

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 36
(7 August 1997)**

**Ronald K. Chan
v.
Asian Development Bank
(No. 2)**

**Mark Fernando, President
Robert Gorman, Vice President
L.M. Singhvi**

1. On 12 December 1978, the Applicant joined the Asian Development Bank (the Bank) on a regular appointment as a project engineer in the Consulting Services Division of the Central Projects Services Office (CPSO).
2. The Applicant claims that in his 16 years of employment with the Bank, he was rated distinguished/outstanding 3 times; above average (or an equivalent) 4 times; above average but adjusted (due to quota) to fully satisfactory once; and the remainder of the time fully satisfactory.
3. On 10 March 1993, the Applicant was transferred under a job rotation program (the Program), to the Private Sector Department and redesignated as a Senior Investment Officer, Level 5. The rationale behind the Program was that since one of the functions of the Post-Evaluation Office (PEO) and CPSO was to serve the projects departments, staff would have the opportunity to gain a better understanding of the work undertaken by another department, thus improving inter-department cooperation and teamwork and eventually improving the quality of service provided by PEO and CPSO to the projects departments. According to a Memorandum dated 4 March 1993, in order to minimize disruption to operations only relatively good performing staff and those with longer service in their existing positions or departments were considered for transfer. The Personnel Handbook for Professional Staff states that the Job Rotation Program is intended to advance the careers of high-performing staff members and that participation in the Scheme will improve promotion prospects.
4. As a result of a major reorganization within the Bank which took place on 1 January 1995, the Applicant was transferred to the Infrastructure, Transport and Communications - West Division (IWTC) in the Infrastructure, Energy and Financial Sectors - West Department (IWD).
5. On 28 February 1995, the Applicant's Performance Evaluation Report for the period April to December 1994 (the 1994 PER) was finalized. The Applicant was given an overall relative rating of C2 - fully satisfactory. However, the Deputy Director of the Private Sector Department noted that the Applicant's performance was on the low side of the C2 rating, and that [h]e is advised to make a determined effort to improve his performance in the future so as to achieve his full potential . The Applicant commented in Part 3 of the 1994 PER that he definitely want[ed] to improve [his] performance in the future and that he agreed with the C2 rating . The Deputy Director responded in Part 4 of the 1994 PER:

Mr. Chans determination to improve his performance and constructive attitude are noted with favor. The important next step would be the agreement between himself and his new Manager on a work program for the year

6. The Applicant applied unsuccessfully for 16 vacant advertised positions within the Bank between February and May 1995 . The Director, IWD, was a member of several of the selection panels responsible for recommending suitable candidates for the vacant positions for which the Applicant had applied unsuccessfully, and he says that, when the candidature of the Applicant was discussed, other members of the selection panels voiced concerns about the Applicant's suitability . It is contended by the Bank that in view of the difficulties of the Applicant in adjusting to the work of IWTC, it was decided at the departmental level and in consultation with Budget, Personnel and Management Systems Department (BPMSD) to hold a meeting to review the Applicant's performance and establish a work program .

7. On 30 June 1995, the Director, IWD, convened a meeting (the Meeting), which was attended by the Applicant, the Deputy Director, IWD, and the Manager, IWTC. It was at that Meeting that the Applicant was informed of the Bank's perception that his work performance was judged marginal (defined in Administrative Order No. 2.03 as those failing to meet the requirements of the job and [requiring] re-training and/or re-assignment) and that because of [his] marginal work performance and general lack of initiative, a 6-month work program was to be imposed to give the Applicant an opportunity to improve his performance; he was also told that if [he] does not improve his performance over the next six months, then BPMSD may have no other option than to review his usefulness as [a] Bank staff member. On 11 July 1995, the Minutes of the Meeting were produced and signed by all those present . At the end of the Minutes, the Applicant wrote an addendum as follows:-

This proceeding is highly irregular. I find the allegations as to my marginal performance incorrect. The records will belie the allegations.

8. On 11 August 1995, the Applicant wrote to the Director, IWD, protesting the irregularity of the Meeting, as a farcical process, a travesty of the Bank's rules of due process and an attempt to by-pass the Bank's procedures for reviewing the performance of an employee whose performance was not satisfactory. He asked for written apologies from the Director, IWD, and other senior Bank officers present at the Meeting, as well as removal of any derogatory remarks (including the Minutes of the Meeting) from his personnel records; and adequate compensation for the mental anguish suffered as a result of the gratuitous remarks and unwarranted action of the Director, IWD, and the other senior Bank officers.

