

# ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 9  
(8 January 1996)**

**Nicanor B. Isip  
v.  
Asian Development Bank**

**Mark Fernando, President  
T. Sawada  
B. Stern**

1. The Applicant was employed by the Asian Development Bank ("the Bank") on 1 March 1978 as a member of its supporting staff in the Budget, Personnel and Management Systems Department ("BPMSD"), and was, at the relevant time, a Technical Assistant (Level 8) in its Training and Development Division ("BPTD"). The Applicant is challenging his overall rating in his Performance Evaluation Report ("PER") for the period 1 January 1992 to 31 March 1993.

## **The Facts**

2. The Bank adopted a new performance evaluation system for supporting staff effective 1 January 1992. That system provided for an evaluation of the performance of a staff member both individually and relative to that of other staff members. The "Guidelines and Procedures" for performance evaluation (issued in terms of Administrative Order 2.03 of 1 November 1993) stated that "the relative performance of staff will be finalized at the departmental level, by performance zones and according to job groupings." There were three "generic" levels of performance: "Satisfactory", "Marginal" and "Unsatisfactory." The "Satisfactory" performance level was divided into four performance zones (or rating zones) as follows: S1, which was to be restricted to the top 10 per cent of the staff in each department/office; S2, for the next 20 per cent of staff; S3, for the next 35 per cent of staff; and S4, for the remaining 35 per cent of staff. The Applicant was in job group 4, which consisted of Assistants at Levels 6-9.

3. The PER form consisted of nine parts, and contained comprehensive instructions for completion. It required the staff member to be assessed by the "first Rater" (generally the person supervising his day-to-day work), then by the "Reviewing Officer" (the member of the Professional Staff having the closest supervision of the first Rater and the staff member), and finally by the Division Manager. The Deputy Director had then to comment on these three assessments, and to make his own assessment. The Head of the Department/Office was required to rate the overall performance of the staff member taking into consideration all relevant factors including Department/Office relativities and the guidelines provided."

4. On 8 June 1993 the Applicant completed Part 1 of the PER form (Staff Member's Review of Work Accomplishment for the period 1 January 1992 to 31 March 1993). Part 2 (Assessment of Performance by Supervisor/first Rater) was completed by the Applicant's immediate superior on 18 June 1993, after full discussion with the Applicant; he assessed the Applicant as "Satisfactory" in respect of the thirteen factors specified therein, and within that level of performance, as "High" (the other possible ratings being "Median" and "Low"). All the comments made by the Supervisor were positive, and in regard to the Applicant's overall performance he said:

"It is clear from the above that Mr. Isip is a solid performer in all respects. His strengths are in his logical and mature judgments, based on strong analysis, good communication skills, leadership and dependability."

5. In Part 3 the Reviewing Officer was required to comment on any significant points not covered in Part 2, and to note any difference in opinion; this Part was not completed. The Applicant states that there was no further discussion or counseling at either division or departmental level after the completion of Part 2.
6. Part 4 (Future Work Plan and Training Requirements), which should have been completed by the Division Manager "after full discussion with the Staff Member, the Reviewing Officer and the first Rater", was also not completed. It consisted of two parts. Part 4.1 required a summary of the nature and scope of work assignment for the Staff Member for the coming year and any major changes planned including additional or different responsibilities [which would] form the base line for evaluation of the coming year's performance." Part 4.2 required a statement of "specific areas of skills or knowledge that the Staff Member will need to obtain, or strengthen, to effectively perform his/her duties including training requirements", based on the assessment of performance in Part 2, and the desired or planned changes for the coming year noted in Part 4.1.
7. In its pleadings, the Bank neither denies nor offers any explanation for these omissions in respect of Parts 3 and 4.
8. On 25 June 1993 the Applicant noted in Part 5 (where he was required to comment on Parts 2, 3, and 4, "including any issues arising from the formal discussion with the first Rater, Reviewing Officer and the Division Manager"), that he was "signing the PER without knowing/discussion [sic] on Part 4 as stated." From the sequence of dates it appears that he completed Part 5 only after the Division Manager had made his comments in Part 6.
9. The Division Manager was required to comment in Part 6 on whether Parts 2 and 3 provide a comprehensive and balanced assessment of the Staff Member's Performance and Future Work Plan and Training Requirements, including any significant points not covered in the Rater's evaluation, the Reviewing Officer's comments, and note any differences in opinion" (emphasis supplied), and to "indicate clearly his/her overall performance assessment of the Staff Member and add any significant comments, especially on the discussion with the Staff Member." On 24 June 1993, the Division Manager commented in Part 6:

