term appointment. As the Tribunal has observed above, the judgment on “career potential” will necessarily be a multifaceted one, which will engage a broad discretion. In their Grievance Committee testimony, Applicant’s managers expressed the view that “career-wise, [Applicant] was not a B-level staff member at the Fund He did not have the potential.” (Tr. III, 26, Supervisor 2.) The senior official testified that what was important was whether Applicant had demonstrated the “initiative and leadership that you would expect from a B level person” and, in her view, he had not. (Tr. II, 34.) Supervisor 2 explained: “[A]s a B-level staff member, I think one needs to see the bigger picture and propose solutions This requires understanding the broader context, connecting the dots between the various stakeholders and incentives and a sort of proactive approach” (Tr. III, 27.) Supervisor 2 also linked these observations to the deficits in “strategic vision” and “negotiating and influencing” (Tr. III, 26) that had been noted in Applicant’s performance assessments.

183. The decision that Applicant failed to demonstrate “career potential” consistent with open-ended employment was closely tied to the assessment of his “performance.” The Tribunal has decided above that Applicant has not shown that the Fund failed to provide him with either (a) assignments that afforded a fair opportunity to demonstrate “career potential” or (b) notice of alleged shortcomings that would figure in the assessment of his “career potential” and opportunity to remedy them. Although Applicant’s “performance” was deemed to fall within the “Effective” range, it was within his managers’ discretionary authority to make a considered determination that his “career potential” fell short of that required for conversion of his fixed-term appointment.

184. The Tribunal has observed that “tailoring of assessment criteria to the nature of the work performed is a core responsibility of managers.” *Mr. “KK”*, para. 138. As well, 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 ‘a managerial, and not a judicial, responsibility.’ Commentary on the Statute, p. 19.” *Ms. “JJ”*, para. 87. The Tribunal will be particularly reluctant to second guess managers in their assessment of the senior-level competencies in which Applicant was seen to fall short. Having reviewed the record, the Tribunal concludes that Applicant’s fixed-term performance assessments identified a pattern of shortcomings relating to competencies in managerial leadership and initiative that reasonably could have led managers to conclude that Applicant lacked potential for a career with the Fund.

185. The Guidelines for Conversion of Fixed-Term Appointments provide that there must be a “*clearly positive assessment of performance and potential* for taking the important step of committing the Fund to providing a career opportunity for the individual.” (Emphasis added.) The collective judgment of Applicant’s managers, based on their expertise concerning the attributes required for effectiveness at the B-Level within the Fund environment, was that the performance shortfalls exhibited by Applicant did not augur well for his future as a B-Level manager. “When managers take such a decision . . . with deliberation and in the absence of

improper motive, it is not for the Tribunal to substitute its judgment for their considered determination.” *Mr. “HH”*, para. 96, citing *Ms. “T”*, para. 53; *Ms. “U”*, para. 53.

186. The Tribunal accordingly concludes that the Fund did not abuse its discretion in deciding not to convert Applicant’s fixed-term appointment on the ground that he did not demonstrate “career potential” with the Fund.

D. Did the Fund abuse its discretion in deciding not to convert Applicant’s fixed-term appointment on the ground of lack of “staffing need” on the part of the Fund?

187. As a second ground for the decision not to convert Applicant’s fixed-term appointment to an open-ended appointment, the Fund submits that it did not have a “staffing need” for a B-Level Advisor position in Applicant’s Department at the time of the non-conversion decision. The Fund describes this as an independently sufficient basis on which to sustain the contested decision.

188. The Tribunal observes that the question of “staffing need” ordinarily will not arise unless the fixed-term appointee has met the “performance” and “career potential” criteria for conversion of the fixed-term appointment. Having sustained the non-conversion decision on the ground of lack of “career potential” on the part of Applicant, the Tribunal does not find it necessary to decide whether the decision may also be sustained on the basis of lack of “staffing need” on the part of the Fund.