9. On 29 September 1995, the Manager, IWTC, presented the Applicant with a work program for comments, discussion and amendments. The Applicant returned the draft work program to the Manager, IWTC, with some notations and a handwritten note stating: Did not agree to sign this contract as being unusual. At a later date he reiterated his protest against the imposition of the 6-month work plan and characterized it as unauthorized, arbitrary and improperly motivated. He repeated his request for setting the record straight regarding the references to his marginal performance.

10. On 27 October 1995, the Director, IWD, responded to say that the Meeting was held in the spirit of fairness ... and in the interest of effective management-staff communications, to inform the Applicant of the perception of his performance as marginal, and to provide guidance as to how the Applicant might successfully complete his work program.

11. The Applicant's grievance to the Director, BPMSD, was rejected on 6 December 1995. On appeal, the Appeals Committee concluded that the Meeting was not in violation of a fair and a reasonable procedure, although it could have been handled better. However, the Committee declined to rule on whether the Director, BPMSD, was negligent in not setting the record straight

with regard to allegations of the Appellants marginal performance during the meetings of selection panels.

12. The Applicant filed his Application with the Tribunal on 29 July 1996 claiming that the Respondent violated his right to due process and fair treatment:

- a. by convening and conducting an irregular mid-year performance review meeting on 30 June 1995, at which arbitrary allegations were made about the Applicant's performance;
- b. by deciding to impose a 6-month probationary work plan on the Applicant with a threat of dismissal; and
- c. by the negligence of the Respondent in not setting the Applicant's work record straight during numerous selection panel meetings.

Consequently, the Applicant seeks monetary compensation on diverse counts, legal costs, written apologies from the officers of the Bank in respect of adverse remarks made regarding his performance and the expunction of any derogatory remarks, notes or words pertaining to his performance from all his personnel files and records in the Bank (including IWD, Central Operations Services Office and BPMSD) and the Minutes of the Meeting. The Applicant also asks for promotion to Level 6, in consideration of his consistent, successful job performance at Level 5 since April 1988 and his having successfully fulfilled the Program.

13. In its Answer, the Respondent denies that it violated the Applicant's right to due process in holding a mid-year performance review meeting and imposing a 6-month probationary work program. Moreover, the Respondent submits that the Meeting was appropriate and fair in all the circumstances and that the preparation of a work program was not a breach of the Applicant's security of tenure.

14. The Applicant relies on the Bank's Administrative Orders and Personnel Policy Statement which require the Bank to be guided by fair, impartial and transparent personnel policies and practices in the management of all its staff, to observe due process in all areas of personnel administration, and to accord staff members security of service in the Bank consistent with their satisfactory job performance and with the efficient functioning of the Bank.

15. This Tribunal has consistently given effect to these provisions and principles, requiring the adherence by the Bank to fair, impartial and transparent policies and practices in the management of all its staff.

16. The main question in this case revolves around the Meeting. The Tribunal finds that the Minutes were signed by all those present and the text of the Minutes is uncontroverted. It is the version contained in the said Minutes which should be taken to constitute the definitive record of the proceedings of that Meeting.

17. The Minutes clearly demonstrate that the Meeting was held on the basis of the Bank's perception regarding Mr. Chan's work performance, which was judged marginal. The Minutes record that this has transpired from various discussions particularly during numerous panel meetings on positions for which Mr. Chan has applied. The Minutes disclose that the Meeting was convened in order to give Mr. Chan an opportunity to improve his performance within 6 months by satisfactorily fulfilling a work program based on which he will be evaluated at the end of the period. If successful, Mr. Chan will have been given the opportunity to clear any doubt

about his ability to perform. On the other hand, however, there is also a downside to this program. It was stated in the course of the Meeting that all selection panel members are aware of Mr. Chan's marginal work performance and general lack of initiative, and that if Mr. Chan does not improve his performance over the next six months, then BPMSD may have no other option than to review his usefulness as [a] Bank staff member.

18. According to the Respondent, the Meeting was part of a continuous process of performance evaluation and was held in accordance with the Guidelines for the Performance Evaluation of Professional Staff, which specifically direct managers to

Discuss and provide regular feedback, throughout the year, on the staff members performance. Performance evaluation is a continuous process.

Make it a practice to conduct periodic reviews of staff including mid-term capsule reviews

Avoid any surprises for the staff member during the annual PER exercise. There should be no surprises if the supervisor has provided regular feedback to the staff member on his or her performance throughout the year.

19. It is noteworthy that the Applicant had received a C-2 or fully satisfactory rating in his 1994 PER which was finalized on 28 February 1995. Between that date and the date of the Meeting, i.e. 30 June 1995, an administrative need might have arisen to discuss the performance of the Applicant with him, but then it could have been done quite differently.