"Mr. Isip has applied his extensive knowledge of job classification most effectively and has provided strong support to the Classification Unit. After the reorganization of BPMSD he assumed even greater responsibilities."
- He expressed no disagreement with the assessment of the first Rater, and assessed the performance of the Applicant as "Satisfactory."
10. The Deputy Director was required by the Guidelines to comment, in Part 7, on the assessments of the first Rater, the Reviewing Officer, and the Division Manager, and to indicate clearly the performance level of the staff member. He made no comment, but assessed the Applicant's performance as "Satisfactory."
11. The Guidelines require the Head of the Department/Office, in Part 8, to provide the overall performance rating, taking into consideration all relevant factors including Department/Office

relativities." In its pleadings, the Bank further explains that the overall performance rating is based on "the Head of Department/Office's assessment of the staff member's individual job achievements . . . relative to others in his/her job grouping, as revealed in the rankings and comments of each staff member's previous raters and discussions with Division Managers." According to the Guidelines, the recommended ratings in respect of performance zones are then consolidated at the departmental level, and it is the Head of the Department/Office who must then ensure that the final departmental ratings are within the specified percentages; BPMSD then checks these for Bank-wide consistency and balance, and requests further review where necessary. It is thereafter that BPMSD implements salary increases linked to the staff member's performance rating.

12. However it was the Deputy Director who completed Part 8, and there is no explanation as to why this was not done by the Director, BPMSD. The Deputy Director assessed the Applicant's overall performance level as "Satisfactory", and rated him in performance zone S3. Although in a memorandum dated 31 May 1993 to the Heads of Departments/Offices explaining the application of the Guidelines and Procedures, the Director, BPMSD had stated that the final ratings should be discussed with the staff member, the Deputy Director failed to discuss the Applicant's overall performance rating with him.

13. According to the Bank this final rating was a result of the comparison of the Applicant's performance with that of other supporting staff conducted by a review Panel consisting of the Director, Deputy Director and all the current and previous Divisional Managers of BPMSD to ensure consistency in the performance evaluation of staff members within and between Divisions in BPMSD. This review Panel met on 29 July 1993. During the review the Applicant's Division Manager stated that the Applicant's first Rater was not in a position to assess the work of other supporting staff in the Division, and that, in his view, two other supporting staff (in the same job group) had outperformed the Applicant in regard to their contributions to the Division. (No such reservation had been recorded by him in Part 6 of the Applicant's PER form). The Bank submitted to the Appeals Committee that

"the final overall performance ratings were arrived at after the best performers in each respective Division of BPMSD were identified, mutually agreed upon, and endorsed by the Director and Deputy Director, BPMSD. The overall rating of the [Applicant] was, therefore, objectively and fairly assessed on a relative basis, consistent with the guidelines and procedures for the 1992/93 PER exercise."

14. The Bank further stated that after the meeting of the review Panel, another Panel (consisting of the Officer-in-Charge (BPMSD), Officer-in-Charge (Human Resources Division, or "BPHR"), Head (BPHR-SS) and six other Heads/Representatives of various Departments/Offices) met on 13 August 1993 to allocate the fractional roundings of S1 and S2 ratings for supporting staff; none were awarded to BPMSD staff members in job group 4 at that meeting. Thereafter, BPMSD convened a third meeting (neither the date nor the participation has been disclosed), at which S2 ratings were awarded to two staff members of BPHR (a Division of BPMSD) in job group 4; this was in addition to two S1 and five S2 ratings previously awarded to the staff members of BPMSD. The Bank has offered no explanation as to how these two staff members were assessed in relation to the Applicant.