E. Was the non-conversion of Applicant’s fixed-term appointment improperly motivated by bias or discrimination?

189. Applicant advances several arguments that raise the question whether the non-conversion of his fixed-term appointment was improperly motivated by bias or discrimination. These arguments include: Applicant was treated less favorably than other B-Level staff members who were not hired through the B-Level Diversity Hiring Initiative; Applicant was treated less favorably than other staff members hired through the same Initiative; and the non-conversion decision was improperly affected by managers’ bias against Applicant. In Applicant’s words, the non-conversion decision was the “culmination of three years of discriminatory treatment . . . because he was hired through the B-Level Diversity Hiring Initiative rather than through the normal recruitment process.” Respondent disputes each of these assertions.

190. Applicant’s allegations that he was treated less favorably than other B-Level staff members who were not hired through the Initiative include that he was assigned a junior-level office and excluded from senior staff meetings, as well as that the SPM had highlighted both Applicant’s nationality and the fact of his recruitment through the Initiative in the initial Department-wide announcement of his appointment. The Fund responds that Applicant’s first two complaints do not evidence discrimination. As for the third, the Fund refers to the SPM’s Grievance Committee testimony, in which she stated that it was important to be “transparent” about the fact that Applicant was hired through the Initiative, and that this information helped to explain to current staff members Applicant’s arrival into a position that had not resulted from competition for a vacancy. (Tr. I, 135, 137.)

191. Having reviewed the record of the case, the Tribunal concludes that Applicant has not met his burden of establishing that he experienced discriminatory working conditions as a consequence of his hiring through the Initiative. (The Tribunal considers below the question of how differences between the recruitment of candidates through the Initiative and recruitment of other fixed-term appointees may bear upon the question whether the Fund treated Applicant fairly in relation to his appointment under the Initiative, given the purposes of the Initiative.¹⁴)

192. Applicant's argument that he was treated less favorably than other staff members who were also hired through the Initiative centers on the claim that, in order to be converted to open-ended status, his Department required him to compete for an open-ended position whereas some others recruited through the Initiative (and employed in other departments) were transferred directly into FTE positions during the course of their fixed terms. The Fund has responded that "[d]ifferent departments took different approaches" because "Management has allowed departments to have flexibility in how they hired and managed staff under this initiative." Departments accordingly had "various options at their disposal" as to how a fixed-term appointee hired through the Initiative might become an open-ended staff member, assuming that the individual fulfilled the criteria of meeting "performance" requirements and demonstrating "career potential." These options, says the Fund, included transferring the staff member—without competition—to an existing open-ended position, as well as creating a new position in the department with departmental monies after Initiative funds expired.

193. The Tribunal has concluded above that the Fund did not abuse its discretion in deciding that Applicant did not meet the criterion of demonstrating the requisite "career potential" for conversion of his fixed-term appointment. In the circumstances, Applicant's allegation of discrimination in relation to the issue of how he might have been retained in the event he had established a "clearly positive assessment of performance and potential" (Guidelines for Conversion of Fixed-Term Appointments), is not a matter that the Tribunal need address.¹⁵

194. As for Applicant's allegation that the non-conversion decision was improperly motivated by managers' bias against him, that claim focuses, in particular, on alleged "personal dislike and false attacks" on his performance by one of Applicant's managers. The Fund disputes the allegation of bias, and, in any event, maintains that the individual in question had input into, but not decision-making authority over, the assessment of Applicant's "performance" and "career potential." In the view of the Tribunal, Applicant has not established on the record of the case that "improper motive" in the sense of "taking account of factors not relevant to the assessment

¹⁴ See *infra* Did the Fund treat Applicant fairly in relation to his appointment under the Initiative, given the purposes of the Initiative?

¹⁵ For the same reasons, the Tribunal has decided not to address the question whether the Fund abused its discretion in taking the decision not to convert Applicant's fixed-term appointment on the ground of lack of "staffing need." See *supra* Did the Fund abuse its discretion in deciding not to convert Applicant's fixed-term appointment on the ground of lack of "staffing need" on the part of the Fund?

