

JUDGMENT, CASE No. 74

FERNANDO FERNÁNDEZ vs. IDB

The Inter-American Development Bank Administrative Tribunal composed of Judge María Ángela Poliche de Sobre Casas, President; Judge Guilherme Caputo Bastos, Vice-President; Judge Robert Gorman, Judge Germán Barreiro González; Judge Desiree Patricia Bernard and Judge German Leitzelar V.; considered the case following the procedures established in the Rules of the Tribunal.

The Complainant was assisted by Samuel McTyre, Esq. The Bank was represented by Stephen Park, Esq. and Rodolfo B. Graham, Esq. The Tribunal heard oral argument on 22 July 2011.

WHEREAS:

On 30 October 2009, Mr. Fernando Fernández, a citizen of Argentina, an auditor by profession and a former employee of the Inter-American Development Bank (the Bank or IDB) filed a complaint against the Bank pursuant to Article 14 of the Rules of Procedure of the Tribunal

I. **THE COMPLAINANT'S CASE.** The Complainant asserts that he seeks a dismissal of the charge of misconduct due to procedural improprieties which tainted and prejudiced the evidence presented against him, reinstatement to his post, and in the alternative, a de novo hearing on the allegations of misconduct.

A. Specifically, the Complainant requests:

1. That the Tribunal make a specific finding that the procedures prescribed in the Procedures for the Code of Ethics and Professional Conduct of the Bank, have not been observed, and order the findings of the Ethics investigation and the recommendations of the Ethics Committee be rescinded and all reference to the ethics investigation be removed from his file, unless timely intervention by the President is sought under Article IX. 2. of the Tribunal Statute.
2. That concurrent to the rescission sought above, Complainant requests that he be reinstated in his post as Principal Advisor to the Vice-President for Finance and Administration.
3. That the Tribunal order compensation for the damage to his career and his personal and professional reputation in the amount equal to the salary and retirement benefits to which he would have been entitled from August 2009 until the projected attainment of his mandatory retirement age. This award should be seen as extraordinary, but just under the circumstances of this case. Furthermore it should serve as a deterrent to all administration officials from acting with disregard for the due process rights of staff members.
4. That the Tribunal recommend to the President that all activities of the Ethics Officer and the Ethics Committee cease until such time as a complete review of the

due process guarantees offered to staff members in the course of an investigation have been revised to conform with minimum standards set forth by this Tribunal.

5. That the Tribunal refer to the President, for investigation and possible sanctions, the unlawful actions of the Ethics Officer, the External Investigator, the Ethics Committee Members, the Executive Vice-President and the Human Resource Manager for their complicity in the denial of due process relative to the investigation, findings and recommendations in this matter.

6. That the Tribunal award all costs incurred by the Complainant in this case including legal fees and out of pocket expenses.

7. That the Tribunal issue a specific order of confidentiality, and that all ex parte communications between the parties and the Tribunal and its staff be strictly prohibited.

B. In support of his prayer for relief, the Complainant sets out the following events as regards the Ethics investigation and recommendation:

1. The Complainant was Principal Advisor to the Vice-President for Finance and Administration at Grade level 1.

2. On 9 April 2009, The Bank's Ethics Officer and the Human Resources Manager presented the Complainant for signature, an agreement of termination, dated 8 April 2009, by which he would have agreed to the termination of his appointment upon admitting ethical misconduct, as charged by the Ethics Officer. Shortly thereafter the Complainant was issued a Notice of Investigation by the Ethics Officer alleging that he unduly influenced the Bank's award of a contract in favor of the XYZ, in exchange for a personal favor to the Complainant, the employment by XYZ of the Complainant's son. Upon declining to agree to the termination of his appointment, the Human Resource Manager informed the Complainant in writing that he was being placed on administrative leave pending the investigation.

3. Upon request by the Complainant for further information regarding the allegation against him, the Ethics Officer told him "you blackmailed XYZ." She then allowed him, briefly and in a limited fashion, to review some emails contained in a binder of documents which the Ethics Officer had with her, which ostensibly made up part of the preliminary investigation of the allegation of misconduct.

4. As part of the administrative leave imposed on him, the Complainant was to turn over all Bank equipment such as his telephone and computer and was to be barred from physically and electronically accessing the Bank and its information systems¹.

¹ At the Complainant' request, the Human Resources Manager authorized the Complainant to return to the office the following day to return his computer and his Blackberry and to put some affairs in order including an application to the Credit Union for a line of credit. The next day, 10 April 2009, in the afternoon, the Human Resources Manager came to the Complainant's office to receive his telephone, and told him that he had been told by the Executive Vice-President to escort him out of the building at once. The Complainant agreed, and was escorted by the Human Resources Manager to the garage where he followed the Complainant to the gate.

5. By letter dated 15 April 2009, Complainant's counsel contacted the Ethics Officer to: (a) restate the allegation of wrongdoing as contained in the "Notice of Investigation"; (b) deny misconduct as alleged and pledge cooperation; (c) request a copy of the preliminary investigation report; (d) request access to the Complainant's papers and electronic messages; (e) express concern over the prejudgment made apparent in the conduct of the investigation and the necessity for a full and impartial investigation; and, (f) offer cooperation including a list of the persons deemed essential to any investigation of undue influence under the circumstance expressed in the Notice of Investigation.

6. Having received no response from the Ethics Officer, on 27 April 2009, Complainant's counsel sent another letter to the Ethics Officer to: (a) renew the request for the preliminary report of the investigation; (b) request the supporting documentation including correspondence to and from the Complainant; and (c) transmit, as promised in the prior correspondence, a list of witnesses to each step in the development of the contract with XYZ. The list included an explanation of the witnesses' roles, and the documentation which was believed to support their probable testimony.

7. On the same day, 27 April 2009, the Complainant's counsel received a letter from an External Investigator introducing himself as the person who would be conducting the investigation. At the same time he denied any request for the Preliminary Investigative Report and the Complainant's papers and electronic files. The only reason given for this denial was that the investigation was ongoing, and the External Investigator believed that it was not "appropriate to share materials germane to the investigation" with anyone outside the investigative process.

8. On 4 May 2009, the Complainant's counsel, by electronic mail, requested verification from the Ethics Officer that the External Investigator was indeed conducting the investigation since the Ethics Officer had never communicated this fact to the Complainant or his counsel. The 4 May 2009, message further stated that the responsibility to ensure that a proper investigation was carried out was hers alone. It was pointed out that the failure to allow the Complainant access to the evidence would continue to be raised with her. The message conveyed the belief that denial of access to documents relevant to the investigation was detrimental to Complainant's defense and that no legitimate investigative reason had been articulated for the denial of access to evidence. That same day, the Ethics Officer confirmed the delegation of the investigation to the External Investigator, and responded that at the conclusion of the investigation the Complainant would be provided with a copy of the report of investigation along with the relevant supporting documentation annexed thereto and would be given an opportunity to respond.

9. On 20 May 2009, the External Investigator conducted an oral examination, under oath, of the Complainant and a simultaneous verbatim record was created of the examination. As a preliminary matter before commencement of the oral examination, Complainant's counsel requested that the External Investigator state the charge of wrongdoing and the scope of the investigation.

The External Investigator responded that the only scope of the investigation that he had seen was the document that was given to the Complainant by the Ethics Officer. The Complainant insisted on a verification of the charge. The

External Investigator explained that he did not have a copy of the document and asked to use the Complainant's copy to photocopy it and make it part of the record.

10. At the onset of the deposition, the Complainant presented to the External Investigator a comprehensive table of the various steps involved in the corporate procurement process detailing the persons who played key decision making roles at each step of the process. Complainant proceeded from that document to explain the various steps in the corporate procurement process and how the procurement policies of the Bank were followed in each step of the contracting of XYZ.