20. The Tribunal agrees with the Applicant that the Director, IWD, could have notified the Applicant's Manager or the Applicant of any shortcomings as contemplated in paragraph 2.5 of A.O. No. 2.03 which reads as follows:

In the course of the performance review when differences arise between a staff member and a supervisor about the staff members performance during the year, the differences should be discussed freely and frankly, and, if necessary, detailed documentation of the differences should be kept as part of the records of the performance review process.

21. The Applicant does not question the right of supervising officers to conduct periodic work performance reviews. His contention in effect is, and the Minutes of the Meeting support his contention, that the Meeting was not merely to discuss and provide regular feedback on the staff members performance and to improve his performance, but was instead a meeting in terms of paragraph 20 of the Guidelines for the Performance Evaluation of Staff (1995) (the Guidelines) which provides as follows:

if a staff member is given a Marginal or Unsatisfactory rating, his/her Department/Office will be required to propose a special and closely supervised Work Plan for the staff member and the latter's performance would be re-evaluated at the end of six months and the next course of action determined. Such Work Plan will be incorporated in Part 5 of the PER form.

22. The Meeting bore the hallmark of paragraph 20 of the Guidelines because it was said to arise out of the Applicant's performance having been judged marginal. It was under the paragraph 20 procedure that a work plan was proposed for the Applicant and he was told in no uncertain terms that he was being given an opportunity to improve his performance within 6

months by satisfactorily fulfilling the work program based on which he was to be re-evaluated. He was also told that if he did not improve his performance over the next 6 months, BPMSD had no other option but to review his usefulness as a Bank staff member. The Tribunal finds that the Meeting was convened without satisfying the condition precedent in paragraph 20 of the Guidelines relating to the staff member having received a marginal or unsatisfactory rating and was fatally flawed because it proceeded on a fundamental error of fact. In fact the Applicant had never received a single marginal rating in his entire career. On the contrary, he was a participant in the Program which, according to the Personnel Handbook for Professional Staff, was meant for high-performing professional staff and as already mentioned, his ratings had always fallen within the outstanding, an equivalent to above average and fully satisfactory categories.

23. It may be that the Applicant did not succeed in the many job applications he had made but that was not a proper basis for subjecting him to the paragraph 20 procedure. The perception and impression of numerous selection panels cannot supplant or substitute for the Applicant's PER. It would be invidious to allow perceptions and impressions of individual members constituting selection panels in the Bank, convened for altogether different purposes, to override the established system of performance evaluation for professional staff.

24. It is noteworthy that in that system of evaluation, marginal is a distinctive, separate and specific rating. A Department/Office can propose a closely supervised work plan for the staff member only if a staff member is given a marginal or unsatisfactory rating. The Applicant did not have a marginal or unsatisfactory rating and his work performance could not have been said to have been judged marginal. The Meeting proceeded on a false assumption and in so doing the Meeting was violative of due process and norms of fairness.

25. Assuming, for the sake of argument, that the Meeting was held as part of an ongoing process of performance review which was within the Bank's discretion, and that the decision to impose the work program was based on the need for improvement in the Applicant's work performance in order to realize his full potential, the Meeting was still in manifest error. Under the Guidelines, performance review meetings can be held from time to time in preparation for the annual PER and to avoid surprises. The performance review in the Meeting was, however, held under threat of dismissal.

26. In the light of the foregoing discussion, the Tribunal holds that the Meeting was irregular and that the 6-month provisional work plan imposed on the Applicant was inoperative and of no effect. The Tribunal directs the expunction of any remarks in the Bank's records to the effect that the Applicant's work performance was rated or judged marginal. The Tribunal does not, however, consider it appropriate to direct the Bank or its officers to offer apologies to the Applicant for the error or invalidity of the Meeting and rejects the request of the Applicant in that respect.

27. The Tribunal also denies the request of the Applicant for promotion to Level 6 as it would constitute an affirmative exercise by the Tribunal of a managerial power which belongs to the Bank and not to the Tribunal. As pointed out in Lindsay WBAT Reports 1990, Decision No. 92, para.29, The Tribunal will review such matters only for the purpose of ensuring that the Administration has behaved in a procedurally correct way and that it 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.

28. The Applicant's right to due process has been infringed, and for that he is entitled to equitable compensation as assessed by the Tribunal.

Decision:

For these reasons the Tribunal unanimously decides that:

- a. the Meeting of 30 June 1995 was irregular and consequently the 6-month probationary work plan was inoperative;
- b. the Bank shall expunge all remarks in its records to the effect that the Applicant's work performance was judged marginal during the relevant period;
- c. the Bank shall pay the Applicant equitable compensation in a sum of US\$7000.00;
- d. the Bank shall pay the Applicant a sum of US\$1000.00 as costs.
- e. all other claims of the Applicant are dismissed.