

ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

JUDGMENT No. 2016-4

Mr. P. Nogueira Batista, Jr., Applicant v. International Monetary Fund, Respondent

TABLE OF CONTENTS

INTRODUCTION	1
PROCEDURE.....	2
A. Applicant’s preliminary requests	2
B. Oral proceedings	5
FACTUAL BACKGROUND.....	5
A. Applicant’s first appointment to the Executive Board.....	5
B. Applicant’s second appointment to the Executive Board	7
C. Applicant’s request for retroactive Plan participation	7
CHANNELS OF ADMINISTRATIVE REVIEW	8
SUMMARY OF PARTIES’ PRINCIPAL CONTENTIONS	10
A. Applicant’s principal contentions	10
B. Respondent’s principal contentions	11
RELEVANT PROVISIONS OF THE FUND’S INTERNAL LAW	11
A. SRP Section 2.2(c).....	12
B. SRP Section 7.2 (Administration Committee).....	12
C. Rule to Permit Acts to Be Performed Beyond Time Limit Under Certain Circumstances (1998)	14
CONSIDERATION OF THE ISSUES	14
A. Did the SRP Administration Committee err in denying Applicant’s request to participate in the Plan retroactive to the date he first became eligible to elect participation in 2007?.....	14
(1) What standard of review governs Applicant’s challenge to the decision of the SRP Administration Committee?	14
(2) Did the Committee correctly interpret the provisions of SRP Section 2.2(c) and soundly apply them to the facts of Applicant’s case?.....	15
(a) Has Applicant established that there was any administrative error on the part of the Fund to support an exercise of discretion by the Committee to waive the three-month time limit to elect Plan participation pursuant to SRP Section 2.2(c)? In particular, has Applicant established that the Fund failed to	

give him notice of the option to elect Plan participation within three months of his initial appointment as Executive Director in 2007?.....17

(b) Do either SRP Section 3.2 or SRP Section 5.1 provide ground for concluding that the SRP Administration Committee erred in denying Applicant’s request for retroactive Plan participation?.....19

CONCLUSIONS OF THE TRIBUNAL19

DECISION20

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INTRODUCTION

1. On November 1, 2016, the Administrative Tribunal of the International Monetary Fund, composed for this case, pursuant to Article VII, Section 4 of the Tribunal's Statute, of Judge Catherine M. O'Regan, President, and Judges Edith Brown Weiss and Francisco Orrego Vicuña, met to adjudge the Application brought against the International Monetary Fund by Mr. Paulo Nogueira Batista, Jr., a former member of the IMF Executive Board and a retired participant in the Fund's Staff Retirement Plan (SRP or Plan). Applicant represented himself in the proceedings. Respondent was represented by Ms. Diana Benoit, Senior Counsel, and Ms. Pheabe Morris, Counsel, IMF Legal Department.
2. Applicant contests the decision of the SRP Administration Committee (Committee) denying his request to be permitted to contribute retroactively to the SRP from the time he first became eligible to elect participation in the Plan, that is, at the time of his initial appointment to the Executive Board in 2007. Applicant did not enroll in the Plan until he again became eligible to elect participation, at the time of his second appointment to the Executive Board in 2010. The Committee denied Applicant's request for retroactive participation on the ground that pursuant to SRP Section 2.2(c), which governs Plan participation by Executive Directors, enrollment is permitted only within the three-month period following an appointment. Applicant asserts that he does not recall that the Fund gave him notice of the opportunity to elect participation in the SRP at the time he first joined the Fund. He also contends that the Fund's practices in similar cases, as well as Plan provisions governing "analogous" situations, support the granting of his request.
3. Applicant seeks as relief that he be permitted to contribute retroactively to the SRP from the date he first became eligible to elect participation in 2007.
4. Respondent, for its part, maintains that the three-month time limit to elect participation in the Plan pursuant to SRP Section 2.2(c) was correctly applied in Applicant's case and that he has not put forward any basis to make exception to it. In particular, the Fund maintains that it fulfilled its responsibility to notify Applicant of his eligibility to enroll in the Plan at the time of his first appointment in 2007 and that he did not elect participation at that time. There are sound reasons for this time limit. Furthermore, submits the Fund, neither its practices in other cases, nor the Plan provisions cited by Applicant, allowing for retroactive participation in specified circumstances, support the granting of his request.

PROCEDURE

5. On January 25, 2016, Applicant filed an Application with the Administrative Tribunal, which was supplemented on February 26 and March 4, 2016. The Application, as supplemented, was transmitted to Respondent on March 4, 2016. On March 15, 2016, pursuant to Rule IV, para. (f), the Registrar circulated within the Fund a notice summarizing the issues raised in the Application.
6. On April 18, 2016, Respondent filed its Answer to the Application. On May 24, 2016, Applicant submitted his Reply. The Fund's Rejoinder was filed on June 30, 2016.
7. On July 28, 2016, Applicant filed a further submission, which the President of the Administrative Tribunal accepted as an Additional Pleading pursuant to Rule XI of the Tribunal's Rules of Procedure. Respondent was given the opportunity to file a responsive Comment, which it did on August 4, 2016. Respondent's Comment was transmitted to Applicant for his information.
8. The further exchanges of the parties in relation to Applicant's preliminary requests are elaborated below.