11. In the course of the deposition, the External Investigator liberally drew from a cache of documents mostly emails, and examined the witness on their content. Among the documents presented in the course of the oral deposition, were numerous documents purporting to be internal emails from XYZ which were labeled "Redacted". No explanation was offered as to why these documents were marked this way, in what way they were "redacted" or what such labeling signified about the documents.

12. Upon information and belief, an external investigation of XYZ was never conducted as required by the procedures for the Code of Ethics and Professional Conduct.

13. Upon information and belief, no evidence was ever developed, presented or reviewed regarding the recruitment and human resources reasons and the justification for the hiring of the Complainant's son by XYZ.

14. On 2 June 2009 the Ethics Officer released the Investigative Report to Complainant. The Report contained a cover letter from the Ethics Officer in which she modifies the allegation of misconduct as "...when you unduly influenced the award of a contract in favor of the company [XYZ], which as a personal favor, hired your son..." Gone is any suggestion of a charge of quid pro quo. Nonetheless, the charge remained that he unduly influenced the award of a contract in exchange for personal gain.

15. Initially, the report clears the Complainant of wrongdoing on the charge levied in the Notice of Investigation. The report states that the Bank's contracting with XYZ was, in the opinion of the Investigator, handled properly by the Bank. Procedures were followed, input sought and received from relevant department representatives, and there is no evidence to suggest that the Complainant manipulated this process or controlled its destiny.

16. Then, the Investigative Report addresses misconduct generally by the Complainant, and weaves a story of sinister intrigue and machination by the Complainant, who allegedly single handedly usurped the Bank's corporate procurement process and schemed to impose his personal goals of finding employment for his son, and thus acting contrary to the best interests of the Bank.

The Investigative Report makes no mention or reference to the Bank's established and published contracting procedures and its robust and well thought

out checks and balances as contained in IDB Corporate Procurement Policy. By ignoring the Policy, the Investigative Report attempts to make credible the unlikely scenarios by which it attributes absolute control of the subsequent contracting process to the Complainant and thus is able to weave a convoluted, but implausible horror story of disloyalty, intrigue and corruption on the part the Complainant and his presumed co-conspirators at XYZ.

17. Of the 31 persons who had been involved on behalf of the Bank at any stage of the IT Roadmap Project for which XYZ was contracted, the Investigator reported having interviewed twenty-two. Upon information and belief, the interviews conducted by the Investigator were electronically recorded, but were not made available to anyone including the Ethics Committee. A prominent omission from the list of those interviewed by the Investigator was the Vice-President for Sectors and Knowledge (VPS), who chaired the Steering Committee overseeing, at the management level, the IT Roadmap Project. Surely if the Complainant had usurped control of the Bank's relationship with XYZ, he would have been an important witness. Of those persons who were interviewed, the Investigator reports no facts derived from the interviews he conducted the VPF, the IT Manager, the Strategy Monitoring Division Chief, the IT Lead Specialist, the Government Risk and Compliance Unit Chief and the Manager of the Budget and Administrative Services Department all of whom are major figures or key decision makers in the matters having to do with the Bank's relationship with XYZ. The Investigative Report relied largely on the Investigator's unfettered access to witnesses and documentation and the absence of any means by the Complainant to challenge its veracity.

18. The bulk of the evidence presented in the report was the testimony of the Complainant. The only attempt to impeach the testimony of the Complainant or otherwise attack his credibility was the juxtaposition of a contradictory version by the Human Resource Manager on the matter described in footnote ¹ supra.

19. Noting the amount of evidence and the number of witnesses which would be involved in a complete probe of the matter, Complainant's counsel requested additional time until 17 July 2009, to respond to the Investigative Report rather than the ten days noted in the Ethics Officer's cover letter. In the same letter, counsel for the Complainant renewed the request for access to the electronic files to which the Complainant had access when he received the Notice of Investigation. The letter made it clear that denial of such access would seriously hamper his response and his ability to defend himself against the charge levied against him.

Complainant's counsel further requested access to the corruption investigation which under the Ethics Procedures should have been undertaken by the Oversight Committee on Fraud and Corruption ("OCFC") of XYZ. According to the Procedures, the OCFC investigation should have been completed before the Ethics Officer began the investigation of the Complainant' alleged wrongdoing.

20. On 4 June 2009 the Complainant's Counsel noting that the Investigative Report did not contain objective documentation of the substance of the interviews other than the suppositions, conjecture and the speculation gleaned by the Investigator from the interviews, a request was made for all such documentation, noting that the Ethics Procedures require that such documentation be made

available as part of the Investigative Report. Despite direct requests by the Complainant, despite promises of the Ethics Officer and in direct violation of the Procedures for the Code of Ethics and Professional Conduct, documentation of the interviews conducted by the Investigator was not made part of the Investigative Report or otherwise made available to the Complainant. The references made in the report to information derived from witnesses he interviewed cannot be confirmed, verified, tested, refuted or rebutted, because there is no record of the statements attributed to witnesses, the context in which they were made or the other circumstances surrounding the information attributed by the Investigator to these witnesses. Complainant's Counsel in the 4 June 2009 letter also noted that the only issue placing in doubt the credibility of the Complainant was the reported difference in the Human Resource Manager's version of the Complainant's final day at the Bank.²

21. Not having received a response to the many and repeated requests for access to the evidence (or to the request for additional time to respond), Complainant's Counsel once again wrote to the Ethics Officer on 8 June 2009, to point out that due to the apparent change in the scope of the investigation and the uncertainty as to the exact charge being levied, it was important for the Complainant to have access to the Preliminary Report of Investigation. Complainant's Counsel pointed out that despite the repeated assurances by the Ethics Officer and the External Investigator that evidence such as the Preliminary Report of Investigation would be made available and despite the false assertion in the Investigative Report that the said report had been "provided to the Complainant for his review on April 9, 2009," the Complainant had never seen the Preliminary Report of Investigation.

22. In an informal communication on 10 June 2009, two days before the Complainant was to have responded to the Investigative Report (without an extension), the Ethics Officer suggested that an extension of time would be granted, but no written confirmation was received until four days after the time had expired. Out of an abundance of caution and laboring under a perceived hostility and disingenuousness on the part of the Ethics Officer, the Complainant decided to file a preliminary response before the original deadline established by the Ethics Officer, 12 June 2009. The preliminary response could not rely on any evidence other than limited evidence presented as part of the Investigative Report. The Preliminary Response stated that due to "the procedural restraints placed on the Complainant's access to evidence, he could not offer a full defense against the allegation but merely address the allegation and the evidence as presented by the Ethics Officer.

23. As a matter of procedural due process the Preliminary Response addresses the absence of a clear and unambiguous allegation of wrongdoing and the

² To resolve this credibility issue the Complainant's counsel urged the Ethics Officer to secure the Bank's surveillance video tapes for the specified times and places as well as the security entry and exit data for the two days in question. Once secured, Complainant's Counsel requested access to this data which would definitively and objectively determine the truth on the sole issue on which the Investigative Report raised doubt on the Complainant's credibility. The Ethics Officer never did so and the recordings were lost. However, security computer data show that the Human Resources Manager exited the Garage Gate a few second behind the Complainant on 10 April 2009.

disregard for the established investigative procedure. As a matter of substantive due process the Preliminary Response addresses primarily the denial of access to evidence and the absence of an investigation of the third party for corruption. On this, the Preliminary Response concluded that the Ethics Officer's "failure to provide access to the evidence of this case is contrary to all accepted norms established to safeguard the due process rights of those accused of wrongdoing."

24. The Preliminary Response addresses some of the assertions presented in the Investigative Report which attempt to couch the Complainant as one who controlled and manipulated the relationship with XYZ in order to bring about a result that was contrary to the Bank's best interests. It is noteworthy that the preliminary response showed without addressing additional evidence that the substantial inaccuracies of fact contained in the report appear to have been fashioned to fit the conclusions that there was a sinister attempt by the Complainant to control the relationship between the Bank and XYZ for the subsequent contracts. The Preliminary Response pointed to the fact that the procedures followed in the initial and subsequent contracts of XYZ were entirely in keeping with the IDB Corporate Procurement Policy a document completely ignored by the investigation.