15. The Guidelines provide that, with the adoption of the appraisal process and performance rating zones outlined above, "Panel reviews will not be necessary for staff rated in performance zones 1, 2 and 3." However, to maintain fairness and ensure consistency, formal Panel reviews will be introduced for supporting staff (a) who are rated in zone 4 having received a marginal or

unsatisfactory rating for any factor in the Performance Checklist in Part 2.1 in the PER form, and (b) who are rated "Marginal", or "Unsatisfactory."

16. On 24 August 1993 the Applicant refused to sign Part 9 of the PER form. In a memorandum addressed to his superior, the first Rater, he complained that the overall rating accorded to him at the departmental level was "grossly inconsistent" with the assessments of his two immediate superiors; and that there had been neither any explanation for this inconsistency, nor any discussion even to point out his shortcomings. He requested that he be informed of his ranking, so that he would at least be guided as to how much more his performance had to improve in order to achieve an outstanding rating. The first Rater forwarded this memorandum to the Officer-in-Charge, BPTD, with the comment that "if a solid performer like Mr. Isip ends up with an S3 rating, I really have strong views against the new PER system."

17. It was only after several reminders by the Applicant that, on 7 January 1994, the new Division Manager replied his memorandum of 24 August 1993. He told the Applicant that although the former Division Manager had supported a high rating for him to the Department after due consideration was given to his performance relative to that of other supporting staff, his final rating was determined to be in the S3 grouping. He further said that supporting staff had not been ranked, citing the Guidelines in justification:

"As an interim measure, the 1992/93 PER process . . . does not require further differentiation of relative performances within the performance zones."

However, in its Answer the Bank says that the S3 rating awarded to the Applicant was "following a ranking of the Applicant against his peers in the same job grouping within his Department."

18. When the Applicant informed the Director, BPMSD, that he wished to submit a formal grievance, the Director replied that the Administrative Review Procedure had not been completed, and that a discussion would be arranged. That discussion took place on 17 February 1994. The Director undertook to see that what was missing in Part 4 of the PER would be attended to, so that the Applicant would have some guidance and direction in his career concerns" from his superiors. The non-completion of Part 3 was not considered. On 22 February 1994 the Director informed the Applicant that -

"while it was acknowledged by your supervisor and previous Manager . . . that your performance during the 1992/93 period of review was on the high side, the panel whose recommendations were made on a consensual basis gave due and fair consideration to your performance. In view of this, I am not inclined to support any further change to your overall rating" (Emphasis supplied).

He also stated that it was intended to arrange a discussion with the Applicant's current Manager and supervisor on his work assignments, training requirements and career development concerns, and to document in a separate memorandum the additional roles and responsibilities of his position.

19. However, even thereafter, Part 4 of the PER was not completed, and the promised discussion did not take place, and the Applicant's roles and responsibilities were not documented.

20. The Applicant re-submitted his case for consideration under the Bank's Grievance Procedure on 8 March 1994, seeking the correction of his overall performance rating, which he

alleged had been downgraded, and asking for consequential salary and other benefits, including promotional opportunities. On 11 April 1994, the Director, BPMSD, rejected his grievance, and informed him that the consensual decision of the BPMSD Panel on the award of S1 and S2 ratings had been based on relative performance evaluation and that his -

"direct supervisor clarified that since you were the only Group 4 staff under his supervision he had no basis for comparing you with other staff members in your job group and rated you against what he perceived to be requirements of the job for the attributes in section 2.1 of the PER."

The Applicant appealed against that decision to the Appeals Committee on 29 April 1994.

21. The Bank challenged the jurisdiction of the Appeals Committee on the ground that, in terms of Section 6.2(b) of Administrative Order No. 2.06 -

"in considering an appeal against a decision made in the exercise of a discretion, the Appeals Committee could only consider whether the decision constitutes an abuse of discretion, being arbitrary, discriminatory, improperly motivated, carried out in violation of a fair and reasonable procedure or otherwise influenced by administrative irregularity or abnormality."

