

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 26
(6 January 1997)**

**Felipe T. Fajardo
v.
Asian Development Bank**

**Mark Fernando, President
Robert Gorman, Vice-President
Toshio Sawada
Brigitte Stern**

1. The Applicant joined the Bank in 1967 as an Accountant. In 1994 he was 55 years old, and was holding the post of Senior Control Officer (Level 6), Controllers Department, having been promoted to that post in 1993. He complains that he was wrongfully denied the right to early retirement under the Special Separation Program ("SSP"), a voluntary early retirement program, which had been notified to the Bank's staff on 24 October 1994. He alleges, first, that the eligibility criteria for the SSP were flawed, and, second, that in any event his exclusion was the result of a mis-interpretation of one criterion.

2. The context in which the Bank says it introduced the SSP, and the objectives and the provisions of the SSP, have been described in detail in the judgment of the Tribunal in Breckner, ADBAT Decision No. 25 [1997], delivered this day, in an application filed by another professional staff member in respect of an identical grievance.

3. The Director, Budget, Personnel and Management Systems Department, by a memorandum dated 24 October 1994, informed the entire staff that the Board of Directors had approved the SSP, and set out the eligibility criteria, the benefits and the implementation procedures. The eligibility criteria were stated as follows:

The staff member:

- a. must not have been promoted during the last 3 years prior to his/her effective date of termination from the service of the Bank;
- b. must not have received exceptional/outstanding, above average or marginal/unsatisfactory performance evaluations during the three rating periods including and immediately prior to the 1992/1993 PER exercise;
- c. must be at least 50 years of age as of the end of the eligibility period; and
- d. must have not less than 15 years of continuous Bank service as of the end of the eligibility period.

4. The Applicant received a fully satisfactory rating in 1990, an exceptional rating in 1991/92 and an S1 (satisfactory - zone 1) rating in 1992/93 but no promotions during the 3 years prior to the desired date of termination. He applied for retirement under the SSP but was told that he was not eligible because he had received high ratings which disqualified him. He filed a grievance, and thereafter exhausted his internal remedies (as described in Breckner, supra). He applied to the Tribunal on 13 February 1996, in due time.

5. The Applicants contentions and claims are virtually identical to those of Mr. Breckner.
6. For the reasons stated in Breckner, supra, the Tribunal holds that as a result of the defects in formulating criterion (a) and in implementing criterion (b), out of 34 staff members who obtained SSP benefits, 16 who could not reasonably have been considered as suffering career stagnation in terms of the objectives of the SSP were nevertheless allowed its benefits. However, that does not justify an order that the Applicant should also be allowed those benefits, as he too was ineligible.
7. But that does not conclude the matter. The criteria for the SSP were not determined on the basis of some inflexible or immutable principles, but pragmatically to create a sufficient number of vacancies in order to recruit new staff with the desired skill-mix. The Board acted upon the representation by the management that about 70 staff members would be eligible, of whom 60% to 70% were likely to separate. Had the Board then realized that in fact only about 37 would be eligible, if it wished to proceed with the SSP it would have directed that the criteria be relaxed to achieve that target of 70 eligible staff members. In that event, there would have been a likelihood that the Applicant would qualify. Because of the defects in formulating and implementing the criteria, he has been wrongfully deprived of that opportunity, and for that he must be compensated, upon an equitable assessment of his chance of coming within that class - which of course, would depend upon the extent of his career stagnation as revealed by high PERs and promotions.
8. In assessing that amount of compensation at US\$25,000, the Tribunal takes into account, on the one hand, the fact that the Applicant has continued to be in employment, and, on the other hand, the unnecessary delay and inconvenience caused to the Applicant during the internal proceedings.
9. The Tribunal had determined, in terms of Rule 5A of the Rules of Procedure, that this case warranted consideration by a panel consisting of all its members. However, on account of illness one member was unable to attend this plenary session of the Tribunal. In the exercise of its powers under Rule 23, and considering that Rule 5, paragraph 4 provides that three members of the Tribunal shall constitute a quorum for plenary sessions, the Tribunal decided that this case should be determined by the four members present at this plenary session.

Decision:

For the above reasons, the Tribunal unanimously

- a. directs the Bank to pay the Applicant the sum of US\$25,000 as compensation;
- b. directs the Bank to pay the Applicant the sum of US\$3,000 as costs; and
- c. dismisses all his other claims.