25. On 16 June 2009, the Ethics Officer responded to the numerous evidentiary requests made by the Complainant's Counsel by formally granting an extension of time to respond to the Investigative Report, and at the same time denying access to specific categories of evidence and not addressing others including the request for a copy of the Preliminary Report of Investigation, thus obviating the stated reason for an extension. The Ethics Officer attempted to justify her position by stating that the procedures "do not provide for additional documentation to be submitted to the employee under review or for additional witness interviews or other proceedings to be conducted at the request of the employee during the period of time provided for comment."

26. Having been denied access to the evidence except what was specifically picked by the Investigator to "make his case," the Complainant submitted his final response on 19 June 2009. The Final Response recapped the absence of evidence to support the Investigator's conclusions. The Final Response further addressed the denial of access to evidence articulated in the Ethics Officer's 16 June 2009 letter by pointing out that "rules of fair procedure may be derived from general principles of law where the written law is silent."³ The Final Response further noted that among the general principles of law that are essential to due process "is the right to present a meaningful defense, including the right to examine witnesses and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts."

27. Upon filing the Final Response to the Investigative Report, the Complainant requested an opportunity to address the Ethics Committee. The request having been granted, he did so on 15 July 2009. At the hearing before the Ethics Committee, the Complainant was asked a series of questions by the Ethics Committee Chair. No questions were posed to the Complainant by any other Committee member. The questions that were asked of the Complainant were substantially the same as those

³ See: C.F. Amerasinghe, *The Law of International Civil Service, Second Edition*, Volume I at page 371

asked by the Investigator. The Complainant's responses were identical in content to the responses he gave at this oral examination, with the exception that he injected as part of his answers the very serious procedural concerns he had raised with the Ethics Officer and in the Responses to the Investigative Report. As it appeared that the Committee Chair and members were thoroughly unfamiliar with the evidence in the case and with the many serious procedural irregularities raised by the Complainant, the Complainant offered the Committee a set of questions that might be posed to the Budget and Corporate Procurement Manager and the Information Technology Department to probe the various allegations that the Complainant unduly influenced their decisions with respect to the XYZ contract and its modifications. The Committee Chair received the questionnaires and appears to have discarded them. Apparently she preferred to remain ignorant of the role of these men. Their positions of trust would have to have been commandeered or usurped by the Complainant if the Committee was to indeed find misconduct.

28. The Ethics Committee adopted the findings of the Investigative Report and specifically denied that there had been any procedural irregularities leading up to the Committee's deliberations. Besides ignoring the procedural irregularities of the case, the Committee ignored the key items of evidence that the Complainant was able to produce without having access to all the documents and witnesses. Among the evidence that was not considered by the Committee is the declaration of a Former President of the Staff Association which directly contradicted the allegations and eventual findings that XYZ participated in the alleged corruption by hiring the Complainant's son in exchange for contracts or contract modifications. Upon information and belief, the Former President of the Staff Association's declaration is the only verifiable evidence that exists about the role of XYZ managers and partners in the alleged corruption.

29. The Committee was aware of the absence of record of the testimony of 21 witnesses interviewed by the Investigator, but failed to require that the said evidence be made a part of the report as required by the Procedures. As a consequence, the Committee failed to consider the testimonial evidence of the managers and executives who made the decisions relative to the XYZ contracts and who in any well reasoned analysis would have been the targets of undue influence. The Committee chair accepted from the Complainant, two sets of proposed questionnaires directed to two key decision makers to determine if they had been subjected to undue influence or control by the Complainant as asserted in the Investigative Report; however, the findings of the Committee make no mention of any testimonial evidence produced by these questionnaires. Similarly, the Committee findings did not account for the numerous distortions of evidence which were pointed out in the Complainant's Responses to the Investigative Report and which permitted the Investigator to liberally infer misconduct without substantiation. The Ethics Committee, often using identical language to that of the Investigative Report, made findings that the Complainant cultivated the impression with XYZ that he was a key influential person in the Roadmap Project, an impression he then exploited to pressure XYZ to hire his son.

30. The Committee believed that the Complainant had "shared confidential information," not because it was confidential, which it was not, but only because a low level XYZ employee claimed it to be confidential apparently in an attempt to impress his superiors. To date, there is no evidence to corroborate the understanding of those who received the email at XYZ, and there is a denial of wrongdoing by the XYZ

employee. The Committee felt [but did not find] that there was an inappropriate level of contact between the Complainant and XYZ even though it was his duty to maintain that contact as chairman of the working group supporting the work of XYZ. The Committee's feelings, without supporting evidence, were that the Complainant had lost objectivity because of his close ties with XYZ, but did not cite one instance of decision in which clouded judgment was apparent or evident or demonstrate an instance of a conflict of interest in which he acted contrary to the best interests of the Bank. The Committee cites an email which it claims demonstrates insistence by the Complainant with respect to interviews for his son. The Committee did not consider or address the explanation given by the Complainant of the circumstances surrounding this email. The Committee noted "significant email traffic" from June through September of 2008 showing the multiple and increasingly insistent inquiries the Complainant made to XYZ regarding his son's employment, exactly at the time when he was playing a key role in the IT Roadmap Project for the Bank. The Committee did not recognize that the role the Complainant was playing was not that of a decision maker and it was not a procurement role. The Committee challenged assertions made by the Complainant at times focusing on minutia and semantics. It insinuates that he lied when he told the Committee that he had no role with respect to the XYZ contract after 11 November 2008. The fact is that only the Budget and Procurement Manager had a formal role in this matter after the oversight committees were disbanded and with respect to the so called second amendment. This is not addressed by the Committee. The Committee found that "the Complainant misused his authority" but there is no explanation of what authority they believe he had and how it was misused. The Committee goes on to find that he "attempted to unduly influence XYZ." There is no explanation of how this relates to the charges that he unduly influenced Bank officials, the charge levied against him. No evidence at all has been produced about how XYZ officials perceived anything much less how they were "unduly" influenced. In conclusion, the Committee indicates that the timing of events "shows that XYZ was influenced by this process, and at least gave his son special favors and advantages as a result of the Complainant's actions." The Committee does not state what those actions were, and there will never be any evidence of what motivated XYZ officials because no investigation of XYZ was ever undertaken. The Committee did not discuss the possibility that the Complainant's son was hired by XYZ because of his qualifications. Facts to this effect were part of the record. The Committee did not consider the possibility that any special considerations by XYZ in hiring the Complainant's son may have resulted from reasons related to the strength of the XYZ alumni network.⁴ Facts to this effect were part of the record. On this evidence, the Committee considered that the Complainant's actions in this matter also compromised the integrity of the Bank's procurement process and caused harm to the Bank's professional reputation. The Committee recommended the termination of his appointment.

C. In addition the Complainant states that he was delivered the Official Notice of Investigation on 9 April 2009. That Official Notice of Investigation stated:

⁴ The Complainant worked for XYZ for more than 13 years until 31 October 1989, when he took a job with the IDB. Having worked for XYZ he was part of what is known as the alumni network of XYZ.

“...The allegation received states that you unduly influenced the Bank's award of a contract in favor of the [XYZ], in exchange for a personal favor to you, the employment by [XYZ] of your son,..."

This statement frames the investigation and shows what has to be proved to find misconduct. This is the formal charge and there was never any other charge made. The Investigator discarded this because he could not prove it and then went on to try to prove something, anything.

The findings of the Investigative Report were that there was no misconduct on the part of Mr. Fernandez with respect to "the award of the contract in favor of the company [XYZ]" which was the only charge contained in the Notice of Investigation.

The Report exonerated the Complainant of quid pro quo, and stated that the initial process of the Bank contracting with XYZ was, in the opinion of the Investigator, handled properly by the Bank and procedures were followed...and there is no evidence to suggest that the Complainant manipulated this process or controlled its destiny.