A. Applicant's preliminary requests

9. Applicant makes two preliminary requests: first, that the Tribunal "arrange an independent technical examination to verify the authenticity" of documents that the Fund has provided in support of its assertion that it gave Applicant notice of the opportunity to elect participation in the Plan at the time of his initial appointment in 2007; and, second, that the Fund send him electronically two documents that it had previously provided to him in hard copy. The principal documents in question in relation to both requests are an initial enrollment email notification of April 11, 2007 and a 30th-day reminder email of May 9, 2007. According to the Fund, both these email notifications served to inform Applicant of his eligibility to participate in the Plan. Applicant's preliminary requests relate to the heart of his case, that is, his assertion that he does not recall that the Fund gave him notice of the option to elect participation in the Plan when he first joined the Fund in 2007.
10. On September 6, 2016, following its consideration of the views of the parties, the Tribunal notified Applicant and Respondent of the following decisions in relation to Applicant's two requests. First, given that Respondent in its most recent submission had offered to send the two emails to Applicant electronically, the Tribunal indicated that the Fund should forward to Applicant via email (a) the initial enrollment notification email and (b) the 30th-day reminder email that it previously had provided him in hard copy. Second, the Tribunal deferred its decision on Applicant's request for an "independent technical examination" of documents until after the Fund had produced the emails electronically. Applicant was given the opportunity to file a submission concerning the authenticity of the two emails and the Fund was provided an opportunity to respond, in accordance with a timetable set out by the Tribunal.

11. On September 19, 2016, the Fund transmitted the two emails electronically to Applicant, with a copy to the Registrar of the Tribunal. On September 30, 2016, Applicant filed his observations; on October 6, 2016, the Fund filed a responsive Comment.

12. In his submission of September 30, 2016, Applicant continued to question the authenticity of the initial notification email and the 30th-day reminder email: “The email sent to me on September 19 does not constitute sufficient evidence to prove that the two alleged emails were actually sent to me in 2007 or that I received them then.” Applicant asserted that the emails earlier provided him in hard copy were “simply copy and pasted at the bottom of the email sent to [him] on September 19.” He also alleged that there was a discrepancy of several hours between the times marked on the attachments provided in hard copy and those provided by email. He additionally questioned the authenticity of the table known as the “Enrollment Email Notification Log” that the Fund had attached to its Answer.¹ Applicant maintained that the electronic production of the emails does “not obviate the need for an independent technical examination of the matter” and reiterated his request for such examination.

13. The Fund responded that “Applicant’s bare accusation that these documents have been tampered with, in the absence of any basis whatsoever to believe this might be true, other than Applicant’s own statement of what is supposedly technically ‘possible,’ should not be sufficient to give rise to the need for an ‘independent technical examination’ to disprove the accusation of malfeasance.” The Fund reiterated that “evidence of the notifications sent to Applicant is clear and credible on its face, and the Fund should not be required to prove, without any predicate, that it has not falsified documents submitted as evidence to the Tribunal.”

14. As Applicant’s second request has been granted, the only preliminary issue that remains to be considered is whether Applicant’s first request, i.e., that the Tribunal “arrange an independent technical examination to verify the authenticity” of the two documents, should be granted.

15. In his request for review to the SRP Administration Committee,² Applicant had posed the following questions:

1. How was HRD [the Human Resources Department] able to retrieve the email notifications sent to me in 2007 when the Secretary of the Committee initially told me that TGS [the Technology and General Service Department] no longer had them on archive?

2. Could you explain the characters (i.e. [/O=IMF/OU=WASHINGTON/CN=RECIPIENTS/CN=SRPENROLLMENT]) which appear below the sender line (i.e. HRD, SRP Enrollment) on both email notifications? What do they mean? Why are they appearing on the copy of the emails?

¹ See *infra* FACTUAL BACKGROUND.

² See *infra* CHANNELS OF ADMINISTRATIVE REVIEW.

3. Are the cop[ies] of the emails forwarded to me now by the Committee the same as the original notifications allegedly sent to me in 2007?

4. Would you be able to forward these emails to me directly, instead of providing them as attachments?

(Memorandum from Applicant to Secretary of the SRP Administration Committee, August 28, 2015.)

16. In its decision on review, the Committee responded to Applicant's questions as follows: Copies of the initial enrollment email and the 30th-day reminder email, which the Committee had attached to its decision of July 10, 2015, had been obtained from the TGS staff member who had provided the log of email notifications from the Fund's archiving system in 2012 when Applicant had inquired informally about retroactive participation in the Plan. In addition, the Committee stated: "TGS has also confirmed that the emails that were forwarded to you are the same email notifications that were sent to you in 2007." As to the 60th-day and 90th-day reminders, said the Committee, TGS was unable to locate them in the Fund's archiving system, "which may be because these emails were deleted from the mailbox prior to archiving." As to the characters that appear below the sender line, these "represent the email exchange server." Regarding Applicant's request to have the emails sent to him directly, the decision on review stated: "TGS has confirmed that these emails are sent to imf.org email addresses as set in the email server and therefore cannot be sent directly to you at this time." (Letter from Secretary of the SRP Administration Committee to Applicant, October 30, 2015.)

17. In his Application, Applicant contends that the Committee "gave unclear and unconvincing replies" to his queries, and he requests that the Tribunal "arrange an independent technical examination to verify the authenticity of the attachments provided as evidence by the Committee." In the Reply, Applicant repeats the same contention and request, and, in his Additional Pleading, he reiterates his view that the "four questions that I ask in that Reply have not been satisfactorily answered to this date."

18. Respondent, for its part, maintains that the questions Applicant poses concerning the documents provided by the Committee have been "asked and answered." It opposes Applicant's request for an "independent technical examination of documents" on the ground that the "evidence of the notifications sent to Applicant is clear and credible on its face, and the Fund should not be required to prove, without any predicate, that it has not falsified documents submitted as evidence to the Tribunal." "Nevertheless," submits the Fund, "if for any reason the Tribunal wishes the Fund to carry out any type of technical examination, or to provide the Tribunal with any additional information to establish the trustworthiness of the evidence it has presented, the Fund will certainly do so."