(continued)

of the staff member's professional competencies," *Mr. "KK"*, para. 103, affected the non-conversion decision. That decision was reasonably based and taken after Applicant was given a fair opportunity to demonstrate his "career potential."¹⁶

195. For the foregoing reasons, the Tribunal concludes that Applicant has not shown that the decision not to convert his fixed-term appointment to an open-ended appointment was improperly motivated by bias or discrimination.

F. Did the Fund treat Applicant fairly in relation to his appointment under the Initiative, given the purposes of the Initiative?

196. The Tribunal has decided that the Fund did not abuse its discretion in taking the non-conversion decision on the ground that Applicant failed to demonstrate the requisite "career potential" with the Fund. Nor has Applicant established that the non-conversion decision was improperly motivated by bias or discrimination. It remains to consider whether the Fund treated Applicant fairly in relation to his appointment under the Initiative, given the purposes of the Initiative.

197. The B-Level Diversity Hiring Initiative was designed to address the underrepresentation at the B Levels of the Fund of individuals from particular regions of the world. (Memorandum from HRD Director to Deputy Managing Director, "Measures to Improve Diversity at the Fund," October 18, 2010.) The Tribunal has observed above that there was an uneasy fit between the Initiative and the usual fixed-term appointment process.¹⁷ The issue of fair treatment in Applicant's case must accordingly be considered in the context of his employment through the Initiative, including the manner in which that differed from the usual fixed-term appointment process.

198. Applicant's recruitment, as part of the Initiative, differed in two fundamental ways from the usual fixed-term process. First, Applicant was hired into his three-year fixed-term Advisor position without having to compete for a vacancy. Second, that position was not part of the Department's complement of FTE positions, i.e., it was not an "ongoing" position; rather, it was set to expire with the conclusion of the Initiative funding at the end of Applicant's three-year appointment. The fact that Applicant's position was not an "ongoing" one was an essential feature of the Initiative, whereby funding was requisitioned from central resources and three-year positions were created in a manner that would "mitigate the impact on promotion prospects of internal non-diverse staff (since, with additional slots for the external recruits, more internal staff

¹⁶ *See supra* Did the Fund abuse its discretion in deciding not to convert Applicant's fixed-term appointment on the ground that he did not demonstrate "career potential" with the Fund?

¹⁷ *See supra* Did the B-Level Diversity Hiring Initiative, or the terms of Applicant's recruitment through that Initiative, constrain the Fund's discretionary authority under the rules governing the conversion of fixed-term appointments?

can still be promoted into ‘regular’ vacancies).” (Memorandum from HRD Director to Deputy Managing Director, “Measures to Improve Diversity at the Fund,” October 18, 2010.)

199. In its pleadings before the Tribunal, the Fund has explained how the Initiative was expected to work: “[T]he purpose of these [Initiative] funds was to provide top candidates entrée to the Fund from which they could learn the institutional culture, build networks, and make themselves more competitive for B-Level vacancies as they arose.” In their Grievance Committee testimony, Applicant’s managers confirmed their understanding that, in order to be converted, a fixed-term staff member recruited through the Initiative would either need to be selected for a vacancy during the fixed term or a new position would need to be created. The SPM explained that the Initiative was to provide “time and exposure and that the diverse candidate who had come on this temporary specialized funding, centralized funding would gain traction in the Department and . . . would motivate the department to then see what, if any, opportunities existed that the candidate could apply to.” (Tr. I, 40.)

200. The Tribunal observes that the Fund’s law governing conversion of fixed-term appointments recognizes the difficult burden that would be placed on a fixed-term appointee who is required to compete, during the course of the fixed term, for a new position. The “mobility” provision of the Fixed-Term Monitoring Guidelines states, in part, that a fixed-term appointee is “expected to remain in the same department, and will normally retain the same position, for the duration of the appointment.”¹⁸ The Tribunal noted in *Mr. “HH”*, para. 126, that the “mobility” provision is to “avoid staff members on fixed-term appointments not being given adequate time to adapt to the job and establish a suitably high level of performance.” This was a challenge inherent in Applicant’s appointment.