However the report raised other issues not contemplated in the Notice of Investigation, and which related to actions subsequent to the original contracting of XYZ. Nobody bothered to inform the Complainant of the new charges. There was no notice as required by the Procedures and by respect the due process of law.

The new and improved charges were amorphous but can be gleaned from the report:

1. Undue influence on Bank Senior Management. However the Bank Senior Management officials involved testified before the Tribunal that there was no such undue influence.
2. Undue influence on XYZ by providing confidential information and/or insinuating he could deliver contract extensions. However, the information in question—the possibility of amplification of scope of work—was already stated in the Request for Proposal (RFP); the insinuation that he could deliver extension of contracts was never probed and much less proven.
3. Conflict of interest, actual or apparent. Since there was no undue influence on Bank Management or XYZ there was no real conflict of interest; regarding the appearance of a conflict of interest, the Complainant testified before this Tribunal that it never crossed his mind that he was doing anything wrong but, in hindsight, he acknowledged it would have been preferable for him to have recused himself in order to avoid the perception of conflict of interest by anyone.
4. Violation of corporate procurement rules. Notwithstanding, the Complainant, the Corporate Procurement Manager, the IT Manager and the VPF testified before the Tribunal that the corporate procurement procedures were followed.

D. Based on the evidence before the Tribunal, the Complainant should be exonerated of having: unduly influenced either Bank Senior Management or XYZ, violating procurement procedures or entering into a quid pro quo.

In retrospect, the only failure in judgment in this process that could be argued is that it would have been better for the Complainant to have recused himself in order to avoid a perceived conflict of interest. For this trespass, the sanction of termination of employment—of a more than 20-year career employee—is grossly disproportionate. The Ethics Code procedures provide for an array of options short of termination that should have been considered and applied in this case.

THE BANK’S CASE. The Bank requests that the Complaint, in its entirety, be dismissed:

A. More specifically the Bank requests that the Administrative Tribunal determine:

1. That the Bank had the right to terminate the Complainant’s employment under the terms and conditions of his employment contract for violation of the Code of Ethics and Professional Conduct.
2. That the Bank’s decision to terminate the Complainant’s employment for misconduct was well-founded.
3. That the Bank has established that the Complainant failed to comply with the provisions of the Code of Ethics and Professional Conduct governing conflicts of interest.
4. That the Bank complied with all applicable policies in its investigation of the allegation of misconduct and respected the Complainant’s right to due process of law.

B. The arguments set forth by the Bank in support of its request can be summarized as follows.

1. The Complainant was a senior Bank official⁵, with nearly twenty years of experience working for the Bank. At the relevant time he served as Principal Advisor to the Vice-President for Finance and Administration (VPF) from which he was in a position to exert significant authority, actual and apparent, on a wide variety of matters. In his twenty years at the Bank, the Complainant had worked in a variety of different capacities in the Finance Department, the Bank’s accounting and audit offices, and the Country Department Southern Cone, in the process acquiring a keen understanding of the Bank’s commercial and financial operations.

As Principal Advisor to the VPF, he was responsible for overseeing the coordination and execution of the wide range of Bank activities under the direct supervision of the Vice-President for Finance and Administration, which includes the Finance Department, the Human Resources Department, the Information Technology Department, the Budget and Administrative Services Department and the Legal Department. As the VPF’s most senior advisor, he was reasonably understood by others to represent the authority of the VPF.

2. The Complainant was a primary actor during all phases of the IT Roadmap Project. He acted as Chair of the IT Roadmap RFP Evaluation Committee, which solicited proposals from outside firms and selected XYZ for the IT Roadmap Project.

⁵ The Complainant occupied a Grade 1 position, which is the highest non-Executive Grade level in the Bank.

Subsequently, once XYZ was awarded the IT Roadmap Project, he was a member of both Bank committees formed to oversee the execution of the IT Roadmap Project: as Chair of the IT Roadmap Working Group, which directly supervised and supported XYZ's work on the IT Roadmap Project, and as Secretary of the IT Roadmap Steering Committee, which evaluated and guided XYZ in this process. The Complainant wielded significant authority that went beyond his duties on these three Bank committees and as Principal Advisor to the VPF. Due to his long-time involvement in the IT Roadmap Project and his unsurpassed knowledge of the Bank officials and departments that participated in the process, the Complainant became a key institutional fulcrum. With respect to the IT Roadmap Project, the Complainant had a unique role in coordinating and shaping different agendas within the Bank, and worked behind the scenes to promote his objectives. Contrary to the Complainant's protestations, it is clear from the record that the Complainant acted well beyond the scope of his official duties in his dealings within the Bank as well as with XYZ.

3. The Complainant argues that he could not have unduly influenced the IT Roadmap Project because the Bank's procurement policies did not authorize him to make final decisions on behalf of the Bank, that he was not the decision maker. This characterization of the case obfuscates the issue at hand. To the contrary, the misconduct committed by the Complainant was based on his ability to leverage his official position as the VPF's closest aide, his multi-faceted role in the IT Roadmap Project, and his relationships with key XYZ employees in order to establish with XYZ the impression that he was capable of directing additional Bank business to XYZ, including, but not limited to, the expansion of XYZ's work on the IT Roadmap Project. From XYZ's perspective, there is no doubt that the Complainant's efforts to create this impression of authority were highly successful. Within XYZ, the Complainant was described as "a very senior person at the IDB that helped us win the IT Roadmap project". The Complainant was successful in convincing XYZ that he was capable of exerting influence over the IT Roadmap Project. On that basis, the Complainant pressured XYZ to hire his son.

4. The Complainant's misconduct, at its core, consisted of a series of deliberate actions with the purpose of obtaining special treatment from XYZ for his son. Complainant's conduct with respect to XYZ paints a picture of a senior Bank official who alternatively bullied and inappropriately favored XYZ for his personal ends in a manner that undermines the very trust on which the Bank in its administration of public funds depends.

Prior to joining the Bank in 1989, the Complainant worked for one of the predecessors of XYZ for ten years, both in Argentina and Washington, DC. Since leaving XYZ and joining the Bank, the Complainant maintained and cultivated personal ties with XYZ employees and professed a fondness for, in his own words, "my beloved XYZ". AA, an XYZ employee from Argentina on secondment in XYZ's Washington area offices, along with Washington area-based XYZ partner BB, became key points of contact for the Complainant in his efforts to secure employment for his son at XYZ. Thereafter and through the Complainant's extensive involvement in the IT Roadmap Project, the Complainant continued to directly interact with AA, BB and other XYZ officials about his son's employment.

The Complainant's deliberate intersection of what should have been completely separate processes—his responsibilities in coordinating and managing the Bank's

harmonization of its information technology systems and his parental desires—demonstrate the degree to which the Complainant compromised his ethical duties:

The Bank entered into the Initial Contract with XYZ on 23 June 2008, which went into effect on July 1, 2008. As Chair of the IT Roadmap RFP Evaluation Committee, the Complainant was heavily involved in the process by which the Bank initially selected XYZ. The Initial Contract, in the amount of US\$325,000, provided for the furnishing of business consulting services through 31 October 2008 for the development of the IT Roadmap Project solely in respect of the Bank's operational systems. The Complainant shared internal Bank information with XYZ regarding the expansion of the IT Roadmap Project to include the Bank's corporate systems, in violation of his duty of loyalty to the Bank. In addition, the Complainant failed to exercise proper discretion, also as described below, in violation of the Ethics Code.

Even before the Initial Contract went into effect, the Complainant shared information with XYZ regarding internal Bank discussions on the potential expansion of the IT Roadmap Project. In an internal XYZ email, AA reported to BB (copying CC, a friend and former XYZ colleague of the Complainant) on a conversation with the Complainant:

“[BB], I met [the Complainant] today... and in fact he mentioned that since our lunch with [CC], you and me, they started to discuss the possibility of extending the contract to cover not only operational systems (ie all systems of the bank [sic]) with [XYZ] rather than issuing another RFP to expand the work (that would probably bring the same competitors to the table). [CC] also talked with him about this potential expansion, which in his view means doubling the project in terms of effort. As always, he wants to maintain this information regarding the extension of the project confidential between us for some days until it becomes more formal, even though he told [CC] that the decision was made today by an internal committee that deals with this subject.”