22. In a memorandum dated 21 June 1994 addressed to the Applicant's former Division Manager, the Appeals Committee noted that the Applicant's first Rater had rated him extremely high "placing all his ticks in the first boxes on the left hand side of the page." (All the boxes for "Satisfactory" and "High" appear on the extreme left hand side of the PER form.) They noted also that (at the Panel review on 28 July 1993) two other staff members in job group 4 in the same Division had received a higher rating (S1 and S2) than the Applicant "despite having fewer ticks in those left hand boxes." The Committee asked for clarification whether it had been his wish that the Applicant be given an S3 rating and the other two a higher rating, and whether he had agreed with the decision taken at a subsequent meeting (the third meeting) to award additional S2 ratings to two other BPMSD staff members. The Divisional Manager made no comment about the difference in the numbers of "ticks." He replied that he agreed with the decision to give the Applicant an S3 rating "given overall limitations on numbers of staff rated above S3"; that since two other staff in the Division outperformed him, "in view of Department-wide assessments of relative performance, and considering limits on numbers of S1s and S2s, no allocation for a rating above S3 was available" for the Applicant; and that he did not recall whether he attended the third meeting, but added that he "had agreed earlier with the decision not to allocate an S2 to [the Applicant] for reasons mentioned . . . above."

23. It is clear that the PER forms relating to the two staff members in the Applicant's Division, who were considered to have outperformed him, were available to the Appeals Committee.

24. In regard to the other two BPMSD staff members who were given S2 ratings at the third meeting, no material was available to the Appeals Committee and to the Tribunal as to the placing of the "ticks" on their PER forms; nor as to the basis on which they were assessed as having outperformed the Applicant.

25. In its decision dated 24 June 1994, the Appeals Committee reached the following conclusions:

- a. the placement of all the "ticks" in the boxes on the extreme left hand side in the Applicant's PER did not necessarily have to result in an S1 or S2 rating; the Committee did not consider whether, and on what basis, the Applicant's two colleagues could have been assessed as worthy of an S1 or S2 rating despite having fewer "ticks" in those left hand boxes;
- b. there were delays in holding necessary discussions and counselling sessions, and these were held only because of the Applicant's protest; and even then, they were held too late; and did not result in any corrective action; and
- c. insufficient care had been taken by BPMSD professional staff in filling the Applicant's PER.

26. The Committee expressed serious concern at the conduct of BPMSD in awarding additional S2 ratings to two of its own staff; thereby 9 out of 24 supporting staff in Group 4 in BPMSD received an S1 or S2 rating, representing 37.5 per cent, thus "exceeding the 30 per cent limit, which was supposed to be applied rigidly to all Departments/Offices in the Bank." It is imperative, the Committee said, that BPMSD apply the regulations regarding PER ratings in a transparent and objective manner, and in full accordance with those regulations.

27. Despite these conclusions and observations, the Appeals Committee declined jurisdiction as it considered it to be "the prerogative of the Department to determine which staff shall receive the S1/S2 ratings on the basis of a relative evaluation among the high performers within each group." And it was for that reason that the Committee concluded that the decision not to rank the Applicant S1 or S2 in the 1992/93 PER exercise did not suffer from any of the flaws mentioned in Administrative Order 2.06, Section 6.2(b).

28. On 11 July 1994 the Applicant submitted an appeal to the President of the Bank, which was declined on 5 September 1994. The Applicant then filed this Application with the Tribunal.

29. The Applicant asks for the following relief:

"(i) back pay computed based on PER rating as outstanding performer with interest retroactive to 1 June 1993;

(ii) compensation for the following injuries suffered, amounts to be determined by the Tribunal:

- a. emotional and mental distress suffered because of the gross injustice inflicted;
- b. loss of standing and esteem among colleagues, and humiliation among peers, with resulting mental anguish;
- c. considerable time and efforts spent pursuing just remedies frivolously denied by Bank;
- d. loss of opportunity to meet eligibility criteria for the Level 9/9A PIO promotion exercise during 1993; and

(iii) freedom from any reprisal action against the Applicant for filing this case in the Tribunal."