201. The Tribunal has decided above that the Initiative did not place the “onus” on the Fund to “absorb” Applicant, that is, it did not create an enforceable expectation of conversion.¹⁹ It did however, in the view of the Tribunal, require the Fund to take proactive steps to give effect to the purposes of the Initiative, in the light of the unusual relationship between the Initiative and the fixed-term appointment process. Having placed Applicant in a non-FTE position for the purpose of “learn[ing] the institutional culture, build[ing] networks, and mak[ing] [himself] more competitive for B-Level vacancies as they arose,” the Fund necessarily took on certain obligations required for the success of the program, in the interests of both the individual recruits and the institution itself.

202. Under the Guidelines for Conversion of Fixed-Term Appointments, supervisors are tasked with particular responsibilities, including to provide “suitable assignments, clear expectations, appropriate guidance, and timely feedback.” In the view of the Tribunal, these

¹⁸ The full text of the “mobility” provision of the Fixed-Term Monitoring Guidelines is found *supra* in RELEVANT PROVISIONS OF THE FUND’S INTERNAL LAW.

¹⁹ See *supra* Did the B-Level Diversity Hiring Initiative, or the terms of Applicant’s recruitment through that Initiative, constrain the Fund’s discretionary authority under the rules governing the conversion of fixed-term appointments?

responsibilities were heightened in the context of Applicant's appointment through the Initiative. Notably, the "[a]dditional budget for external hires," which funded Applicant's three-year appointment, was not only to "provide an incentive to hiring departments" to hire external candidates from underrepresented regions but also to "*facilitate the recruits' onboarding and integration.*" (Memorandum from HRD Director to Deputy Managing Director, "Measures to Improve Diversity at the Fund," October 18, 2010.) (Emphasis added.) Accordingly, the following question arises. Did managers take the steps necessary to "facilitate [Applicant's] . . . integration" into the Fund?

203. Having reviewed the record of the case, the Tribunal finds as follows. The challenges Applicant faced as an Initiative recruit (whose position was set to expire with its funding after three years) were amplified by a series of managerial lapses in integrating Applicant into the work of the Department. These included, following the departure of the senior Departmental official who had championed Applicant's recruitment, that the official's successor did not initially demonstrate support for incorporating Applicant into the work of the branch of the Department that she oversaw. The new official testified that she did not think she had ever seen Applicant's TOR (Tr. II, 45-47) and that this left her with "some frustration" that Applicant had been assigned to work in the Department and with no clear idea of the assignments Applicant would be performing. (Tr. II, 83-84.) Following her predecessor's retirement, the official observed, "[t]here really wasn't anybody who seemed to know exactly what the plan was [for Applicant's work in the area under the official's supervision and in which Applicant had expertise]." (*Id.*) In the view of the Tribunal, the purposes of the Initiative and fairness to Applicant required that the new manager be advised of Applicant's program and undertake proactive measures to support its success.

204. The external recruitment of B-Level appointees such as Applicant was part of a broader effort to increase diversity at the Fund's managerial levels. Notably, this effort also included "strengthened career development support" to "maximize the potential of our high-potential diverse A14/A15 staff, so that they can compete successfully for B-level vacancies," including a pilot mentoring program and enhanced feedback from the Review Committee and hiring departments to shortlisted but unsuccessful candidates. (Memorandum from HRD Director to Deputy Managing Director, "Measures to Improve Diversity at the Fund," October 18, 2010.) These measures recognized the importance of "strengthened career development support" to assist *existing* diverse staff in advancing to B-Level positions. Such support was perhaps even more important to the success of individuals such as Applicant who entered externally into B-Level posts.

205. Inevitably, there will be challenges in implementing programs such as the Initiative. Individuals entering the Fund at senior levels will encounter particularly formidable challenges, both in terms of learning the ways of the institution and gaining the respect of subordinates and peers. As well, there will be challenges relating to the acceptance of the program by existing staff. It is notable that the Initiative was designed in such a way as to "mitigate the impact on promotion prospects of internal non-diverse staff." (Memorandum from HRD Director to Deputy Managing Director, "Measures to Improve Diversity at the Fund," October 18, 2010.) These challenges are also evident in the record of the instant case. *See, e.g.*, the SPM's testimony that

“after the announcement [of Applicant’s appointment] went out, there was sort of questioning . . . – well, managers told me the staff had been questioning why, what was this – they didn’t see the need for this job. It wasn’t a real job.” (Tr. I, 133, SPM.) In the view of the Tribunal, Fund managers had a duty to mitigate these concerns. In Applicant’s case, the record shows that they fell short of this responsibility.