The apparent casualness with which the Complainant confided with XYZ is alarming—even more so due to the fact that the Complainant made such a representation before XYZ was to have commenced work under the Initial Contract. The IT Roadmap Steering Committee and the IT Roadmap Working Group, the two Bank committees formed to evaluate XYZ's performance under the Initial Contract, had not yet met a single time as of the date of the email above. Moreover, the potential expansion of the scope of the Initial Contract to include the Bank's corporate systems was not public information. XYZ, as an outside party, would not have come across this information in any official Bank document made available to the public, and there was no justification for sharing it.

The Complainant placed XYZ's interests before the interests of the Bank. A reasonable interpretation of the Complainant's disclosure is that he sought to assure XYZ of its continued and future role in the IT Roadmap Project, at the same time representing himself to XYZ as XYZ's advocate and protector within the Bank. The Complainant's bias in favor of XYZ was evident, and his professional judgment in regards to the IT Roadmap Project was questionable.

Prior to the initiation of the IT Roadmap Project, the Complainant sought the assistance of XYZ employees for his son, which included soliciting the help of DD,

AA's predecessor in Washington, in expediting the interview process and discussing his son's interview at XYZ with AA and BB. The Complainant's son interviewed with XYZ on 7 March 2008. On 25 March the Complainant learned from BB that his son would not be offered a job at XYZ. However, the Complainant's efforts on behalf of his son did not cease. Once the IT Roadmap Project began—and particularly following the awarding of the Initial Contract to XYZ—the Complainant renewed and escalated his attempts to enlist the assistance of XYZ employees in securing employment for his son. After his son was rejected by XYZ in March 2008, the Complainant adopted a “carrot-and-stick” approach with XYZ to compel XYZ to re-consider his son. These persistent efforts—no matter how laudable the intent behind them—led the Complainant, in his capacity as a Bank senior official, to interact with XYZ in ways that were ethically objectionable and without justification.

The Complainant assiduously cultivated his personal relationships with XYZ employees for the purpose of securing employment for his son. On 16 July 2008, two weeks after XYZ began work on the IT Roadmap Project under the Initial Contract, AA reported to his colleagues EE and GG:

“I was at the IDB yesterday and I spoke to the people involved in the client feedback instrument project ... I've also spoke [sic] with [the Complainant], who is a very senior person at the IDB that helped us win the IT Roadmap project, and he talked with the owner of the Client Feedback Instrument RFP to see what's going on and give us some more feedback.”

As evident in this email message, the Complainant was directly working together with AA of XYZ on Bank-related matters, a fact that the Complainant has not denied. On the basis of this professional relationship in his capacity as a Bank official, the Complainant sought to secure AA's assistance for his son. A few days after the Complainant's meeting with AA described above, the Complainant set up a meeting between his son and AA so that AA could prepare his son for an interview at XYZ, which the record suggests that AA assisted in securing. On 19 July the Complainant wrote to his son:

“[AA] wants u to meet with him on the 24 so helps u to prepare for the interview, which will take place the following week. Write an email to him so as to coordinate the time and place he wants to meet with u.”

On 24 July the interview preparation session took place at XYZ's offices. AA reported to EE and BB afterwards:

“I've received [the Complainant's son] at the office today to help him for the interview. I told him he should be expecting a call from XYZ within the next two weeks to schedule the interview.... [The Complainant] told me today he will take this opportunity as a very big and special favor from us.”

The special treatment that the Complainant sought and obtained from XYZ in respect of his son was accompanied by his renewed efforts to increase XYZ's involvement in the IT Roadmap Project.

The Complainant, as Chair of the IT Roadmap Working Group, advocated the expansion of the scope of the IT Roadmap Project, as documented in the minutes of

the meeting held on 16 July. This was followed by his email to a Bank colleague in the Information Technology Department and Secretary of the IT Roadmap Working Group:

“[W]e could organize a meeting of the Steering Committee, provided that [the VPS] is available. Before that meeting somebody has to talk to [the VPS] to give him the preliminary information that XYZ shared with the Working Group. It would be desirable to have the minutes of that meeting to provide [the VPS]. Furthermore, it would be a good opportunity for the Steering Committee to endorse the decision to extend the scope of work of the Roadmap to encompass the financial and administrative systems of the Bank.”

Even at this juncture, while he served on the Bank committees considering the future of the IT Roadmap Project and explicitly advocated on behalf of XYZ, the Complainant did not disclose his solicitations of special treatment for his son. The Complainant’s entreaties to XYZ continued in a series of email exchanges with BB and AA on 31 July, 5 August, 7 August, 8 August and 26 August, in each case regarding interviews for his son with XYZ. The Complainant’s reply to BB on 8 August is particularly revealing regarding the Complainant’s motivations:

“We are returning to Washington tomorrow, so [the Complainant’s son] will definitely be available for interviewing the week of Aug. 18 [T]he Bank’s CIO has already started to work on extending the contract for the IT Roadmap so we can encompass financial accounting, personnel, administrative and investment systems in the scope of the review.”

The Complainant’s explicit commingling of his son’s employment prospects and the Bank’s potential expansion of the IT Roadmap Project is obvious. Amendment No. 1, which expanded the scope of the IT Roadmap Project to include XYZ’s diagnostic analysis of the Bank’s corporate systems, was agreed upon on 3 September 2008 and signed by the parties on 8 September 2008, in the amount of US\$325,000.

After Amendment No. 1 was signed, the Complainant’s appeals to XYZ became even more explicit and increasingly aggressive. Internal correspondence between XYZ employees intimate the pressure imposed by the Complainant. On 11 September AA wrote to HH, an XYZ employee who was responsible for supervising XYZ’s work at the Bank, asking:

“Hi HH did you talk to EE?”

HH forwarded AA’s email to EE asking,

“Any progress on [the Complainant’s son]?”

EE responded,

“Yes - I spoke with JJ yesterday. I let her know that we are interested but need to “slow walk” this, given current economic/market uncertainty. I’m going to reach out to [the Complainant’s son] today and ask him to come in for another round of interviews.”

AA forwarded these email messages to BB and asked

“[BB], can you help with this?”

BB responded to AA,

“I pushed this up the ladder today. We should see some movement next week.”

AA forwarded these internal XYZ emails to the Complainant, stating that he had successfully obtained BB’s assistance, to which the Complainant replied,

“Many thanks. This sounds better. I hope that next week the bullshit and runaround ends, the results of which have been very frustrating.”

It is obvious from this exchange that the Complainant was bullying XYZ behind the scenes to advance his son through XYZ’s interview process, enlisting the help of XYZ employees (AA and BB) with an interest in XYZ’s ongoing relationship with the Bank to expedite consideration of the Complainant’s son as a XYZ hire. If XYZ had not committed to giving special treatment to the Complainant’s son, at the increasingly strong behest of the Complainant, there would have been no reason for the aforementioned XYZ employees to become directly involved in XYZ’s internal human resources-managed hiring process. Had the Complainant informed the VPF and his colleagues at the Bank of the lengths to which he risked sullyng the Bank’s relationship with XYZ for personal ends, there is no way that he could have justified his conduct—nor can it be justified after the fact.

As XYZ’s offer of employment to the Complainant’s son remained forthcoming in the fall of 2008 and XYZ’s work on the IT Roadmap Project continued, the Complainant’s approach with XYZ became more pugnacious. On 17 September HH reported to EE (copying his colleagues, among which included BB, AA, and KK, the designated XYZ engagement partner on the IT Roadmap Project, who had signed the Initial Contract on behalf of XYZ) on his latest interaction with the Complainant, in an email:

“Re: [the Complainant’s son] ...Sorry to be a nag, but AA and I just met with [the Complainant] and it’s clearly an elephant in the room.”