### **The Applicant's Submissions**

30. The Applicant alleges that:

- a. the relative ranking system was no different from the previous "quota system" of performance evaluation which the Tribunal held to be impermissible in Tay Sin Yan, Decision No. 3 [1994], because there was a similar distribution of performance awards based on predetermined percentages or quotas, particularly in respect of S1 and S2 performance zones; according to Administrative Order 2.03, "Heads of Departments/Offices are expected to strictly adhere to the percentage distribution guidelines for performance ratings in S1 and S2 zones";
- b. there were procedural irregularities in the completion of the PER form, and in the evaluation process leading up to the award of his overall performance rating; and
- c. BPMSD's decision to award him only an S3 rating was neither justifiable nor reasonably possible on the basis of the material in the PER form.

31. The Applicant also contends that the failure to complete Part 4 of his PER caused negative remarks to be made in his PER for the review period 1993/94.

### **The Bank's Submissions**

32. The Bank submits that the relative ranking system of performance evaluation which it used is distinguishable from the quota system which the Tribunal held to be impermissible in the Tay Sin Yan case. Moreover, the Bank asserts that there are factual differences between Tay Sin Yan and this case. There the staff member's PER ratings did not accurately reflect his actual level of performance; his intended PER ratings had been changed in accordance with an impermissible practice of distributing employee awards as widely as possible. Here, however, there has been no change in the "Satisfactory" performance level at which the Applicant was assessed. The overall performance rating S3 is within that "Satisfactory" performance level, and was based on an assessment of his performance relative to others in his group. There was thus no impermissible practice of distributing performance awards by reference to predetermined quotas.

33. The Bank acknowledges that the 1992/93 PER exercise in relation to the Applicant was deficient in that Part 4 was not completed by the Division Manager, and that the Deputy Director provided no "narrative comments or other explanation" for the overall rating of S3. However, the Bank submits that "such omissions do not rise to the level of a denial of due process to the Applicant or a violation of fair and reasonable employment standards," because "the Applicant's job duties were sufficiently defined and known to him so that the omission of such summary cannot be claimed to have left him completely without guidance as to his job responsibilities, [and because] the Applicant had frequent contact with and free access to his supervisors and managers, and no serious question can have arisen as to his future work plan."

34. Similarly, the Bank submits that the Applicant had been fully informed of the nature of the Bank's relative performance evaluation system and the criteria for such evaluation; that he should have understood that his performance would be evaluated and rated relative to the performance of other supporting staff in his job group; that the Applicant was not denied the benefit of counselling to help him to reconcile the "inconsistency" between the ratings and comments of his first Rater and the Division Manager, and his overall rating; and that he had enjoyed "the full attention of the entire senior management of his Department at the discussion on 17 February 1994" although, admittedly, such counselling should have been more prompt.

35. The Bank contends that there had been a meaningful performance evaluation; and while there had been some minor errors and omissions, these caused no prejudice to the Applicant. Thus there had been reasonable and substantial compliance with the performance evaluation procedures.

36. With regard to the Applicant's contention that the S3 rating is not justified the Bank argues that the award of the final performance rating to a staff member is a discretionary decision (Tay Sin Yan), and that

"the Tribunal will review such matters only for the purpose of ensuring that the Administration has behaved in a procedurally correct way and has not reached a substantive conclusion that is not reasonably sustainable. It is not the task of the Tribunal to substitute its own assessment for that of the Bank" (Lindsay, WBAT Reports 1990, Decision No. 92, para. 29).

