

**THE ADMINISTRATIVE TRIBUNAL
OF THE
EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT**

Case No. 2019/AT/09

Appellant

vs.

**European Bank for Reconstruction
And Development**

DECISION

by a Panel of the Administrative Tribunal comprised of

Michael Wolf, Chair
Giuditta Cordero-Moss
Spyridon Flogaitis

6 March 2020

I. Introduction

1. Appellant is the former Associate Director, [Team], for the European Bank for Reconstruction and Development (“EBRD” or “Bank”). He resigned his employment with the Bank on 3 December 2018, effective 22 February 2019.
2. This appeal arises out of the decision not to select Appellant for the position of Director, [Team]. The decision not to short-list his application was communicated to Appellant on 20 November 2018.
3. Appellant requests monetary compensation for alleged violations in the processing of his application.

II. Procedural Background

4. On 16 January 2019, Appellant initiated these proceedings with a request for administrative review directed to the Bank’s Managing Director for Human Resources (“MDHR”). Dissatisfied with the response from the MDHR, Appellant submitted a request for review (the “RARD”) dated 5 April 2019 to the Bank’s President. The President forwarded the request to the Administrative Review Committee (the “ARC”) for fact-finding and a recommendation.
5. The ARC issued its written report and recommendation on 20 September 2019. It recommended that the non-selection decision be affirmed.
6. The Bank’s President accepted the ARC recommendation on 21 October 2019 (the “PARD”).
7. The appeal to this Tribunal was filed 23 December 2019. The Bank’s response is dated 29 January 2020.
8. Neither party has requested an oral hearing.

III. Factual Background

9. Appellant started his employment with the EBRD in June 1995.
10. From April 2008 to February 2019, Appellant was Associate Director, Senior Banker, [Team]. For much of that time, Appellant also had the title “Deputy Head,” [Team], but that title was removed as of 1 January 2018.
11. When the Director, [Team], took temporary leave in May 2018, another Senior Banker on that team was designated Acting Director. The Director position became vacant as of 31 October 2018 when the former Director left employment with the Bank.
12. Appellant submitted an application for the Director position on 11 November 2018.

13. The hiring manager for the Director position was a Bank Vice President. He sat on the selection committee with two other officials from Human Resources (“HR”).
14. On 20 November 2018, the Talent Acquisition Team in Human Resources informed Appellant by email that he would not be short-listed for the Director position. Appellant was also informed orally by an HR official that he was not deemed to have the necessary qualifications for the position.
15. Appellant was later advised by the Vice President/hiring manager that he was indeed qualified for the Director position, but the Vice President identified an alternative applicant (the staff member previously designated the Acting Director) as his preferred candidate.
16. On 15 January 2019, a selection for Director was made. Neither Appellant nor the Vice President’s preferred candidate was selected.
17. After Appellant sought administrative review, the MDHR rejected Appellant’s complaint based on the following:

The applications were considered against specific requirements of the job description and demonstrated EBRD competencies, including: being directly accountable for the engagement and effective overall management of staff; leadership and communication skills; driving vision and purpose; leading innovation and change; business expertise & strategic thinking; collaboration, building relationships and influence. The indicators of past performance, over the last 5 years were also a factor taken in consideration.

With respect to your application, given due consideration to the job requirements and associated competencies, on balance it was decided not to progress your application to the short-listing stage.

18. After the Bank President referred the RARD to the ARC, it issued its Report and Recommendation with the following principal findings of fact relevant to this appeal:
 - a. The selection panel considered “the relative suitability of the candidates for the post taking account of the ‘knowledge, skills, experience and qualifications’ section as set out in the job description.” R&R at ¶31.
 - b. Of the 12 internal applicants, five were selected for the short-list. Three of the five came from the [Team].
 - c. The selection panel reviewed the CVs and cover letters and the Vice President took account of his direct experience and knowledge of the three candidates in the [Team].