19. Applicant emphasizes that his request is "for the Tribunal to arrange an *independent* verification" because it would "not be appropriate for the technical examination to be carried out by one of the contending parties." (Emphasis in original.)

20. Notably, neither party has addressed the question of what authority the Tribunal might have under its Statute and Rules of Procedure to arrange for an independent technical examination of documents. The Tribunal is of the view that it is not necessary for it to address in this case the question whether it has the authority to order an “independent technical examination” of documents. Even if the Tribunal does have that authority, it would not be exercised unless it would be necessary for the disposition of a case. In the light of the considerations set out below as to the merits of the Application, the Tribunal has concluded that such an examination would not be dispositive of the issues in this case. Accordingly, it denies Applicant’s request.

B. Oral proceedings

21. Article XII of the Tribunal’s Statute provides that the Tribunal shall “. . . decide in each case whether oral proceedings are warranted.” Rule XIII, para. 1, of the Rules of Procedure provides that such proceedings shall be held “. . . if . . . the Tribunal deems such proceedings useful.” Neither party has requested oral proceedings in this case. In view of the written record before it and in the absence of any request, the Tribunal decided that oral proceedings would not be useful to its disposition of the case.

FACTUAL BACKGROUND

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

A. Applicant’s first appointment to the Executive Board

23. Applicant was first appointed as a member of the IMF Executive Board on April 9, 2007. In accordance with SRP Section 2.2(c), as an Executive Director, Applicant was eligible to elect to participate in the Plan by giving written notice to the SRP Administration Committee within three months of his appointment date. Applicant did not make such election.

24. Central to the dispute between the parties is what notice the Fund gave Applicant of his eligibility to elect participation in the Plan within the relevant three-month period following his April 9, 2007 appointment.

25. The Fund has produced the following documentation:

- (i) Appointment Checklist – “Checklist on Procedures for Incoming Executive Directors, Alternate Executive Directors, and Senior Advisors to Executive Directors,” April 9, 2007, addressed to Applicant and including his Fund ID number. The Appointment Checklist stated:

Directors desiring to participate must so elect within **three months** of assuming duties. You will receive an e-mail regarding retirement insurance explaining your benefits under the SRP should you decide to participate. You will

be asked to respond to the e-mail whether or not you wish to participate.

(Emphasis in original.)

- (ii) Initial Enrollment Notification Email, April 11, 2007 – The email stated:

Dear New IMF Board or Staff Member:

Our records indicate that you are eligible to participate in the IMF Staff Retirement Plan (SRP). . . . If you decide to participate, you must enroll in the SRP within 90 calendar days from your Entry on Duty (EOD) date. (Please note that the SRP Election Form has been eliminated).

You must respond directly to HRD, SRP Enrollment by email

The notification attached a personalized projection of Plan benefits. The notification also advised:

If we do not receive your election to enroll in the SRP by the 90th calendar day, you will not be allowed to enroll in the SRP. However, at the end of your current appointment, if you are offered a new fixed-term appointment that is at least two years or more (for a member of the Board of Executive Directors, if you are re-elected) you will be eligible to enroll at that time; or if you are offered a “regular appointment”, then the participation in the SRP is automatic and mandatory.

(Email from HRD, SRP Enrollment, [/O=IMF/OU=WASHINGTON/CN=RECIPIENTS/CN=SRPENROLLMENT] to Applicant, “Enrollment in the Staff Retirement Plan,” April 11, 2007.)

- (iii) 30th-day Reminder Email, May 9, 2007 – The text of this email is identical to the initial enrollment email, but for the subject line “30th Day Reminder for the SRP Enrollment”; and
- (iv) “Enrollment Email Notification Log” – This table lists each of the four email notifications by date and time sent, subject line, and Applicant’s name as Recipient, including the 60th-day reminder email, June 8, 2007, and 90th-day reminder email, July 1, 2007, along with the terms “Read” and “Received” in relation to the latter reminder.

26. Applicant asserts that he does not recall receiving the initial enrollment email or any of the reminder emails. Applicant disputes the authenticity of the two email notifications—the initial enrollment notification email and the 30th-day reminder email—that the Fund produced to

him initially in hard copy, and, following the Tribunal's decision of September 6, 2016, has produced to him electronically.

B. Applicant's second appointment to the Executive Board

27. On November 23, 2010, Applicant was appointed to a second term as a member of the IMF Executive Board. It is not disputed that on the occasion of his second appointment Applicant elected participation in the Plan. He effected that election by email to the "HRD, SRP Enrollment" mailbox, stating: "I would like to enroll in the Retirement Plan. The effective date of participation would be November 23, 2010." (Email from Applicant to HRD, SRP Enrollment, cc: [Secretary of the SRP Administration Committee], December 14, 2010.)

28. Applicant continued to participate in the Plan and to make contributions to it until his retirement on July 1, 2015. He began receiving pension payments on July 31, 2015.

C. Applicant's request for retroactive Plan participation

29. The record shows that in 2012 Applicant inquired informally about the possibility of contributing retroactively to the SRP. At that time, he was provided with a copy of the Enrollment Email Notification Log. (*See* Letter from Secretary of the SRP Administration Committee to Applicant, October 30, 2015, p. 2.)