206. In reviewing challenges to the non-conversion of fixed-term appointments, the Tribunal has emphasized that the Fund’s discretionary authority is “constrained by principles of fair treatment.” *Mr. “HH”*, para. 98; *see also Ms. “T”*, para. 38; *Ms. “U”*, para. 38. In the view of the Tribunal, in undertaking the Initiative, which provided funding for Applicant’s B-Level position for a three-year term without any provision for continuation of the position at the conclusion of that period, it was incumbent on the Fund to take proactive efforts to assist Applicant to “learn the institutional culture, build networks, and make [himself] more competitive for B-Level vacancies as they arose.” The record of the case shows that the Fund fell short in “facilitat[ing] [Applicant’s]. . . integration,” as envisioned by the Initiative. The Tribunal accordingly concludes that the Fund did not treat Applicant fairly in relation to his appointment under the Initiative, given the purposes of the Initiative. For that lapse of fair treatment, Applicant is entitled to compensation.

CONCLUSIONS OF THE TRIBUNAL

207. For the reasons elaborated above, the Tribunal has concluded as follows.

208. First, Applicant has not shown, either as a matter of Fund law or expectation created, that his Department was obligated to “absorb” him following the expiration of three years’ central funding under the Initiative. The Fund’s discretionary authority to decide whether to convert Applicant’s fixed-term appointment to an open-ended appointment was not constrained by his recruitment through the B-Level Diversity Hiring Initiative.

209. Second, the Fund did not abuse its discretion in taking the non-conversion decision on the ground that Applicant did not demonstrate “career potential” as required by GAO No. 3 and the Guidelines for Conversion of Fixed-Term Appointments. Applicant has not shown that the Fund failed to provide him with assignments that afforded a fair opportunity to demonstrate “career potential” or notice of alleged shortcomings that would figure in the assessment of his “career potential” and opportunity to remedy them. Although Applicant’s “performance” was deemed to fall within the “Effective” range, it was within his managers’ discretionary authority to make a considered determination that his “career potential” fell short of that required for conversion of his fixed-term appointment. Applicant’s fixed-term performance assessments identified a pattern of shortcomings relating to competencies in managerial leadership and initiative that reasonably could have led managers to conclude that Applicant lacked potential for a career with the Fund.

210. Third, having decided that the non-conversion decision is sustained on the ground of lack of “career potential” on the part of Applicant, the Tribunal does not find it necessary to decide whether the decision may also be sustained on the basis of lack of “staffing need” on the part of the Fund.

211. Fourth, Applicant has not established that the non-conversion decision was improperly motivated by bias or discrimination.

212. Fifth, the Fund failed to treat Applicant fairly in relation to his appointment under the Initiative, given the purposes of the Initiative. Managers should have undertaken proactive steps to give effect to the Initiative's purposes, in the light of the uneasy fit between the Initiative and the fixed-term appointment process. Instead, the challenges Applicant faced as an Initiative recruit were amplified by a series of managerial shortcomings in integrating Applicant into the work of the Department. For that lapse in fair treatment, Applicant is entitled to compensation.

REMEDIES

213. Applicant seeks as relief: (a) rescission of the non-conversion decision and removal of all related records from Applicant's personnel file; (b) three years' salary for lost employment; (c) compensation for losses of his pension and retirement benefits, including that Applicant be placed on Leave Without Pay in the Interest of the Fund in order to continue making pension contributions until reaching early retirement age in 2020; (d) an additional one year's salary for "appalling stress" and damage to Applicant's reputation and family; and (e) legal fees and costs, which the Tribunal may award, in accordance with Article XIV, Section 4 of the Statute.