- d. All five short-listed candidates had been graded as “consistently exceeding” expectations in their performance evaluations.
- e. Appellant had been rated as “meeting” his expectations.
- f. Given the very senior status of the Director position, it was to be expected that the Vice President would rely on his personal knowledge of Appellant’s work in addition to Appellant’s performance appraisal.
- g. The Vice President did not evidence bias in his decisions on the election panel. This finding is supported by the fact that the Vice President’s preferred candidate was not the person ultimately selected for the Director’s position.
- h. An HR official erroneously told Grievant he was not qualified for the Director position. The Bank’s Vice President corrected this error and informed Appellant that he was qualified but was not as suitable for the position as the Vice President’s preferred candidate.
- i. The Bank did not have a prescribed procedure for the short-listing of candidates for open positions, although there was a “custom and practice.”
- j. “As there [is] no formal legal procedure under the Bank’s internal laws it cannot be said that the shortlisting was in breach of such procedure. Despite the Committee’s concerns over the process, [it] cannot be said that the decision not to shortlist the Staff Member was irrational or otherwise an abuse of managerial discretion.” R&R at ¶39.

19. Although the ARC did not conclude that Appellant’s rights were violated, it did make two recommendations: (a) a contemporaneous record should be kept of the short-listing decision, and (b) the record should state in writing the relevant criteria upon which decisions were made to include or exclude applicants from the short-list.

20. The Bank President accepted the ARC Report and Recommendation based on the findings “that the Administrative Decision was not biased or otherwise an abuse of managerial discretion and did not breach the Bank’s internal law.” PARD dated 21 October 2019.

III. Appellant’s Position

21. The following are the principal arguments raised by Appellant.

22. The selection process was tainted by the bias of the Vice President who was Appellant’s line manager. The facts show that the Vice President had expressed a preference for another candidate even before interviews were conducted. The Vice President “demonstrated that he had formed a final opinion on the most suitable candidate for the Director post from the onset of the recruitment process...and that he was prejudiced

against me and other candidates.” Appeal at 6. The Vice President should therefore have been excluded from the selection process.

23. The ARC wrongly found that Appellant’s performance evaluations were supportive of the decision not to short-list him. The MDHR decision did not even rely on alleged shortcomings in management and leadership competencies, which are now cited by the Bank as reasons for Appellant’s rejection.
24. Appellant had previously been praised for his leadership and managerial qualities during his tenure at the Bank. The Bank’s current criticism of his leadership skills is incorrect and contradicted by his past record.
25. “Instead of carrying out a holistic review of all relevant performance appraisals, the Bank focused on a few critical comments in my 2017 performance evaluation to justify my exclusion from the recruitment process. The Bank’s argument presented in the Response thus lacks basic fairness, as single statements of a satisfactory performance were unduly taken out of an overall context.” Appeal at 8.
26. The Bank Vice President improperly made his decision based on first-hand knowledge of Appellant’s work. The Bank’s procedures precluded consideration of first-hand knowledge. Only performance appraisals may be used to assess past performance.
27. An official from HRD informed Appellant that he did not have the necessary qualifications for the Director’s job. The Bank conceded that the statement was made, but it later stated that this official was incorrect and that Grievant had all necessary qualifications. The Bank’s recantation is not credible. Appellant was therefore excluded from consideration based on the erroneous belief by HRD that he was not qualified.
28. Appellant asked the ARC to question the HRD official who made the statement regarding his qualification, but it refused and proceeded to make findings adverse to Appellant. The Tribunal should now take testimony from that official.
29. An HR policy document on the recruitment of staff was binding law with respect to the procedures that must be used. The ARC improperly failed to conclude that this policy document was binding.
30. The Bank’s selection process for the Director position did not comply with Sections 4.9.1 and 4.9.2 of the applicable Staff Handbook. The Bank failed to establish assessment methods prior to posting of the Director opening, and it failed to compare Appellant’s qualifications with other candidates on the basis of selection criteria.
31. The Bank failed to document the selection process. There was no record to ensure that the selection committee did not apply arbitrary criteria.