The Bank says that it "behaved in a procedurally correct way" in awarding the Applicant the overall performance rating of S3, and that that decision is reasonably sustainable because

"at the end-July 1993 meeting convened by the Director, BPMSD, for a Panel review and discussion of the Overall Performance Ratings to be awarded to supporting staff members of BPMSD, the Applicant's former [Division] Manager gave as his judgment that the Applicant's performance within his job group was below that of two others in the same group and above that of four others in the group. . . . Under the relative ranking system of performance evaluation used by the Respondent . . . this placement of the Applicant relative to others in his job grouping, on the basis of carefully considered and objective assessment factors, resulted in the Applicant falling within the S3 rating category when these categories were applied to all staff members ranked in the Applicant's job grouping."

37. The Bank also emphasises that there was no change in the Applicant's performance rating. His supervisor rated him as "Satisfactory", and as "High" in the various components which make up the "Satisfactory" category. These ratings did not automatically entitle the Applicant to an overall performance rating higher than S3. The S3 rating awarded to the Applicant was within the "Satisfactory" performance zone, and was justified in relation to the performance of other staff members in the same job group.

### **The Tay Sin Yan Case**

38. In Tay Sin Yan, the Tribunal held that the applicable regulations and guidelines for performance evaluation required an objective examination of the work involvement, contributions and achievements of each staff member; that if he/she satisfied the criteria laid down for a "Distinguished" performance rating, he/she was entitled to receive it; and that the



relevant Administrative Order did not authorize the withholding of such rating on the basis of a fixed quota, whether applicable to the Bank as a whole or to each of its individual Divisions and Departments.

39. There the Applicant had not challenged the imposition, by BPMSD guidelines, of a 15 per cent quota of "Distinguished" ratings, for the Bank as a whole, and the Tribunal did not rule on the validity of that quota.

40. However, the Bank had gone beyond the express terms of that guideline; that quota had been applied to each Department or Office, and even to each Division within each Department or Office. The Tribunal held that the restriction in this way of the award of "Distinguished" ratings, outside the terms of the relevant guidelines prescribing the quota for the Bank as a whole, necessarily led to arbitrary and discriminatory results tending to defeat the very purpose of objective and fair performance evaluation within each Division of the Bank. Thus it became more difficult for an outstanding performer, in a "strong" Division (i.e. one with several outstanding performers) to obtain a "Distinguished" rating than for an outstanding performer in a "weak" Division to do so. The application of the 15 per cent Bank-wide quota to each Department and Division obviously encouraged and supported the development of the unofficial practice of sharing employee awards by distributing them as widely as possible.

41. In consequence of that practice, the Applicant's Division Manager and Department Head had withheld their intended recommendation for a "Distinguished" rating, and recommended instead a "Fully Satisfactory" rating.

### **Considerations**

42. The present case is, in some respects, clearly distinguishable from Tay Sin Yan. The Applicant was objectively rated as "Satisfactory", in respect of his level of performance, by his first Rater, Division Manager and Deputy Director; there is no suggestion that this was incorrect. That was the rating which they intended to give him, and which he was entitled to receive; it was awarded to him, and it was neither withheld nor subsequently changed.

43. However, the current evaluation process involves a second stage, in which staff members within the "Satisfactory" performance level are ranked; it is in accordance with that relative ranking that a further rating, the overall performance rating, is given.

44. The Tribunal considers that there is force in the Applicant's contention that this relative ranking system, which requires Heads of Departments/Offices to adhere strictly to the stipulated percentages, is contrary to the decision in Tay Sin Yan. While the Tribunal did not rule on the Bank-wide quota of 15 per cent in that case, the Tribunal did hold that the application of that quota to each Department and Division, "necessarily led to arbitrary and discriminatory results, tending to defeat the very purpose of objective and fair performance evaluation within each Division." What the Applicant complains of here is the imposition of a quota, Department-wide (and possibly Division-wide), which could similarly lead to the award of S1 and S2 ratings being unduly affected by the presence of too many outstanding performers in one Department (or Division), and too few in another.