It would be reasonable to understand that the so-called “elephant in the room” was the Complainant’s son and his expected hiring by XYZ, which the Complainant decided to raise with HH.

XYZ responded quickly to the Complainant’s entreaty, calling the Complainant’s son later that same day for an interview scheduled for 26 September. EE agreed to meet with the Complainant’s son before the formal interviews at XYZ’s offices.

The final episode documented in Bank emails of the Complainant’s efforts to assist his son occurred on 20 October. HH reported to KK (copying EE) on a conversation at the Bank initiated by the Complainant:

“Sorry I dropped off the call. [The Complainant] came in to my office. He wanted to discuss our strategy for moving forward.... I told him the call was about some

work we won at the Treasury. He suggested that this would be great work for [the Complainant's son]. He's probably right."

According to the Complainant, the strategy to which the email refers was Management's presentation to the Bank's Board of Executive Directors, seeking the Board's budgetary approval of the implementation of the IT Roadmap Project. Once again, the Complainant co-mingled his assistance to XYZ on the IT Roadmap Project and his son's hiring by XYZ.

A week after the Complainant's conversation with HH, the Complainant and HH scheduled a lunch with BB. The Complainant has confirmed that this lunch meeting took place with HH and BB. According to the Complainant, the purpose of the lunch was to discuss the delay in XYZ's decision on the Complainant's son. The record does not include any other accounts of this lunch. What is most notable about this lunch meeting is that the Complainant coordinated with HH, the XYZ employee assigned to Bank headquarters to supervise XYZ's work on the IT Roadmap Project, regarding the topic of his son's employment with XYZ.

Within a few days after the Complainant's lunch meeting with HH and BB in the last week of October or the first week of November 2008, XYZ extended an offer of employment to the Complainant's son on 5 November.

In recounting these episodes, which occurred over the course of a six-month period during which XYZ's involvement in the IT Roadmap Project was being negotiated, evaluated and expanded, it is important to note that the evidence presented herein may very well account for only a portion of the Complainant's inappropriate interactions with XYZ. The Bank was able to obtain, review and question the Complainant regarding emails sent and received by the Complainant as well as a select number of emails provided by XYZ. The Ethics Committee was able to benefit from the reporting of certain improper interactions between XYZ and the Complainant in the internal XYZ emails provided by XYZ. What cannot be addressed are other possible communications regarding the Complainant's efforts on behalf of his son that were not documented.

The Complainant's argument that he did not have the authority to control and manipulate the Bank's relationship with XYZ mischaracterizes the manner in which he was able to use his influence within the Bank for the benefit of XYZ. Undoubtedly, the Bank's decision to enlarge XYZ's role in the IT Roadmap Project was not single-handedly carried out by the Complainant alone. The Complainant did not sign on behalf of the Bank the Initial Contract, the two Amendments to the Initial Contract or the IT Roadmap Implementation Services Contract. Nor does the Bank suggest the Complainant usurped the role of the VPF, to whom he served as Principal Advisor.

Rather, the Complainant's conduct in respect of the Bank's internal procurement process demonstrates the means that he successfully employed to help XYZ and thereby strengthen the impression to XYZ that he could deliver on his promises. His conduct in respect of the Bank's internal procurement process can best be understood in the context of his favoritism towards XYZ, whether motivated solely by his interest in securing employment for his son or also by his fondness for his former employer. By doing so, the Complainant blurred the line between his duty of loyalty to

the Bank and his advocacy of XYZ, conduct unbecoming a senior Bank official entrusted with such a high level of responsibility.

Once XYZ was selected in June 2008 for the diagnostic analysis of the Bank's operational systems and entered into the Initial Contract with the Bank, the Complainant sought to influence the agenda—both official and unofficial—by which the Bank would decide whether or not to expand XYZ's role in the IT Roadmap Project. On 2 July 2008, the Complainant wrote the Chief of the Talent Management Division within the Bank's Human Resources Department (HRD), which is under the direct supervision of the VPF. In regards to a proposal by the Bank's Knowledge Management Division (KNL), which is under the supervision of the Vice-President for Sectors and Knowledge) for a new expert locator database, the Complainant told the Chief of the Talent Management Division:

“You're right on ... clearly to have a database that would allow identification of talent within the institution is of strategic importance. However, its development and operation falls within the competence of HRD and not KNL ... I take advantage [of this opportunity] to share with you, that the diagnosis that is being carried out by XYZ, which the Bank has just hired so that it helps us to identify the Roadmap in IT to integrate our platforms and system operators and to develop central systems for the functioning of the matrix, we are thinking of expanding it to incorporate the corporate systems (accounting, budget, wages, etc.). This work would be ready in October/November, at which time on the basis of the diagnostic, we will establish a Roadmap and decide on that base that [sic] systems and platforms will be developed.”

At the time the Complainant wrote this email, the Initial Contract had been in force only for one day. Neither the IT Roadmap Working Group nor the IT Roadmap Steering Committee had met to evaluate and discuss XYZ's performance under the Initial Contract, and the Bank had not yet approved the expansion of XYZ's work to include the Bank's corporate systems. The Complainant has suggested that he simply wanted to express his support for the Chief of the Talent Management Division in the “power struggle between personnel [HRD] and knowledge [KNL]”. However, in light of the Complainant's other actions, his suggestion to the Chief of the Talent Management Division that XYZ's role in the corporate systems had already been determined could also be viewed as an attempt to present XYZ's continued involvement as *fait accompli*.

The Complainant suggests that his influence over the Bank's procurement process regarding the IT Roadmap Project ended by November 2008, upon the completion of the work of the IT Roadmap Working Group and IT Roadmap Steering Committee. However, the Complainant continued his zealous advocacy on behalf of XYZ through December 2008 when XYZ's selection for the implementation of the IT Roadmap Project was subject to internal Bank debate.

On 8 December 2008, the Secretary of the Corporate Procurement Committee circulated the first of a series of memoranda concerning the selection of XYZ for the implementation of the IT Roadmap Project. The memorandum requested the Corporate Procurement Committee's approval of an expansion of the Initial Contract to include work by XYZ through 31 May 2009 on the preparation for the implementation and management of the IT Roadmap Project. The memorandum specified the value of these

implementation services at US\$967,000. Approval of this proposed third amendment to the Initial Contract would avoid the need to open the selection process to parties other than XYZ.

When asked by the External Investigator about the Corporate Procurement Committee's email and memo, the Complainant stated that he was not certain whether he had seen and commented on this proposal. The Complainant's efforts to downplay his direct involvement in this process are contradicted by his email of the following day to the VPF, who was Chair of the Corporate Procurement Committee. Attempting to justify the de facto selection of XYZ for the implementation of the IT Roadmap Project, the Complainant wrote to the VPF and the Manager of the Budget and Administrative Services Department:

"The [IT Manager, the IT Services Chief] and I went through the figures and brought them down...we are getting top quality from very senior professionals. Worth it [sic] every penny."

A couple weeks later, the Secretary of the Corporate Procurement Committee circulated another memorandum to the members of the Corporate Procurement Committee, again requesting an increase in the Initial Contract to cover XYZ's initial work on the implementation of the IT Roadmap Project.

In response to the Secretary of the Corporate Procurement Committee's revised memorandum, the General Counsel of the Bank and legal advisor to the Corporate Procurement Committee raised concerns regarding the process by which XYZ's role was being expanded; and questioned the justification for single-sourcing provided in the memo. The Complainant commented on the General Counsel's concerns, writing to the VPF:

"You need to talk to [the General Counsel] so he understands that it is in the Bank's best interest to hire XYZ to manage implementation of the Roadmap. Bringing another firm would eventually be much more expensive and put in jeopardy implementation of the plan, since a ne[w] firm will not only not know the Bank but also may not have the kind of relevant experience with matrix management we need. The bulk of the work amunting [sic] to approximately \$20 m that deals with software development will be bid through [a] competitive process.