30. On June 8, 2015, shortly before his retirement, Applicant initiated a formal request to the Committee to contribute retroactively to the Plan from the date of his initial appointment in 2007. (Memorandum from Applicant to Secretary of the SRP Administrative Committee, June 8, 2015.) In support of this request, Applicant asserted that: (i) he was "not asking for any privilege," as he would be exercising a right he had held since April 2007; (ii) he did "not recall having received any email notifications about this matter when [he] joined the Fund"; and (iii) he had learned from colleagues that there have been a "number of similar cases, involving different types of retroactive payments." Applicant asked the Committee to provide him with a "copy of all the enrollment email notifications that were sent to [him] at the time" of his initial appointment. Additionally, he asked the Committee to "go back to all cases where it made exceptions for late registration to confirm whether there are any cases similar to [his]."

31. On July 10, 2015, the Committee denied Applicant's request for retroactive Plan participation on the ground that "Plan provisions only allow enrollment during the 90-day period following an appointment or change in appointment." (Letter from Secretary of the SRP Administration Committee to Applicant, July 10, 2015.) The decision also stated that similar requests had been denied in the past, "with the exception of very few cases, where it was established that the Fund had failed to notify or remind staff/Board members of their eligibility to enroll." In Applicant's case, said the Committee, the evidence showed that he had been "properly notified and reminded" of his option to enroll during the relevant period and therefore there was no basis to make an exception to the three-month time limit in his case.

32. In support of its conclusion that Applicant had been properly notified and reminded of the SRP enrollment option at the time of his initial appointment to the Executive Board, the Committee attached to its decision of July 10, 2015 the following documentation: (i) the

Appointment Checklist, April 9, 2007; (ii) the initial enrollment email notification, April 11, 2007; and (iii) the 30th-day reminder email notification, May 9, 2007. The decision also noted: “These notifications were further established by the log information provided by TGS (a copy of which you already received), which also indicates that you read the final reminder for SRP enrollment.” The decision emphasized that Plan participants have been permitted to make retroactive contributions only in cases of “administrative error on the institution’s part” or because particular Plan provisions governed their circumstances.

CHANNELS OF ADMINISTRATIVE REVIEW

33. On August 28, 2015, pursuant to Rule VIII³ of the Committee’s Rules of Procedure, Applicant filed a request for review by the Committee of its July 10, 2015 decision. (Memorandum from Applicant to Secretary of the SRP Administration Committee, August 28, 2015.) In his request for review, Applicant posed the questions to the Committee that are set out at para. 15 above. Applicant also reiterated arguments presented in his request of June 8, 2015,

³ Rule VIII (Review of Decisions) of the SRP Administration Committee’s Rules of Procedure provides:

1. A Requestor, or any other person claiming any rights or benefits under the Plan, who wishes to dispute a Decision may submit an Application for Review of a Decision (hereinafter “Application”) to the Secretary within ninety (90) days after the Requestor receives a copy of the Decision. An Application shall satisfy all of the requirements as to form set forth in Rule III and otherwise applicable to a Request. Subject to Rule X, paragraph 2, if no Application has been submitted within this period and an extension of time described in Rule IX, paragraph 2 has not been granted, the right to submit an Application shall cease.
2. The Committee may review a Decision, either in response to a timely Application or at its own initiative. The Committee may also be required to review a decision at the request of the Pension Committee in accordance with the jurisdiction of that Committee as set out in Section 7.1(c) of the Plan. The Committee shall not, however, review a Decision so as to affect adversely any action taken or recommended therein, except in cases of:
 - (a) misrepresentation of a material fact;
 - (b) the availability of material evidence not previously before the Committee; or
 - (c) a disputed claim between two or more persons claiming any rights or benefits under the Plan.
3. If the Committee undertakes to review a Decision, or if it declines to review a Decision, all parties to the Decision shall be notified in writing.
4. Any review of a Decision shall be conducted in accordance with Rules IV, VI and VII. The Committee shall notify the Applicant of the results of its review within three months of the receipt of the Application by the Secretary.

(Staff Bulletin No. 99/17 (New Rules of Procedure for Appeals to the Administration Committee of the Staff Retirement Plan) (June 23, 1999), Attachment.)

and asked the Committee to “examine all cases, since the beginning of the SRP, to check whether there are precedents for what I am requesting.”

34. On October 30, 2015, the Committee denied Applicant’s request for review. (Letter from Secretary of the SRP Administration Committee to Applicant, October 30, 2015.) The Committee’s responses to Applicant’s four questions about the documentation are set out above at para. 16.

35. The decision on review additionally stated that the Committee had identified twelve cases over the preceding twenty years in which the Committee had permitted participants to enroll after the 90-day time limit of SRP Section 2.2(c) and that “[i]n each case, the exception was made due to the Fund’s failure to notify or remind staff/Executive Board members of their eligibility to enroll.” In Applicant’s case, however, the Committee found that there was “no such administrative error” to justify his retroactive participation.

36. The Committee further noted that when Applicant had separated from the Fund in June 2015, he had requested copies of the initial enrollment email and reminder emails that had been sent to him: “As there were no copies of the requested emails in the Secretary’s files, it was assumed that given the amount of time that had lapsed, it was not possible to retrieve those emails.” Instead, Applicant had been provided with an extract from the TGS log indicating the date and time the emails had been sent to him: “This log was provided to HRD in 2012 when you first inquired about retroactive contributions and Fund Management informed you that it would not be possible to retroactively contribute to the SRP without an amendment to the Plan.”

37. The Committee additionally rejected, as it had in its decision of July 10, 2015, Applicant’s arguments that Plan provisions providing for retroactive contributions in cases of restoration of prior service (SRP Section 5.1) and in cases of the one-time buyback for contractual service provided by amendment to the Plan in 2002 (SRP Section 3.2) were “analogous” to his situation.