45. Further, in the present case, the Applicant's Division Manager, in a Note for the File dated 11 March 1994, stated that at the Panel review meeting on 29 July 1993 he had argued that the Applicant "should be given a rating of S2 if the Department-wide relativities and permissible numbers would allow this." At that meeting, 2 out of 7 BPTD staff members in job group 4, and 7

out of 24 BPMSD staff members in job group 4, received S1 or S2 ratings: in each case approximately 29 per cent. One more S2 rating would have resulted in the stipulated percentages being exceeded. The Division Manager was apparently not present at the third meeting, at which two other BPMSD staff members in job group 4, from another Division who obviously had been given S3 ratings earlier - were given S2 ratings (thus increasing the BPMSD share to 37.5 per cent). References by the Applicant's Division Manager on 21 June 1994, to "overall limitations on numbers of staff rated above S3", and the lack of an "allocation" for a rating above S3 for the Applicant, tend to support the Applicant's contention that it was the "permissible numbers", or quota, for the Applicant's Division that stood in the way of his receiving an S2 rating.

46. However, the Tribunal will not rule on this issue as it holds that the performance evaluation of the Applicant for 1992/93 was flawed for the reasons set out below.

47. Although the Guidelines made a Panel review unnecessary, a Panel review did take place. In order to justify the S3 rating given to the Applicant, the Bank relies on comments made at that review, which appear adverse to the Applicant: that the first Rater had clarified that he had no basis for comparing the Applicant with other staff in job group 4, and that the Applicant's former Division Manager had said that the first Rater had no opportunity to assess other staff in that group, and that he himself had rated two other staff members in that group ahead of the Applicant. These comments cannot be reconciled with the observations made by the Division Manager and the first Rater in the PER form. If they had made such comments in the PER the Applicant would have had the opportunity to discuss and to rebut them; and so, even assuming that a Panel review was proper, to act on those comments, despite the Applicant having had no opportunity of rebutting them, amounted to a failure to adopt a fair and reasonable procedure, if not also a denial of due process.

48. Moreover, there is no record of the "clarification" attributed to the first Rater, by the Director BPMSD in his letter dated 11 April 1994. But whatever the first Rater might have said, his comments on the Applicant's memorandum of 25 August 1993 show that he was strongly of the view that the Applicant merited at least an S2 rating. It is therefore likely that, if given an opportunity to respond to what the first Rater said, the Applicant would have succeeded in dispelling any implication adverse to him. Thus the failure to adopt a fair and reasonable procedure caused prejudice to him.

49. The determination of the overall performance rating was a matter for the Director, as Head of the Department. However, the Director's letter of 22 February 1994 confirms that the final recommendation were made on a consensual basis by the review Panel.

50. The performance evaluation system was intended to assess not only a staff member's performance level, but to place him in the correct performance zone. Parts 3, 4, 6 and 8 of the PER form set out requirements integral to the evaluation process. Non-compliance with those requirements, in relation to the evaluation of the Applicant's performance, was not minimal or technical, but substantial. Parts 3 and 4 were not completed; the Division Manager failed to record in Part 6 adverse comments which he later made without the Applicant's knowledge giving him no opportunity of rebuttal; there was no discussion as required by Parts 4 and 8, despite the Applicant's note in Part 5; the Applicant was not given the direction and guidance contemplated by Part 4; and it was not the Director, BPMSD, who completed Part 8. Moreover, if, as stated by the Division Manager on 7 January 1994, the supporting staff who were rated as "Satisfactory" were not ranked, it is difficult to see how the Bank assessed the Applicant in relation to the four staff members given S2 ratings at the meeting on 29 July 1993 and the

subsequent meeting. If they were in fact ranked, there are serious doubts as to fairness of the methodology used (including the panel meetings). Two of those staff members had fewer "ticks" on the boxes intended for the highest rating; and the Applicant did not have the benefit of his Division Manager's participation at the third meeting at which two of the staff members were awarded S2 ratings in preference to the Applicant. These were administrative errors and irregularities, which were both significant and prejudicial.

51. The Tribunal holds that the failure to follow a fair and reasonable procedure, and these administrative errors and irregularities, vitiated the process by which the Applicant's performance was assessed in order to rank him in relation to his colleagues.

