

## **ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL**

**Decision No. 41  
(5 August 1998)**

**Roman A. Alcartado  
v.  
Asian Development Bank**

**Robert Gorman, Vice President  
Thio Su Mien  
Shinya Murase**

1. The Applicant joined the Bank in December 1970 as a temporary messenger, Level 1 and was promoted to Level 2 in 1980 and to Level 3 in 1984. As a result of a reclassification exercise in 1987 in the Office of Administrative Services (OAS) in which he was employed, the Applicant was upgraded to the position of Clerk, Level 4. In May 1984 and in February 1988, the Applicant unsuccessfully applied for positions graded at Level 8. He was transferred to his present position as a clerk within another office in April 1994, at Level 4.

2. On 24 March 1993, the position of Technical Assistant (Communications), Level 8, (hereinafter Technical Assistant) in the Communications Section of the Facilities Management Division (OAFM) was advertised within the Bank by the Human Resources Division (BPHR), which is within the Budget, Personnel and Management Systems Department (BPMSD). The Applicant applied for this position. Of the ten applicants, five were in Level 7, three were in Level 6, one was underfilling Level 6, and the Applicant was in Level 4. Three of the Level 7 candidates - and not the Applicant - were shortlisted for interviews by a selection panel, which concluded that none was suitable for the position. After consultation between OAS and BPMSD, the position was advertised externally in July 1993.

3. On 12 August 1993, some four months after submitting his application for the Technical Assistant position, the Applicant - who apparently had heard nothing yet about the progress of his application - sent a memorandum to BPHR, requesting an update on the status of [his] application. The Applicant received no written response to his memorandum. In the record before the Tribunal, however, the Respondent has submitted a copy of the Applicant's memorandum, on which written notations made by BPHR representatives in August 1993 affirm that the Applicant was informed orally that he was regarded as unsuitable for the position. The staff member allegedly so informing the Applicant has submitted a further statement to that effect, but the Applicant denies that any such conversation took place.

4. On 11 October 1993, the selection panel convened and after interviewing five external applicants for the Technical Assistant position, it selected an individual with a degree in electronics and communications engineering and more than ten years of experience in telecommunications and computer engineering. He was formally appointed to the position on 21 February 1994. The Respondent claims that two days later, all of the applicants for the position, including the Applicant, were informed by individual letters that they had not been selected. In view of what the Bank regards as the administrative burden of retaining and filing all copies of such letters sent to all disappointed applicants for all Bank positions, no written copy of the memorandum allegedly sent to the Applicant was retained in his personnel file; but the Respondent has submitted a formal record showing that regrets were indeed sent on 23 February 1994. The Applicant appears to claim that he never received such notification.

5. The Respondent contends that within days of the appointment, the new Technical Assistant - who had responsibility, inter alia, for supervising the Applicant - introduced himself to each of the clerks under his supervision. Some three months later, on 3 June 1994, BPMSD issued to all staff members a 14-page personnel announcement confirming new appointments to the professional and supporting staff; listed was information about the recent appointment to the Technical Assistant position. Once again, the Applicant appears to claim that he was unaware of this formal announcement.

6. More than three years after the appointment of the new Technical Assistant, and some thirty-three months after the issuance of the BPMSD personnel announcement, the Applicant - on 26 February 1997 - wrote to the Senior Training Officer, Training and Development Division, seeking to know Who was being considered for the Technical Assistant, level 8 position, Communications Section, advertized [sic] in March 1993, and asking whether the person under consideration was an Asian Development Bank staff member and why the selection panel had decided to consider that person. The Applicant's letter was referred to the Officer-in-Charge, BPHR, who responded to him on 3 March 1997 that: None of the internal candidates interviewed was found suitable by the Selection Panel. The position was subsequently advertised externally and was filled by an external candidate in February 1994.

7. On 5 June 1997, the Applicant filed a grievance with his Manager in OAFM, regarding the Bank's decision not to promote him to the position of Technical Assistant, claiming that there was a violation of specified Administrative Orders. After being told, twice subsequently, that his grievance was being misdirected to his departmental supervisors, rather than to BPMSD which had actually taken the challenged decision, the Applicant on 24 June 1997 submitted his grievance to the Director, BPMSD. In response, the Officer-in-Charge, BPHR, informed the Applicant that his failure to first submit the grievance to me is in itself a basis for its rejection (pursuant to Administrative Order (A.O.) No. 2.06, Section 4.3(a)); but that in any event the grievance had not been submitted within the prescribed time limits set out in A.O. No. 2.06, Section 4.1. That provision states: A grievance must be formally submitted within six (6) months from the date the staff member is notified of the decision giving rise to the grievance. The Officer-in-Charge, BPHR, asserted to the Applicant: The most recent decision giving rise to your grievance was made on 16 February 1988 [sic, 1994?], on which date you were notified that your application for a technical assistant (communications) Level 8 position was unsuccessful. You will appreciate that there must be some point at which administrative decisions taken by the Bank have finality.