38. The Committee concluded that Applicant was “. . . properly notified and reminded in 2007 of [his] option to enroll in the Plan. Given that there was no error on the institution’s part,” the Committee held, it could not grant Applicant’s request because “doing so would not only require an amendment of the Plan, but would be unfair to other participants whose requests were denied under similar situations.”

39. In accordance with Rule X, para. 1(b),⁴ of the SRP Administration Committee’s Rules of Procedure, the channels of review provided by that Committee are exhausted for purposes of

⁴ Rule X (Exhaustion of Administrative Review), para. 1, of the SRP Administration Committee’s Rules of Procedure provides:

1. The channel of administrative review for a Request submitted to the Committee shall be deemed to have been exhausted for the purpose of filing an application with the Administrative Tribunal of the Fund when, in compliance with Article V of the Statute of the Administrative Tribunal (Statute):

(continued)

filing an application with the Administrative Tribunal when the Committee has notified the requestor of the results of its review of the contested decision.

40. On January 25, 2016, Applicant filed his Application with the Administrative Tribunal.

SUMMARY OF PARTIES' PRINCIPAL CONTENTIONS

A. Applicant's principal contentions

41. The principal arguments presented by Applicant in his Application, Reply, and additional submissions may be summarized as follows:

1. The Plan does not expressly prohibit retroactive participation in the circumstances presented by Applicant's case.
2. Applicant is "not asking for any privilege," as he would be exercising retroactively a "right [he] already had since April 2007."
3. Applicant "do[es] not recall having received any email notifications about this matter when [he] joined the Fund." The Fund has not "establish[ed] clearly" that Applicant was appropriately notified of the SRP enrollment option when he joined the Fund in 2007.
4. Other staff or Board members who did not join the Plan at the beginning of their service because the Fund failed to notify them have been subsequently authorized by the Committee to participate retroactively.
5. Staff members who were formerly contractual employees were allowed a one-time opportunity to contribute retroactively to the SRP. The same principle of fairness should apply to Applicant.
6. Staff and Board members who have left the Fund and rejoined after an interval of time are permitted to restore their participation in the Plan retroactively. This procedure is analogous to what Applicant requests.

-
- (a) three months have elapsed since an Application for review of a Decision was submitted to the Committee in accordance with Rule VIII, paragraph 1 and the results of the review have not been notified to the Applicant; or
 - (b) the Committee has notified the Applicant of the results of any review of a Decision, or its decision to decline to review a Decision; or
 - (c) the conditions set out in Article V, Section 3(c) of the Statute have been met.

(Staff Bulletin No. 99/17 (New Rules of Procedure for Appeals to the Administration Committee of the Staff Retirement Plan) (June 23, 1999), Attachment.)

7. Applicant requests as relief that he be permitted to contribute retroactively to the SRP from the time he first became eligible to elect participation in April 2007.

B. Respondent's principal contentions

42. The principal arguments presented by Respondent in its Answer, Rejoinder, and additional submissions may be summarized as follows:

1. Applicant has not shown that the SRP Administration Committee erred in denying his request to waive the three-month enrollment time limit adopted by the Executive Board in SRP Section 2.2(c). The Committee had no legal basis to make an exception to the rule in his case.
2. The Plan puts limits on timing of election to join so that individuals for whom participation is voluntary cannot engage in "adverse selection" against the Plan. Allowing Applicant to make retroactive contributions several years after the election deadline would be an unjustified exception to a sound and longstanding rule.
3. There is no authority in the text of the Plan for waiver of the three-month time limit to join the SRP pursuant to SRP Section 2.2(c).
4. The Fund satisfied any obligation to notify Applicant of the time limit for SRP enrollment through an initial enrollment email notification and three follow-up email notifications at 30-day intervals thereafter, as well as through an appointment checklist at the time of his initial entry on duty in 2007.
5. The only cases in which retroactive contributions have been permitted after the three-month deadline of SRP Section 2.2(c) are those in which the Fund failed to notify or remind the participant of his or her eligibility to enroll. Applicant's circumstances differ from these cases because the evidence shows that the Fund satisfied any obligation to notify Applicant of the time limit.
6. Applicant's case is not analogous to retroactive Plan participation pursuant to specific Plan provisions governing (i) restoration of service following a break in service (Article 5.1) or (ii) the "buy back" of service in the case of former contractual employees, as approved by the Executive Board following revision of the Fund's categories of employment in 2002 (SRP Section 3.2). These provisions do not provide a basis to waive the three-month enrollment rule in Applicant's case.

RELEVANT PROVISIONS OF THE FUND'S INTERNAL LAW

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

A. SRP Section 2.2(c)

44. SRP Section 2.2(c) provides that IMF Executive Directors may elect to participate in the Plan by written notice to the SRP Administration Committee within three months of their appointment date:

Article 2

PARTICIPATION

Section

....

2.2

....

(c) Every Executive Director, Alternate Executive Director, the Director, Independent Evaluation Office, every employee in the Independent Evaluation office on a fixed term appointment for a period of two years or longer, and every staff member on a fixed-term appointment for a period of two years or longer, who is devoting to his work not less than one fourth of the Employer's normal business hours and is receiving remuneration therefore may, within three months after he shall first satisfy the requirements of this subsection (c), elect to become a participant by filing written notice with the Administration Committee.

....