32. Under principles followed by the UNAT, Management can assert a presumption of regularity in its selection process for a job opening only if it “is able to minimally show that [a] candidature was given full and fair consideration.” *Riecan v. Secretary General*, 2017-UNAT-802. The Bank “did not make a minimal showing that my candidacy was given full and fair consideration.” Appeal at 12.
33. Appellant’s anonymity should be maintained in this appeal because of potential adverse impact on his reputation.

IV. The Bank’s Position

34. The following are the principal arguments asserted by the Bank.
35. Discretionary decisions are subject to limited review . The decision not to short-list Appellant for the Director position was a reasonable exercise of managerial discretion.
36. The administrative decision gave full and fair consideration to Appellant’s candidacy. The decision to create a short-list of five candidates from the original 12 was based on their experience and the criteria described in the job description.
37. Information on selection processes published on the EBRD intranet do not constitute binding law. Because the Bank did not have a written short-listing or selection procedure in its regulations or Staff Handbook, the decision not to select Appellant could not have contravened applicable procedures.
38. The burden of proving bias rested with Appellant.
39. The Vice President on the selection panel had five years’ experience with the work of the [Team]. It was appropriate for him to use that knowledge in assessing each of the applicants – “it would be unreasonable to expect the Vice President to discard such knowledge... .” Resp. at ¶5.15.
40. Appellant was not short-listed because of perceived deficiencies in his management and leadership skills – deficiencies that were evidenced by his last performance appraisal by the prior Director.
41. Whereas Appellant had only met his performance objectives over the preceding five years, the short-listed candidates had consistently exceeded their expectations. In addition, the ARC properly noted that the title of “Deputy” had been taken away from Appellant and that he had not been selected to be the acting Director after the previous Director left. These factors support the reasonableness of the decision.
42. The Vice President kept an open mind during the selection process. The fact that he found other candidates more suitable does not evidence bias.

43. The statement by a staff member in HRD that Appellant lacked the qualifications for the job is irrelevant. The Vice President corrected that mistake and explained the basis for his decision-making.
44. There are no principles of international administrative law that prescribe short-listing procedures. It would be a burden on resources to require the Bank to devote a disproportionate amount of time to this preliminary stage of the selection process.
45. Even if there had been a procedural irregularity in the short-listing procedure, it would not have been material because it would not have affected the outcome of the Vice President's reasonable decision.

V. The Tribunal's Conclusions

46. The Tribunal grants Appellant's request for anonymity.
47. The selection of a Director is a discretionary decision on the part of the Bank. The Tribunal will not second-guess discretionary assessments of a candidate's qualifications for a position unless one of the criteria in Paragraph 3.03(b), Section IV of the Appeals Process Directive has been met: "When the Administrative Decision complained of is a Decision of a Discretionary Nature, the Tribunal shall uphold the Appeal only if it finds that the decision was arbitrary, or discriminated in an improper manner against the Staff Member or the class of staff members to which the Staff Member belongs, or was carried out in violation of the applicable procedures." A similar rule is followed by other international organizations. See, e.g., *S. v. WTO*, ILOAT Judgment No. 3868 (2010).
48. To the extent Appellant argues that the decision not to short-list him was based on a selective reading of his 2017 performance appraisal and that a "holistic" review of his record was necessary, he is simply asking this Tribunal to repeat the review process and to assign different weight to factors than the selection panel did. Similarly, when Appellant complains that the selection panel overlooked the praise given to his leadership skills in prior performance appraisals, he is asking the Tribunal to substitute its assessment of the relevant factors for that of the decision-makers. For the reasons stated above, the Tribunal cannot and will not do so. Only defects of the sort identified in Paragraph 3.03(b) can give rise to the rescission of a discretionary decision.
49. The Tribunal is also constrained in cases such as this by Paragraph 7.01, Section IV of the Directive on the Appeals Process:

7.01 Reliance on Findings of Fact

(a) In the ordinary course, the Tribunal shall decide the Appeal on the basis of the Appeal Documents which shall include the Statement of Appeal, Response, Findings of Fact of the Administrative Review Committee and a transcript of the proceedings before the Administrative Review Committee and any other documents and evidence submitted to the Tribunal.