214. The Tribunal's remedial authority in respect of challenges to individual decisions is found in Article XIV, Section 1, of the Statute, which provides:

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

215. The Tribunal's jurisprudence reflects that its remedial powers fall broadly into three categories: (i) rescission of the contested decision, together with measures to correct the effects of the rescinded decision through monetary compensation or specific performance; (ii) compensation for intangible injury resulting from procedural failure in the taking of a sustainable decision; and (iii) compensation to correct the effects of intangible injury consequent to the Fund's failure to act in accordance with its legal obligations in circumstances where there may be no decision to rescind. *See Ms. "GG" (No. 2)*, para. 444 and notes 58-60. In all three categories, the Tribunal has had occasion to compensate applicants for "intangible injury."

A. Monetary compensation for intangible injury

216. Intangible injury ordinarily arises when the Fund "fails through inaction to discharge a duty imposed by its written law or by general principles of international administrative law, such as the obligation to take decisions in accordance with fair and reasonable procedures." *Ms. "NN"*, para. 144, quoting *Ms. "GG" (No. 2)*, para. 445. Accordingly, "[c]ompensation for intangible injury responds to staff members' legitimate expectations that the Fund will act in accordance with the rule of law." *Id.*

217. In this case, the intangible injury arose from the Fund’s failure to treat Applicant fairly in relation to his appointment under the Initiative, given the purposes of the B-Level Diversity Hiring Initiative. In the view of the Tribunal, these supervisory shortcomings do not vitiate the non-conversion decision. However, they do warrant a remedy for unfair treatment. *See Ms. N. Sachdev, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2012-1 (March 6, 2012), paras. 253, 256 (“Tribunal’s findings reveal an accumulation of failures of requisite managerial pro-activeness . . . [that] . . . evidence a degree of indifference to Applicant inconsistent with fundamental fairness to staff”; awarding compensation for failure of fair treatment in relation to non-selection for vacancy and abolition of position, while sustaining the contested decisions).

218. The Tribunal has recognized that intangible injury, by its nature, will be difficult to quantify. *Ms. “GG” (No. 2)*, para. 446. The Tribunal’s approach in such cases is to “identify the injury and assess its nature and severity, giving due weight to factors that may either aggravate or mitigate the degree of harm to the applicant.” *Id.* This is because “[c]ompensation for intangible injury responds not only to a staff member’s legitimate expectation that the Fund will adhere to its legal obligations but also to the nature of the particular obligation that has been breached.” *Id.*, para. 448.

219. Here, the essence of the harm is that managers failed to meet their obligation to take proactive steps to give effect in Applicant’s case to the Initiative’s purposes, in the light of the uneasy fit between the Initiative and the fixed-term appointment process. In setting an award of monetary compensation for intangible injury, the Tribunal will also look to any aggravating or mitigating circumstances. *Ms. “GG” (No. 2)*, para. 446. In this case, an aggravating factor is that Fund officials took pains to encourage Applicant to opt for a position under the Initiative, which would “count towards the department’s B-level [diversity] benchmark levels,” after Applicant initially communicated a preference for pursuing a different option for employment with the Fund. (Tr. I, 40-41, SPM; Tr. III, 89, Applicant.) This was the case even though one of the officials expressed concern at the time that “having [Applicant] work as an advisor will not give us a good handle on his capacity to operate as a Division Chief.” Following Applicant’s arrival, managers did not respond with proactive efforts to “facilitate [Applicant’s]. . . integration,” as envisioned by the Initiative.

220. Having regard for these factors, the Tribunal sets the compensation to correct the effects of the intangible injury consequent to the Fund’s failure to treat Applicant fairly in relation to his appointment under the Initiative, given the purposes of the B-Level Diversity Hiring Initiative, in the sum equivalent to nine months of Applicant’s salary at the time of the lapse of his fixed-term appointment.

B. Legal fees and costs

221. Article XIV, Section 4, of the Statute provides:

If the Tribunal concludes that an application is well-founded in whole or in part, it may order that the reasonable costs incurred by the applicant in the case, including the cost of applicant’s counsel,

be totally or partially borne by the Fund, taking into account the nature and complexity of the case, the nature and quality of the work performed, and the amount of the fees in relation to prevailing rates.