8. The Applicant submitted an appeal to the Appeals Committee on 14 July 1997 and, after discussions between the Applicant and a representative of BPHR at the urging of the Appeals Committee, the Appeals Committee rendered its report on 7 October 1997. The Appeals Committee concluded, among other things, that the personnel announcement distributed by BPMSD to all staff members announcing the appointment did not constitute adequate notification of the Bank's adverse decision regarding the Applicant's position application, so that his appeal was not time-barred; but that, in any event, there was no evidence to suggest that the Bank failed to follow correct procedures in filling the disputed position or that there was any abuse of discretion or violation of fair and reasonable procedure.

9. The Applicant filed this Application with the Tribunal on 13 January 1998. He claims that the Respondent's decision in 1993 to exclude him from the shortlist of applicants, leading to his non-selection for the position of Technical Assistant, and the hiring of an external candidate, were arbitrary, an abuse of discretion, improperly motivated, and in violation of fair and

reasonable procedures. He also contends that the Respondent violated certain specific Administrative Orders in carrying out the promotion exercise. As a preliminary measure, the Applicant requested that the Tribunal direct the production of certain documents and employment records. He sought various remedies, including promotion to a Level 8 position, a monetary award for salary and benefits he would have received had he been promoted in 1993, and exemplary damages and legal fees.

10. On 22 April 1998, the Respondent filed its Objection to Jurisdiction, based on two grounds: the Applicant's failure to initiate his grievance by filing with the person stipulated in the pertinent Administrative Order, and his failure to exhaust administrative remedies within the Bank through timely initiation of his grievance. The Tribunal directed that the issue of jurisdiction be addressed separately and preliminarily by the parties, and the usual pleadings on this issue were filed. The Tribunal has decided to deny the Applicant's request for documents.

11. The principal question to be addressed at this preliminary stage is whether the Applicant has complied with the jurisdictional requirements of the Statute of the Tribunal. Article II, Section 3(a) of the Statute provides: No such application shall be admissible, except upon exceptional circumstances as decided by the Tribunal, unless . . . the applicant has exhausted all other remedies available within the Bank . . . . The Applicant contends that he has complied with this requirement by filing a timely grievance after being informed on 3 March 1997 by the Officer-in-Charge, BPHR, that all internal candidates for the Technical Assistant position advertised in March 1993 were found unsuitable and that the position was filled by an external candidate; and thereafter by promptly pursuing his grievance through the Appeals Committee, which determined that his appeal was timely.

12. It is the Tribunal's conclusion, however, that the Applicant failed to comply with the exhaustion requirement set forth in Article II, Section 3(a) of the Statute. An essential element of the exhaustion of available remedies is that they be invoked in a timely manner. As the Tribunal has stated in Behuria, Decision No. 8, [1995] I ADBAT Reports 96, para. 23:

It is an established principle that in order to fulfill the requirement of exhausting all other remedies available within an organization (imposed by provisions such as Article II, paragraph 3(a)), it is not sufficient merely to submit a grievance or an appeal to the internal appeal bodies. Such grievance or appeal must be submitted also in conformity with prescribed time-limits.

This principle has been consistently applied by other international administrative tribunals. E.g., *In re Brocard*, ILOAT Judgment No. 676, para. 1 (1985); *Abadian*, WBAT Reports 1995, Decision No. 141, para. 26. Prompt exhaustion of remedies provides an early opportunity to the institution to rectify possible errors - when memories are fresh, documents are likely to be in hand, and disputed decisions are more amenable to adjustment. This purpose would be significantly undermined if the Tribunal were to condone long and inexcusable delays in the invocation of these remedies, as is the case here.

13. Section 4.1 of A.O. No. 2.06 expressly provides for the prompt initiation of internal proceedings for the review of grievances: A grievance must be formally submitted within six (6) months from the date the staff member is notified of the decision giving rise to the grievance. The Applicant asserts that it was not until 3 March 1997 that he was notified of the decision made in May 1993 not to select him for the Technical Assistant position, and of the decision implemented in February 1994 to appoint an external candidate. The Tribunal finds this altogether unconvincing, and concludes that the record clearly confirms that the Applicant was

promptly notified of these decisions shortly after they were taken, and much longer than six months before he filed his grievance on 5 June 1997.

14. The memorandum of 12 August 1993, in which the Applicant stated that he had received no information regarding his application for the Technical Assistant position, was clearly annotated thereafter with a written direction to a Human Resources officer to [p]lease advise Mr. Alcartado verbally of status, as well as with a written comment in the hand of that Human Resources officer dated 16 August 1993 that he had orally informed the Applicant that his application could not be considered because of his present level (4 levels below the vacancy) and PER [performance evaluation report] records. The Applicant challenges the authenticity of these notations, but there is no good reason to doubt their authenticity. They appear clearly to have been made in the ordinary course of the Respondent's business and to have been written contemporaneously by the two responsible individuals, and their substance has been confirmed in this proceeding by the Human Resources officer. Whether or not the Applicant has in good conscience forgotten having been so informed, the Tribunal concludes that there is convincing evidence that he was, on 16 August 1993. Thus, the six-month period for filing a grievance began to run on that date.