I would really appreciate your expert assistance here dealing with [the General Counsel], who clearly does not understand what is involved but is shooting from the hip!"

The Complainant has retrospectively acknowledged the reasonableness of the General Counsel's concerns and claimed that the Complainant's response was due to his misunderstanding of the General Counsel's email at the time he responded.

Based on the two exchanges described above and regardless of the intent of the Complainant's comments, it is clear and indisputable that he remained involved in the expansion of XYZ's role in the IT Roadmap Project through the end of 2008, weeks after he claims that his involvement in the IT Roadmap Project had concluded.

On 9 January 2009, the Corporate Procurement Committee met and approved the selection of XYZ through a non-competitive bid process. The Complainant attended this meeting, and spoke in favor of XYZ in response to a concern expressed regarding a perceived conflict of interest between XYZ's dual roles in designing and implementing the IT Roadmap Project. The IT Roadmap Implementation Services Contract was signed by the Bank and XYZ on 22 January 2009 in the initial amount of US\$985,000 and with the exercise of all extensions, a total amount of US\$5,910,000.

During the time the Complainant advocated on behalf of XYZ within the Bank, XYZ extended an offer of employment to the Complainant's son, who joined XYZ on 1 December 2008. At no time did the Complainant consult with the Bank's Ethics Officer, or disclose his dual functions to the VPF, the IT Manager, the IT Services Chief or any other Bank officials working alongside him on the IT Roadmap Project.

The Complainant's employment with the Bank was subject to upholding and maintaining the established norms, standards and rules of conduct of the Bank pursuant to Staff Rule No. 325 (End of Employment). As described in the preceding discussion, the Complainant violated the Bank's core values of integrity, equity, impartiality and discretion as well as rules governing conflicts of interest. Accordingly, after a fair and complete investigation of the facts, the Bank terminated his contract of employment.

C. The Complainant failed to comply with the Bank's rules regarding conflicts of interest. The Complainant was aware of the applicable Bank ethics rules and standards of conduct that he violated, due to his position and experience at the Bank. Particularly in light of his two decades as a Bank staff member, for much of this time in a managerial and/or supervisory capacity, his behavior cannot be excused for lack of awareness of the rules that govern the Bank's internal decision-making process. The Complainant failed to recuse himself from the IT Roadmap Project and/or properly disclose his efforts to secure employment for his son at XYZ.

D. The Complainant devotes considerable attention to the process by which the Bank decided to terminate his employment for misconduct. However, the Complainant's arguments are irrelevant and have no substantive bearing on the misconduct committed by the Complainant. The Bank agrees that due process, transparency and fairness are fundamental principles that apply in any case of termination of employment. However, the Complainant's arguments—even if accepted as true and correct in all respects—do not place into question the determination by the Bank that the Complainant had committed misconduct warranting the termination of his employment.

CONSIDERING THAT:

The Tribunal is called upon to review a termination decision made by the Executive Vice-President on 5 August 2009, upon a recommendation by the Ethics Committee. The Committee's determination that the Complainant had engaged in misconduct was based in turn upon the report of an external Investigator who had interviewed the Complainant and other witnesses, had made findings of fact, and had concluded that the Complainant had engaged in behavior that implicated provisions of the Bank's Code of Ethics and Professional Conduct. The Complainant has raised objections both to the procedures utilized by the Investigator and the Ethics Committee and to the conclusion that he engaged in serious misconduct worthy of

termination of employment.

I

The initial issue for consideration by the Tribunal is the extent to which it may review, and possibly overturn, the decision to terminate the Complainant's employment. In many cases in which the Bank's decisions concerning its staff members are reviewed by the Tribunal, the decision is to be set aside only if the Bank has "abused its discretion" in its treatment of the staff member. This is a deferential standard, properly taking into account the Bank's managerial expertise and authority with respect to such matters as redundancy, performance evaluations, merit pay increases, and the like. With respect to matters of discipline, however, the Bank's procedures and decisions resemble those of a judicial body, and they can lead to discipline that may have a most severe impact upon the economic and personal status of the individual staff member. For these reasons, the Tribunal's power of review is broad.

As has been held in Koudogbo⁶ of the World Bank Administrative Tribunal, endorsed in the jurisprudence of other international administrative tribunals:

"[The] scope of review in disciplinary cases is not limited to determining whether there has been an abuse of discretion. When the Tribunal reviews disciplinary cases, it 'examines (i) the existence of the facts, (ii) whether they legally amount to misconduct, (iii) whether the sanction imposed is provided for in the law of the Bank (iv) whether the sanction is not significantly disproportionate to the offence, and (v) whether the requirements of due process were observed.'"

At the core of this case are the Complainant's claims that the facts do not support the findings of misconduct with which he has been charged and that termination of his employment was significantly disproportionate to any offence he may have committed.

The Tribunal will first address the Complainant's claims that the requirements of due process were not observed in his case. Due process requires that the Bank comply with the pertinent procedures set forth in its staff rules and related mandatory Bank documents as well as the commonly accepted norms of fair procedure that assure just treatment of staff members. The purpose is to ensure that the accused staff member is given notice of the charges, findings and underlying facts, and a timely opportunity to present information and argument in his defense. The Complainant asserts that the investigatory process that culminated in the finding of misconduct on his part was seriously flawed, because inconsistent with the Bank's Procedures for the Code of Ethics and Professional Conduct and/or with prevailing norms of due process, and that these flaws prevented him from fully and fairly presenting his case.

One of the Complainant's allegations of a breach of due process concerns the findings of the Investigator which went beyond the scope of the investigation as set out in the Notice of the Investigation sent to him by the Ethics Officer, and which indicated that "you unduly influenced the Bank's award of a contract in favor of the company [XYZ], in exchange for a personal favor to you, the employment by XYZ of your son..." In fact, the Investigator's report acknowledged that there was no evidence to suggest that the Complainant manipulated the process or controlled the destiny of the initial award of the contract by the Bank to XYZ. The Investigator nevertheless formed the opinion that the Complainant took control of and managed the

⁶ Koudogbo, No. 246 [2001], paragraph 18.

Roadmap that XYZ followed throughout its business dealings with the Bank by engineering the process so that XYZ would emerge as the logical contractor for the additional work being sought.

A natural interpretation of the Notice of Investigation would lead one reasonably to conclude that the initial contract and any later amendments constituted a single transaction. Consequently, the Complainant would have been put on notice that the entire contract with XYZ in all respects was being investigated, and would not have been misled.

The Tribunal finds that the notice sufficiently satisfied the requirements of due process.

The Complainant also contends that although he was charged with unduly influencing the Bank in awarding the Roadmap contract to XYZ, the investigation ultimately focused upon the abuse of his position so as to pressure XYZ to employ his son. The Tribunal, however, finds that the Complainant's efforts on behalf of his son were at the core of the conduct with which he was charged, so that here again his defense was not impeded by any disparity between the charge and the Investigator's findings.

In relation to the Complainant's allegation that he was not given a copy of the findings of the preliminary investigation, Rule 301.4 of the Procedures of the Code of Ethics provides that such an inquiry is primarily a fact-finding exercise with the objective of providing the Ethics Officer with sufficient information to determine whether an allegation warrants further consideration. This involves conducting discussions with relevant parties and reviewing documents and files, and may result in the allegation being dismissed or being referred to the Ethics Committee for further action.

The preliminary inquiry being merely investigatory rather than adjudicatory, the Tribunal concludes that the Ethics Officer's compliance with Rule 301.4 did not constitute a breach of due process.

The Investigator's report listed the witnesses who testified during his investigation, and these included the Complainant himself and witnesses identified as being supportive of his testimony. He nevertheless complains that he was not given a copy of the testimony of these witnesses. This leads to a consideration of Rule 301.6(d) of the Procedures which instructs the Investigator to prepare a report summarizing the investigation process and his findings as well as the facts upon which those findings are based. It provides that relevant supporting documentation should be attached to the report as exhibits.