B. SRP Section 7.2 (Administration Committee)

45. SRP Section 7.2 sets out the role and responsibilities of the SRP Administration Committee:

7.2 Administration Committee

(a) The Administration Committee shall be composed of five persons, each with an alternate, appointed by the Pension Committee upon nomination by the Managing Director of the Employer, to serve at the pleasure of the Pension Committee. Each member and each alternate appointed after January 1, 1978 shall serve for a period of three years, subject to the pleasure of the Pension Committee, but may be reappointed. The Pension Committee shall designate one of the members of the Administration Committee as chairman and another as vice

chairman of the Administration Committee. The alternate of any member of the Administration Committee may act and vote in his stead.

(b) The Administration Committee, subject to the supervision and control of the Pension Committee, shall be responsible for the administration of the Plan and its application to participants, former participants and persons claiming through them. Except as may be herein otherwise expressly provided, the Administration Committee shall have the exclusive right to interpret the Plan, to determine whether any person is or was a staff member, participant or retired participant, to direct the employer to make disbursements from the Retirement Fund in payment of benefits under the Plan, to determine whether any person has a right to any benefit hereunder and, if so, the amount thereof, and to determine any question arising hereunder in connection with the administration of the Plan or its application to any person claiming any rights or benefits hereunder, and its decision or action in respect thereof shall be conclusive and binding upon all persons interested, subject to appeal in accordance with the procedures of the Administrative Tribunal. Nothing herein shall prevent the Administration Committee, at its own discretion, from reconsidering a decision taken or from submitting a matter to the Pension Committee in accordance with subsection (c) of Section 7.1.

(c) The Administration Committee, subject to the general authority of the Pension Committee, shall have authority to make, establish and prescribe such rules, policies, procedures and forms for the administration of the Plan, its interpretation, the exercise by individuals of rights or privileges hereunder, the disbursement of the Retirement Fund and the application of the Plan to individuals and the Employer as shall not be contrary to the provisions hereof.

(d) The Administration Committee shall maintain accounts showing the fiscal transactions of the Plan, and shall keep in convenient form such data as may be necessary for actuarial valuations of the Plan. The Administration Committee shall prepare annually a report showing in reasonable detail the assets and liabilities of the Plan and giving a brief account of the operation of the Plan for the past year. Such report shall be submitted to the Pension Committee, and a copy shall be on file at the headquarters of the Employer, where it shall be open to inspection by any participant or retired participant.

(e) In any case where it shall be necessary to determine the part of any benefit under the Plan that is provided by the

contributions of a participant or of the Employer, the Administration Committee, subject to any rules or orders of the Pension Committee with respect thereto, shall make such determination in such manner as it shall deem equitable.

C. Rule to Permit Acts to Be Performed Beyond Time Limit Under Certain Circumstances (1998)

46. The SRP Administration Committee has adopted a Rule to Permit Acts to Be Performed Beyond Time Limit Under Certain Circumstances:

In the event that the Administration Committee (hereinafter “Committee”) of the Staff Retirement Plan determines that a time limit prescribed for the doing of any act required under the Plan, in relation to the interest of a participant or retired participant, has not been complied with, as a result of any failure by the Employer or the Committee to notify a participant or retired participant of such time limit that the Employer or Committee is obligated to give notice of either under the Plan or pursuant to a responsibility that it has specifically undertaken, whether due to error, oversight or any other reason, and such interest has thereby been affected adversely, the Committee may, in its sole discretion, permit such act to be done and deem it to have been done within the time prescribed.

CONSIDERATION OF THE ISSUES

47. The Application presents the following issue for consideration: Did the SRP Administration Committee err in denying Applicant’s request to participate in the Plan retroactive to the date he first became eligible to elect participation in 2007?

A. Did the SRP Administration Committee err in denying Applicant’s request to participate in the Plan retroactive to the date he first became eligible to elect participation in 2007?

(1) What standard of review governs Applicant’s challenge to the decision of the SRP Administration Committee?

48. The Tribunal has recently reaffirmed that when it considers a challenge to a decision of the SRP Administration Committee it decides whether the Committee has correctly interpreted the provisions of the Plan and soundly applied them to the facts of the case. *Mr. J. Prader, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2015-1 (March 15, 2016), paras. 52-54; *Ms. “J”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-1 (September 30, 2003), para. 128.⁵ If the Tribunal concludes that

⁵ In *Ms. “J”*, para. 128, the Tribunal also formulated as part of the standard of review the questions whether the Committee’s decision was taken in accordance with fair and reasonable procedures and whether it was in any

the Committee's decision was "in error," it may rescind the decision. *See, e.g., Prader*, para. 78 (rescinding decision denying applicant's request to revoke currency election under SRP Section 16.3); *Mr. "P" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2001-2 (November 20, 2001), para. 144 (giving effect to order for division of marital property pursuant to SRP Section 11.3).

49. The Tribunal has explained that the reasons for this approach are twofold. First, pursuant to SRP Section 7.2(b), the authority to take an individual decision under the Plan is vested exclusively in the SRP Administration Committee, subject to appeal (following reconsideration by that Committee) to the Tribunal. Accordingly, in contrast to recommendations of the Fund's Grievance Committee, the decisions of the SRP Administration Committee are not subject to further consideration by Fund Management. Second, the ". . . process of construing the applicable terms of the Staff Retirement Plan and applying them to the facts of a particular case to determine an applicant's entitlement or not to the requested benefit more closely resembles a judicial act than one typically taken pursuant to managerial authority." *Prader*, para. 53, quoting *Ms. "J"*, paras. 112-113 (rescinding denial of disability pension).

50. Mindful of the "unique nature of the [Tribunal's] appellate authority" over decisions of the SRP Administration Committee, *see Prader*, para. 54 and cases cited therein, the Tribunal will consider whether the Committee correctly interpreted the provisions of SRP Section 2.2(c) and soundly applied them to the facts of Applicant's case.