222. In accordance with Rule IX, para. 5, of the Tribunal's Rules of Procedure, Applicant included with his Reply the amount and supporting documentation of requested legal fees and costs incurred. Respondent, for its part, asks the Tribunal to apply a principle of proportionality to any fee award, so that if Applicant prevails on some claims and not on others, the Tribunal would limit the award to a percentage of the total that fairly represents the extent to which Applicant prevailed. The Fund also asserts that Applicant has presented argument devoted to claims of animus or bias on the part of certain managers "despite the complete absence of a factual record to support any such claim."

223. The Tribunal has recently summarized principles guiding its awards of legal fees and costs. *See Mr. "LL"*, para. 295. Among those principles is that a "measure of proportionality" will apply, based on the degree to which an applicant is successful in the context of the totality of the case. Where an applicant has prevailed in part on his claims, the Tribunal will weigh the "relative centrality and complexity" of the various claims and their "ultimate disposition" by the Tribunal. *Mr. "F", Applicant v. International Monetary Fund, Respondent (Assessment of compensable legal costs pursuant to Judgment No. 2005-1)*, IMFAT Order No. 2005-1 (April 18, 2005).

224. In applying a principle of proportionality, the Tribunal may also take account of the record assembled by an applicant's counsel in pursuit of unsuccessful claims. In two cases in which applicants did not succeed on their principal claims but prevailed in showing unfair treatment, the Tribunal awarded substantial fees and costs. *See Mr. "F"*, Order No. 2005-1 (record assembled by counsel was "indispensable to the Tribunal's award to Applicant of substantial relief on other substantial counts"); *Sachdev*, para. 260 (applicant prevailed in "demonstrating significant failures of fair treatment"; record assembled by counsel formed basis upon which Tribunal reached its conclusions).

225. In this case, Applicant has not prevailed on his chief complaint, namely, that the Fund abused its discretion in deciding not to convert his fixed-term appointment to an open-ended appointment. He has prevailed, on the extensive record of the case, in showing that the Fund did not treat him fairly in relation to his appointment under the Initiative, given the purposes of the Initiative. In making the fee award, the Tribunal additionally observes that the Application raised for the first time important issues relating to the differentiation of "performance" and "career potential" in the law governing the Fund's fixed-term conversion process, as well as issues concerning the relationship between the B-Level Diversity Hiring Initiative and the fixed-term appointment process. These are matters of significance not only for Applicant's case but for the institution as a whole.

226. Having considered the representations of the parties, and the criteria set out in Article XIV, Section 4, of the Statute, the Tribunal concludes that the Fund shall pay Applicant the sum of \$22,201.08, being fifty percent of the total amount of legal fees and costs incurred by him in the case.

DECISION

FOR THESE REASONS

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

1. The Fund's decision not to convert Mr. "OO"'s fixed-term appointment to an open-ended appointment on the ground that he failed to demonstrate "career potential" with the Fund is sustained.
2. It is not necessary to decide whether the Fund's decision not to convert Mr. "OO"'s fixed-term appointment to an open-ended appointment on the ground of lack of "staffing need" may also be sustained.
3. The Fund failed to treat Mr. "OO" fairly in relation to his appointment under the Initiative, given the purposes of the B-Level Diversity Hiring Initiative.
4. To correct the effects of the Fund's failure identified at paragraph 3 above, Mr. "OO" is awarded as compensation the sum equivalent to nine months' salary at the time of the lapse of his fixed-term appointment.
5. The Fund shall also pay Mr. "OO" the sum of \$22,201.08, being fifty percent of the total amount of legal fees and costs incurred by Mr. "OO" in the case.

Catherine M. O'Regan, President

Andrés Rigo Sureda, Judge

Jan Paulsson, Judge

/s/

Catherine M. O'Regan, President

/s/

Celia Goldman, Registrar

Washington, D.C.
December 17, 2019