Rule 301.6(e) directs the Ethics Officer to provide the staff member under review with a copy of the report in order to afford him an opportunity to comment on the findings. Although this rule does not expressly provide that the employee be given relevant documentation which was attached to the report as exhibits, it follows logically that the report and exhibits should be made available to the staff member as one document. Even if, however, the Complainant was not given any exhibits with the report, this omission is not necessarily a breach of due process.

Support for this conclusion can be found in a decision emanating from the World Bank Administrative Tribunal, Rendall-Speranza⁷, where the Tribunal concluded that denying the Applicant her request to be provided with the transcripts of the testimony of all the witnesses

⁷ WBAT, Rendall-Speranza v. IFC, No. 197 (1998),

interviewed by the Investigator did not deprive her of a fair opportunity to put forward her evidence and her arguments, nor did it violate any basic right of the parties.

In the instant case, however, the omission was clearly a breach of Rule 301.6(e).

Despite the Bank's failure to comply with Rule 301.6(e), nevertheless the Complainant did exercise his right under the same Rule to present a response to the Report, and he in fact filed two such responses. Admirably the Ethics Committee went beyond the requirements of the aforementioned Rule and granted him a hearing at his request.

In spite of the Tribunal's findings that the Complainant's contentions did not establish a breach of due process, the Tribunal recommends that the Bank give consideration to addressing the abovementioned issues with a view to amending the Staff Rules governing procedures in cases of misconduct.

Finally, with respect to the issue of due process, the Tribunal observes that the Investigator went beyond what was essentially his mandate, which was to collect evidence and to make findings of fact pertinent to the charge of the Complainant's misconduct, without making conclusions as to his culpability, which was to be the function of the Ethics Committee. Instead, the Investigator reached conclusions directly affecting the issue of culpability, which must surely have influenced the Ethics Committee's recommendation to terminate the Complainant's employment. Moreover, his findings with respect to the Complainant's alleged undue influence on the Bank were, in the view of the Tribunal, very general in nature and not supported by the evidence before him. This too must have contributed to an unsubstantiated and unfair conclusion by the Ethics Committee.

II

Contrary to the Bank's assertion, there is no evidence that the Complainant actually influenced the renewal or extension of the contract with XYZ. In fact it was impossible for a single person, the Complainant, to influence the Bank to implement the Roadmap project. Indeed in the testimony before the Tribunal of several managers who made key decisions during the Roadmap project, all unequivocally denied having been unduly influenced by the Complainant.

Therefore, imposing the serious sanction of dismissal after the administrative proceeding (Ethics Officer, External Investigator, and Ethics Committee) violated the principle of proportionality.

In international civil service law, disciplinary measures are discretionary and governed by regulations. This means that sanctions cannot be imposed arbitrarily, and that they are subject to judicial oversight.

Even though it is clear that the Complainant did not influence the Bank in its relationship with XYZ, the Tribunal finds that there was on the part of the Complainant a violation of the contractual obligation to act in good faith, which is relevant in evaluating the Complainant's misconduct. It is not so much that he had the capacity to influence, but rather that he purported to have it and convinced XYZ that he did.

There can be a breach of good faith even when the intended purpose is not accomplished either in terms of the damage inflicted—which may be minor or even nonexistent as in this case—or the Complainant's objectives. What matters is the procedure followed, the means used, and the conduct observed. Trust is violated by one's actions, not the results of same. The harm to the Bank or benefit to the Complainant does not determine whether or not there was misconduct, although the existence of these elements may facilitate such a determination. What matters here is that ethical obligations have not been upheld and that there has been an irreparable loss of trust which renders the Complainant unsuitable with his position.

Such a highly qualified professional with such vast experience as the Complainant knew or should have known that his conduct amounted to an abuse of his high position for personal gain. The Complainant's conduct can only be classified as serious and culpable. This is confirmed by inconsistencies and apparent untruths in his testimony before the External Investigator. For example, when asked about the various steps related to the search for a job for his son in XYZ, the Complainant denied having had appointments or having spoken about it. However, when shown the emails on the subject, he acknowledged that these had in fact taken place.

Complainant himself acknowledged to the Tribunal: "Did I commit an error of judgment? Yes. I made a judgment error."

The Tribunal finds the Complainant's misconduct to be more grave than a mere error in judgment and evidences bad faith.

The misconduct committed by the Complainant was in part failure to observe and uphold clause c) of his loyalty oath signed on 1 June 1990, which reads: "I shall not use to private advantage, information known to me by reason of my official position." In addition, he violated provision III.B.7 (Conflicts Involved in Procurement and Contracting) of the Code of Ethics. The Complainant also violated provision III.B.8 of the Code of Ethics relating to Conflicts Involved in Receiving Gifts or Favors, as XYZ gave the Complainant's son favored treatment in interview training and scheduling⁸.

The Tribunal does conclude that there was misconduct by virtue of the fact that the Complainant took advantage of his post and position of trust as Senior Advisor to the Vice-President for Finance and Administration to procure a job for his son. This abuse of position entailed

⁸ The relevant clause of provision III.B.7 reads: "Whenever an employee engaged in Bank procurement and contracting activities knows that a relative works for or has an interest in an entity contracted or to be hired by the Bank to provide goods or services, or that a relative has been contracted or is to be hired by the Bank in any capacity, the employee must report the relationship to the Ethics Officer, who may require, among other remedial actions, that the employee recuse himself or herself from any decision related to business between the Bank and that entity or relative." The relevant clause of provision III.B.8 reads "...employees may not accept gifts or favors, or a promise of gifts or favors, of significant value and in no event greater than US\$100 equivalent offered to them during their Bank employment and because of their position with the Bank."

soliciting and receiving a favor from a company that was doing business with the Bank, which is a conflict of interest and therefore improper behavior and misconduct by a senior staff member. As noted at the outset of these considerations, the disciplinary sanction imposed should have been proportional to the misdeed committed, but the aforementioned violation of the Code does not justify the penalty imposed, given the far more serious misconduct with which the Complainant was charged and for which termination was recommended by the Ethics Committee. The termination of the Complainant's employment is therefore null and void.

The Bank could have chosen from an array of disciplinary sanctions—established in Article 302.2 of the Code of Ethics and Professional Conduct—and applied one that would have been in proportion to the infraction committed, and therefore reasonable.

Although the Complainant—as a high official and former Deputy Auditor with responsibility for investigating ethics violations—should have known of the obligation set forth in the ethics rules to disclose when a family member works for or is in the process of seeking employment with a company doing business with the Bank, he did not inform the Ethics Officer or his supervisor. That was certainly understood by the Complainant's immediate supervisor, the Vice-President for Finance and Administration who stated in his testimony before this Tribunal, "...if anything, I think [the Complainant] should have recused himself. He should have been smart enough to see that it would not have been a good idea to be involved when this was going on".

But, without informing his superiors of the obvious conflict, the Complainant persisted in writing and speaking to XYZ about Bank business along with his desire for favored treatment for his son. For example in an email dated 20 October 2008 HH stated to KK, his colleague at XYZ, that: "Sorry I dropped off the call. [The Complainant] came in to my office. He wanted to discuss our strategy for moving forward.... I told him the call was about some work we won at the Treasury. He suggested that this would be great work for [the Complainant's son]. He's probably right."

III

In light of the above considerations, the Tribunal quashes the dismissal of the Complainant. Further, the Tribunal rules that the Bank impose on the Complainant a suspension without pay—pursuant to Section 302.2(b) of the Procedures of the Code of Ethics—for a period of three years starting on 5 August 2009.

NOW THEREFORE:

The dismissal of the Complainant is quashed.

The Bank will suspend the Complainant without pay for a period of three years with effect from 5 August 2009.

All other claims are denied.

Washington, 29 July 2011

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Guilherme A. Caputo Bastos

Robert A. Gorman

Germán Barreiro González

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