15. Beyond that, the Respondent has introduced a formal printed document (captioned Internal Advertisement 1-31 March 1993) that records each step of the process in filling the Technical Assistant position - including the applications of ten internal candidates, their shortlisting (excluding the Applicant) and interviews, and the identity of the candidate ultimately selected. This document, clearly prepared contemporaneously in the ordinary course of the Respondent's business, affirms that regrets were sent to the unsuccessful candidates on 23 February 1994, when the position was formally filled. Again, although the Applicant may in good conscience have forgotten receiving such a letter of regrets, there is no reason to doubt that it was sent pursuant to the terms of the Respondent's records.

16. Indeed, the Applicant's objection to treating this letter as notifi[cation] of the decision giving rise to the grievance, under A.O. No. 2.06, Section 4.1, appears not so much to be that he never received it but rather that it was not a standard memorandum to which he claims he was entitled. But this pertinent Administrative Order does not require the transmission of any such standard memorandum. The six-month period begins to run when an aggrieved staff member is notified of an adverse decision, and it is reasonable to interpret that to include express oral notification, as on 16 August 1993, as well as a letter such as that of 23 February 1994 expressing the Bank's regrets that the Applicant was not selected for the position for which he had applied.

17. This interpretation applies as well to yet a third form of notification given the Applicant of the Bank's decision not to select him for the position of Technical Assistant. It appears to be unchallenged by the Applicant that he, a Level 4 Clerk, in fact worked under the supervision of the newly appointed Technical Assistant, Level 8, beginning in February 1994. It is certainly highly likely that, as the Respondent contends, the individual just then appointed to that position promptly introduced himself to the clerks working under his supervision and informed them that he was their new supervisor. Again, even the Applicant appears not to dispute that such information was imparted to him; he emphasizes rather that it was not done in some form of standard memorandum.

18. It is therefore unnecessary to determine whether the Tribunal agrees with the Appeals Committee that the 3 June 1994 personnel announcement from BPMSD, notifying all staff

members of the new appointment, did not constitute clear enough notice of the Applicant's non-selection so as to start the running of the six-month period stipulated in A.O. No. 2.06, Section 4.1. (The Tribunal does, however, firmly reject the contention of the Applicant that the decision of the Appeals Committee is in any way binding upon the Tribunal. The Appeals Committee is not meant to be a formal adjudicatory body but rather a recommendatory body (A.O. No. 2.06, Grievance and Appeals Procedures, paras. 9.2 and 15), albeit a most important one, that assists the Bank in the adjustment of grievances (Lewin, WBAT Reports 1996, Decision No. 152, paras. 43-45) (interpreting World Bank regulations regarding the Appeals Committee that are similar to those of the Asian Development Bank).) Surely, under the circumstances already recounted, the Applicant knew - or clearly should have known - of the Bank's decision, even prior to June 1994, so that the six-month period for filing his grievance had already begun to run.

19. In any event, even assuming that none of the four events discussed above is treated as the date the staff member [was] notified of the decision giving rise to the grievance, no reasonable staff member in the Applicant's situation could have been under the impression - in February 1997 when the Applicant inquired about the person being considered for the disputed position - that the Bank had not already decided to reject his position application filed in March 1993. Had there been no earlier oral or written notification of that rejection, surely the passing of nearly four years - without any word from the Respondent, as the Applicant appears to contend - would have alerted any reasonable staff member that the Bank had reached an adverse decision quite a long time before. The filing of a grievance under such circumstances cannot be viewed as a timely initiation of internal remedies. As this very case demonstrates, protracted and inexcusable delay in challenging an adverse decision that should have been long obvious to an aggrieved staff member will result, among other things, in distorted or lost recollections, unavailable documents or witnesses, and unfair disturbance of well-established employment rights of others.

20. Nor can the Applicant cure his delinquency by sending an inquiry to the Respondent, as he did on 26 February 1997, in order to provoke a response, such as the one from the Officer-in-Charge, BPHR dated 3 March 1997, which simply reiterates and confirms a decision made many months before. As the Tribunal has previously stated in a similar context:

Where a complaint is not admissible, because it is time-barred or because internal remedies have not been exhausted, a complainant cannot seek a reconsideration of that complaint and attempt to found the jurisdiction of the Tribunal upon the refusal of such reconsideration. (Behuria, Decision No. 8 [1995], I ADBAT Reports 96, para. 24)

Other international administrative tribunals have also clearly concluded that actions or statements by the institution that merely confirm an earlier final decision are not to be treated as starting anew the pertinent time periods for filing grievances or requesting administrative review (Agerschou, WBAT Reports 1992, Decision No. 114, para. 42).

21. The Tribunal concludes that the Application is inadmissible for failure properly to exhaust remedies within the Bank, as required by Article II, Section 3(a) of the Statute of the Tribunal. It is therefore unnecessary for the Tribunal to consider other issues raised by the parties, and in particular the question whether the Application is inadmissible by virtue of the Applicant's having initially, and more than once, filed his grievance with an inappropriate officer under the Bank's Administrative Orders.

**Decision:**

For the above reasons, the Tribunal unanimously decides that the Application is inadmissible.