(b) The Tribunal shall take full account of the Findings of Fact made by the Administrative Review Committee in the Administrative Review Committee's Report and Recommendation unless, on application of either party, the Tribunal determines that the Findings of Fact contain a manifest error on the face of the written materials before it (including the Findings of Fact and the transcript) or are perverse or are reached in breach of applicable law or the Tribunal grants a request of either party to present new evidence not available to that party before the Administrative Review Committee.

The Tribunal must consider all questions of law *de novo*, but it will defer to ARC findings of fact except those that violate one of the standards in Paragraph 7.01(b). To the extent the ARC has not made a finding on a material subject, the Tribunal will do so. Cf. EBRDAT Judgment 2017/05.

50. Appellant argues that Bank law and a policy statement on the intranet require the establishment of a procedure for the selection of candidates for vacancies and that the Bank failed to create such a procedure. The Tribunal concludes that the intranet policy statement cited by Appellant did not create a legal obligation or entitlement. The Tribunal must look solely to EBRD regulations and Staff Handbook for a determination of Appellant's rights.
51. The relevant provisions of the Staff Handbook in effect during the times relevant to this case state as follows:

4.9 PROMOTIONS

4.9.1 Promotion procedures

(1) The decision to promote an employee, i.e., permanently reassign an employee from one title level to a higher level in the same job family rests with the senior managers of the relevant department concerned. The Human Resources Department, shall review all proposed promotions and is responsible for ensuring that all qualified candidates have been adequately considered and that all relevant criteria have been met

(2) Employees may be promoted through either:

(i) a direct reassignment (career-progression), i.e., if s/he is considered to perform the duties and meet the qualifications and requirements for the higher level; or

(ii) a selective procedure, that is, selection for a new or vacant position at a higher level for which an established procedure for the selection of candidates and the assessment of their suitability has been followed.

4.9.2 Factors considered when making promotion decisions

The factors that will be taken into account when deciding on a promotion include the employee's own relevant work experience, skill and commitment, the quality of past performance as established by performance appraisals, and the assessed ability to assume higher responsibilities. In the larger job families, such as Banking and the Secretarial and Administrative families, staff will normally be subject to specific promotion criteria and a defined time frame for advancement through the various title levels; these criteria may be reviewed and changed at the Bank's discretion from time to time.

4.16 ANNUAL PERFORMANCE APPRAISAL

Each year a formal appraisal of performance of all eligible staff⁷, except those who have only recently joined, will be carried out on a Bank-wide basis. Written comments are prepared by the line manager and discussed with the employee, who is given the opportunity to add his/her own written comments. The formal performance appraisal process is intended to assess the performance of all eligible staff during the previous year, both against a number of specified criteria and in overall terms. It is also intended to facilitate a structured and focused discussion between employees and their line managers about performance and related matters and memorialise their views and comments. The assessment of performance is an important element in the allocation of merit pay increases and, where applicable, performance-based compensation payments for the year under review, and in reaching promotion decisions. The exercise is also used to identify training and developmental needs, discuss career development issues as appropriate, and set work and performance goals for the coming year. [Emphasis added.]

52. Appellant attacks his exclusion from the short-list because the Bank had not published formal procedures for the short-listing process. Paragraph 4.9.1(2)(ii) requires that a selection process be undertaken pursuant to an “established procedure.” It does not state, however, that it must be a written procedure. In this case, the ARC made the finding that the procedure used in his case was pursuant to “custom and practice.” That finding is not manifestly erroneous, perverse, etc.
53. The Tribunal shares the ARC’s concern that the absence of written procedures can be an invitation to arbitrary and capricious decision-making. The Tribunal nevertheless concludes, in agreement with the ARC, that there was no abuse of discretionary authority. By following procedures established by “custom and practice,” the Bank’s ultimate decision did not violate Paragraph 4.9.1(2)(ii) or principles of international administrative law. See, e.g., *Riecan v. Secretary General*, 2017-UNAT-802 (“There is always a presumption that official acts have been regularly performed. This is called a presumption of regularity. But this presumption is a rebuttable one. If the management is able to even minimally show that the Appellant’s candidature was given a full and fair consideration, then the presumption of law stands satisfied.”)