52. In view of that finding it is unnecessary to deal with the Applicant's submission that the decision to award him only an S3 rating was neither justifiable nor reasonably possible on the basis of the material in his PER.

53. The PER form makes it clear that the contents of Part 4 would constitute the basis for evaluation of the staff member's performance in the subsequent year. The Bank contends, however, that the deficiencies in respect of Part 4 were not material because the Applicant had such frequent contact with his superiors that no serious question could have arisen as to his work plan, and because he had enjoyed the full attention of the entire senior management of his Department at the discussion on 17 February 1994. The Tribunal rejects this contention. The purpose of formally documenting a staff member's "Future Work Plan and Training Requirements" is to give him precise and unambiguous direction and guidance as to his responsibilities, without leaving the matter entirely to informal, oral communications. The discussion of 17 February 1994 was irrelevant because it took place almost at the end of the subsequent review period 1993/94, and, in any event, the undertakings then given were not honored. In these circumstances, the failure to complete Part 4, must inevitably have affected the evaluation of the Applicant's performance for the review period 1993/94. However, since the Applicant did not raise this matter in his internal appeal, in these proceedings the Tribunal can give him no relief by requiring the amendment of his PER for 1993/94.

54. Some consideration of the Applicant's performance evaluation for the previous review period (1991) is relevant to the relief which the Applicant seeks. On 8 April 1992 the Applicant claimed that he had not been given the "Distinguished" rating recommended for him. His Division Manager replied on 27 April 1992 that he did not disagree with the Supervisor's evaluation, but that it had not been possible to recommend a "Distinguished" rating "because of the guidelines which restrict Distinguished ratings to only 15 per cent of staff." Although this was contrary to the decision in *Tay Sin Yan*, the Tribunal cannot give him relief in these proceedings.

55. The Bank's Personnel Handbook for Supporting Staff provides:

"[i]f you are in Level 8, you may be eligible for promotion on PIO [Present Incumbent Only] basis when you have:

. . . .

had a "Distinguished" Performance rating for at least two of the last five years, including the most recent rating; . . . ."

56. The Tribunal holds that the flawed performance evaluation process for 1992/93 prejudicially affected the Applicant's eligibility to be considered for a PIO promotion.

### **Relief**

57. While setting aside the overall performance rating of S3 given to the Applicant, the Tribunal will not direct the Bank to grant a higher performance rating, salary increases or PIO promotion for the reasons set out in Tay Sin Yan, para. 30. The Tribunal will instead direct the Bank to reconsider whether a higher overall performance rating shall be given to the Applicant, and, if so, to pay him any consequential salary increases and to consider the PIO promotion of the Applicant. Whatever action the Bank may now take, the Applicant's substantive right to a fair and objective performance evaluation has been infringed, and for that he is entitled to equitable compensation assessed by the Tribunal.

58. In regard to the Applicant's prayer for freedom from reprisals, the Tribunal will only observe that having established the system of appeal to the Tribunal, there is no reason to believe that there would be any reprisal for filing an application to the Tribunal.

### **Decision:**

For these reasons the Tribunal unanimously decides that:

- a. The decision to grant the Applicant an overall performance rating of S3 is set aside;
- b. The Bank shall pay the Applicant equitable compensation in a sum of 175,000 pesos;
- c. The Bank is directed to consider whether a higher overall performance rating shall be granted to the Applicant, and if granted to pay him any consequential salary increases, and to consider him for PIO promotion without retrospective effect;
- d. If as a result of such consideration, the Bank does not by 31 March 1996, make any change in the Applicant's position, the Bank shall then pay the Applicant the whole of the equitable compensation ordered in paragraph 2 above;
- e. If as a result of such consideration, the Bank retroactively makes a change on the position of the Applicant involving a payment to him. the equitable compensation payable to the Applicant shall be reduced by the amount of such payment; and
- f. The Bank shall pay the Applicant a sum of 25,000 pesos as costs.