(2) Did the Committee correctly interpret the provisions of SRP Section 2.2(c) and soundly apply them to the facts of Applicant's case?

51. SRP Section 2.2(c) provides that an "Executive Director . . . may, within three months after he shall first satisfy the requirements of this subsection (c), elect to become a participant by filing written notice with the Administration Committee." It is not disputed that Applicant did not make such election in 2007. Rather, he became a participant in the Plan only when a second period of eligibility arose, that is, when he received a fresh appointment to the Executive Board in 2010. At that time, he stated that the effective date of his Plan participation would be November 23, 2010. There is nothing in the record to suggest that, at the time Applicant was advised of the option to join the Plan in 2010, he raised either the question of his not having been notified of his eligibility to join the Plan at the time of his 2007 appointment or the question whether he could be permitted retroactive participation in the Plan.

52. The Tribunal has recently stated, in relation to the election of currency for pension payments, that the "Committee should start by considering the provisions of the Plan and assessing whether the relevant election was made in accordance with the provisions of the Plan." *Prader*, para. 65. It is not disputed that Applicant did not satisfy the requirement of SRP Section 2.2(c) to elect Plan participation with three months of appointment. Accordingly, the question is

respect arbitrary, capricious, discriminatory or improperly motivated. As such contentions have not been made in the instant case, it is not necessary to consider them here.

whether there is any ground to conclude that the Committee erred in denying Applicant's request for exception to that Plan provision.

53. Applicant asserts that the Plan does not "expressly prohibit" retroactive participation in the circumstances presented by his case and that he is "not asking for any privilege," as he would be exercising retroactively a "right [he] already had since April 2007."

54. Respondent points out that there are sound reasons for the three-month time limit to elect participation under SRP Section 2.2(c), so as to protect the Plan against "adverse selection" and that there is no authority in the text of the Plan for waiver of that deadline. "Consequently," maintains the Fund, "permitting Applicant to make retroactive contributions several years after the election deadline would be an unjustified exception from a sound and longstanding rule, for him alone." According to the Fund, only in cases of "administrative error" on the part of the Fund, that is, a failure to notify or remind individuals of the option to elect participation, have exceptions been made to the three-month time limit.

55. The Tribunal notes that the Committee has adopted a Rule to Permit Acts to Be Performed Beyond Time Limit Under Certain Circumstances (1998). By that Rule, the Committee has granted itself discretion,

[i]n the event that [it] determines that a time limit prescribed for the doing of any act required under the Plan, in relation to the interest of a participant or retired participant, has not been complied with, *as a result of any failure by the Employer or the Committee to notify a participant or retired participant of such time limit* that the Employer or Committee is obligated to give notice of either under the Plan or pursuant to a responsibility that it has specifically undertaken, whether due to error, oversight or any other reason, and such interest has thereby been affected adversely, . . . [to] deem [such act] to have been done within the time prescribed.

(Emphasis added.) The Fund states that this Rule applies to all time limits under the Plan and codifies the principle that a statutory deadline may be waived when the deadline was missed due to agency error.

56. Accordingly, the Tribunal will consider: (i) Has Applicant established that there was any administrative error on the part of the Fund to support an exercise of discretion by the Committee to waive the three-month time limit to elect Plan participation pursuant to SRP Section 2.2(c)? In particular, has Applicant established that the Fund failed to give him notice of the option to elect Plan participation within three months of his initial appointment as Executive Director in 2007? (ii) Do either SRP Section 3.2 or SRP Section 5.1 provide ground for concluding that the Committee erred in denying Applicant's request for retroactive Plan participation?

- (a) Has Applicant established that there was any administrative error on the part of the Fund to support an exercise of discretion by the Committee to waive the three-month time limit to elect Plan participation pursuant to SRP Section 2.2(c)? In particular, has Applicant established that the Fund failed to give him notice of the option to elect Plan participation within three months of his initial appointment as Executive Director in 2007?

57. At the heart of the controversy in this case is Applicant's assertion that he "do[es] not recall" having been given notice of the option to enroll in the Plan within three months of his appointment as Executive Director in 2007. Applicant states that he "do[es] not recall having received any email notifications about this matter when [he] joined the Fund" and other staff or Board members have been subsequently authorized by the Committee to participate retroactively.

58. Respondent, for its part, maintains that although Applicant contends that he does not recall having received any email notifications about this matter when he first joined the Fund, the evidence shows that the Fund satisfied any obligation to notify him of the time limit.

59. As described above,⁶ the Fund has produced documentation intended to demonstrate that it gave Applicant notice of his option to join the Plan in 2007. This documentation consists of (i) Appointment Checklist, April 9, 2007; (ii) initial enrollment notification email, April 11, 2007; (iii) 30th-day reminder email, May 9, 2007; and (iv) an "Enrollment Email Notification Log," listing 60th-day reminder email, June 8, 2007, and 90th-day reminder email, July 1, 2007, along with the terms "Read" and "Received" in relation to the latter reminder.

60. Applicant disputes the authenticity of the documentation. In particular, Applicant states: "[A]fter initially informing me that the emails allegedly sent to me in 2007 were no longer retrievable and that TGS no longer had them on archive, the Administration Committee informed me that HRD had supposedly managed to locate two of the four emails sent to incoming staff. It is the authenticity of these two emails that is being challenged." The Committee has explained, however, that the copies of the initial enrollment email and the 30th-day reminder email, which the Committee had attached to its decision of July 10, 2015, had been obtained from the TGS staff member who had provided the log from the archiving system in 2012.⁷

61. Applicant also asserts that as copies of the 60th day and 90th-day reminder emails have not been retrieved by the Fund, ". . . only two of the four emails that were supposed to have been sent were allegedly retrieved. Under normal procedures, four emails should have been sent to me. And the two emails supposedly retrieved can be contested, for the reasons given above." Applicant additionally questions whether the Email Notification Log listing a "read receipt" posted in the Fund's email system provides sufficient evidence of notification.