54. Appellant also complains that the Vice President who sat on the reviewing panel had improperly used his personal knowledge of Appellant's past work as a basis for his decision-making. Appellant points to language in the then-existing Staff Handbook that, he asserts, made performance appraisals the sole indicator of past performance. The Tribunal rejects that interpretation of the Staff Handbook. As noted in Section 4.16, quoted above, the performance appraisal is only one "element" used in "reaching promotion decisions." Nothing in the Handbook precludes using other measures of performance such as a line manager's personal knowledge of a candidate's suitability to fill a vacancy.
55. Appellant further accuses the Vice President of bias because he had, after the fact, informed Appellant he had preferred the candidate who was filling the role of Acting Director. Appellant asserts that this preference evidences bias because it existed even before interviews took place. The Tribunal agrees with the ARC that this fact alone does not prove bias, especially in light of other facts in the record (e.g., the ultimate selection of a candidate who was not the Vice President's preferred candidate). Every promotion decision necessarily involves preferences. When a candidate list is long, a form of personnel triage is required. When a decision-maker expresses a preference for a particular candidate it is not necessarily bias; it is a discretionary decision. The burden was on Appellant to prove that he was discriminated against because of personal animosity or because he fell within a protected class such as a particular race or religion. The record does not support such a conclusion.
56. The fact that the Bank does not require a written record of short-listing decisions is problematic. The Bank does not dispute that its regulations require all selection decisions to be made "with fairness and impartiality." See Section 3(a), Staff Regulations. The absence of a written record can easily be used to mask bias, inattention to material facts or arbitrariness. In certain cases, the absence of a written record may be used as circumstantial evidence that a selection decision was not a proper exercise of authority; without a record, the fact-finder may decide there is not sufficient evidence to show that the decision-makers gave reasoned consideration to each candidate.
57. Notwithstanding the absence of a written record at the short-listing phase of this case, the ultimate question must still be: Was the applicant given fair and impartial consideration? In this case, the ARC has made a factual finding that there were sufficient facts in the record to justify the decision not to short-list Appellant. The Tribunal agrees with the ARC that the facts do not support a finding that unfairness or partiality tainted the short-listing process.
58. Lastly, Appellant points to the HR official who told him that he had failed to meet the qualifications for the job. Appellant challenges the credibility of the Bank's response that the HR official was uninformed and that the Vice President had corrected the error in a later conversation with Appellant. Appellant complains that the ARC should have called the HR official as a witness. The Tribunal agrees with the ARC that it was not necessary to call the HR official in light of the factual finding that Appellant's credentials fell short

in a comparison with other candidates and in light of critical comments made in his 2017 performance appraisal. As with the ARC, the Tribunal finds no basis for discrediting the Vice President's statement that he did not want to short-list Appellant based on the merits of his candidacy and not because of a lack of qualifications.

59. For the foregoing reasons, the Tribunal affirms the PARD in this case and dismisses all of Appellant's claims.

VI. Recommendation

60. The Bank suggests that documenting the decision-making at the short-listing phase of the selection process would be burdensome. The Tribunal disagrees. Pursuant to Section IV, Paragraph 8.03(b), the Tribunal recommends that the Bank develop a procedure for documenting the reasons why individual candidates have or have not been short-listed. Such information can be included in a document specific to the short-listing decision (e.g., notes listing the pros and cons of each candidate) or it can be derived from the entire record made of the decision-making process. In either event, the Bank should ensure that the Tribunal has sufficient documentation to allow it to assess whether fair and impartial decisions have been made when short-listing candidates. The availability of documentation will avoid the need for or can supplement witness recollections.

VII. Remedy

61. Because the Tribunal does not find any merit to this appeal, Appellant is not entitled to any remedy.

For the Administrative Tribunal



Michael Wolf