62. Applicant's principal basis for alleging error in the Committee's decision is that he does not recall receiving notice of his eligibility to participate in the Plan in 2007. It is important to

⁶ See *supra* FACTUAL BACKGROUND.

⁷ See *supra* CHANNELS OF ADMINISTRATIVE REVIEW.

observe what Applicant argues: Although Applicant states that he “do[es] not recall having received any email notifications about this matter when [he] joined the Fund,” he does not squarely claim that the Fund, in fact, failed to notify him.

63. Furthermore, Applicant asserts that the Fund has not “establish[ed] clearly” that he was “appropriately notified” of the SRP enrollment option when he joined the Fund in 2007. It is always the applicant’s burden, however, to show error in a challenged decision.

64. The Tribunal must consider whether Applicant has met his burden of showing that he was not notified of his eligibility to join the Plan when he joined the Fund in 2007. For the following reasons, the Tribunal concludes that Applicant has not met this burden. First, the Fund has produced an Appointment Checklist bearing Applicant’s name and date of appointment which states clearly that Executive Directors are eligible to join the Plan and must make an election to do so within three months of their appointment. Applicant does not deny he received this Checklist, nor does he explain why he considers the Checklist not to constitute notification to him of his eligibility to join the Plan. Second, although Applicant questions the authenticity of the email documentation produced by the Fund, and in particular suggests that the Fund has not established that he received that documentation, he has not drawn to the Tribunal’s attention any basis to doubt its authenticity other than his own asserted lack of recall and the fact that the Committee initially had informed him that it could not find any of the four email notifications but later asserted that it had retrieved two of the four. Third, it must be accepted that Applicant became aware of the option to enroll in the Plan at the latest when he joined the Fund as an Executive Director for a second time in 2010. He appears not to have complained at that time that he had never been notified of his entitlement to join the Plan during his first term as Executive Director. The record shows that he first made an informal inquiry as to the possibility of retroactive participation only in 2012 and then only launched his formal request in 2015 when he was about to retire from the Fund. All of these facts support the conclusion that the Committee did not err when it concluded that there had been no “administrative error” in terms of a failure to notify Applicant of his option to enroll in the Plan that would justify granting his request for retroactive participation.

65. Accordingly, the Tribunal concludes that Applicant has not shown that the Fund failed to fulfill its duty to notify him in 2007 of the option to elect participation in the SRP so as to establish that the Committee erred in denying his request for retroactive Plan participation. Applicant has not brought to light any basis for the Committee to have exercised a discretion to waive the time limit of SRP Section 2.2(c) under the Rule to Permit Acts to Be Performed Beyond Time Limit Under Certain Circumstances.

66. Having concluded that Applicant has not established administrative error on the part of the Fund in notifying him of the option to elect participation in the Plan pursuant to SRP Section 2.2(c), the Tribunal considers whether there is any other ground for finding error in the Committee’s denial of his request.

(b) Do either SRP Section 3.2 or SRP Section 5.1 provide ground for concluding that the SRP Administration Committee erred in denying Applicant's request for retroactive Plan participation?

67. Applicant seeks to invoke SRP Section 3.2 and SRP Section 5.1 in support of his contention that the Committee erred in denying his request to participate in the Plan retroactive to the date of his initial eligibility to elect participation. Applicant contends that these provisions deal with circumstances that are "analogous" to his own.

68. Respondent, for its part, maintains that Applicant's case is not analogous to retroactive Plan participation pursuant to specific Plan provisions governing (i) restoration of service following a break in service (Article 5.1) or (ii) the "buy back" of service in the case of former contractual employees, as approved by the Executive Board following revision of the Fund's categories of employment in 2002 (SRP Section 3.2). These provisions, asserts the Fund, are ". . . explicitly provided for in the Plan based on decisions of the Executive Board and apply to certain categories of staff in certain specified circumstances that are not analogous to Applicant's case."

69. In the view of the Tribunal, the issues of this case are governed solely by SRP Section 2.2(c). The assertions Applicant raises as to other Plan provisions relate to specific rules established for specific circumstances that do not apply to Applicant. It is clear that Applicant's case does not fall within SRP Section 3.2 or SRP Section 5.1. Accordingly, neither of these provisions provides ground for concluding that the Committee erred in denying Applicant's request for retroactive Plan participation.

CONCLUSIONS OF THE TRIBUNAL

70. For the foregoing reasons, the Tribunal concludes that the SRP Administration Committee correctly interpreted the provisions of SRP Section 2.2(c) and soundly applied them to the facts of Applicant's case. Applicant has not established administrative error on the part of the Fund in notifying him of the option to elect participation in the Plan pursuant to SRP Section 2.2(c). Nor do the other Plan provisions cited by Applicant provide ground for his claim. Accordingly, the Committee's decision denying Applicant's request for retroactive participation in the Plan was not in error and the Application must be denied.

DECISION

FOR THESE REASONS

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

The Application of Mr. Nogueira Batista is denied.

Catherine M. O'Regan, President

Edith Brown Weiss, Judge

Francisco Orrego Vicuña, Judge

/s/

Catherine M. O'Regan, President

/s/

Celia Goldman, Registrar

Washington, D.C.
November 1, 2016