

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 42
(5 August 1998)**

**Ronald Chan
v.
Asian Development Bank
(No. 4)**

**Mark Fernando, President
Martti Koskenniemi
Thio Su Mien**

1. This is a request by the Applicant for clarification as to the implementation of the Tribunal's decision in Ronald Chan (No. 3), ADBAT Decision No. 38 [1998] (the Decision). The Applicant had in that case challenged the C3 rating given to him pursuant to the 1995 Performance Evaluation Report (PER).

2. The Tribunal considered that challenge under two heads:

- a. whether there was a breach of due process in the 1995 PER exercise which led to that C3 rating; and
- b. whether that rating involved an abuse of discretion, or was arbitrary, discriminatory or improperly motivated.

3. The Tribunal held that the first ground had been established, but not the second, and set aside the 1995 PER. The Tribunal considered whether to order a re-evaluation of the Applicant's performance, but for the reasons stated in the Decision (para. 21), held that a meaningful re-evaluation was not feasible, and directed that:

"the absence of a PER for 1995 shall not prejudice him in any respect whatsoever"
[emphasis supplied].

This request relates principally to that direction.

4. The Applicant had been given a salary increase on 1 May 1996, based on the C3 rating. After the Decision, the Applicant pointed out to the Bank that since the C3 rating had been set aside by the Tribunal, he should be given a salary increase based on a C2 rating:

considering that throughout [his] career in the Bank his performance has been rated outstanding, above average and fully satisfactory (C2), with no rating below C2...

5. The Bank refused, on the ground that the Tribunal's direction meant that:

the lack of [a] PER should not be held against [the Applicant] in matters such as future applications for promotion. It was not intended to entitle [him] to a greater pay increase for [his] work performance in 1995.

6. The Applicant now asks the Tribunal to interpret the Decision so as to clarify its impact on that salary increase.

7. The Applicant also complains of the measly compensation of US\$7,000 awarded in Ronald Chan (No. 2), Decision No. 36 [1997] III ADBAT Reports 111, and of US\$1000 awarded in the Decision, for the malicious and reprehensible acts of senior Bank officials which have caused him serious moral injury. He asks the Tribunal to revise the Decision "taking into account, among others, the serious offense committed by the Bank, the prejudice, actual material loss and moral injury suffered", and to award him three years' salary.

8. The Bank cites Isip, Decision No. 9 [1996] II ADBAT Reports 16, in which the applicants overall performance rating was set aside, and the Tribunal directed the Bank to reconsider whether a higher overall performance rating shall be granted. It argues that in the absence of a direction to re-evaluate the Applicant, "it must be assumed that the Tribunal considered the consequences of its rescission of the 1995 PER", that "in the absence of such a re-evaluation", the Tribunal "did not have the ability to order any change in his overall pay increase"; and that it is not within "the scope of the Tribunal's remedial jurisdiction under Article X of its Statute" to order the Bank to grant "a pay increase consistent with an overall performance rating that the Applicant did not receive". The Bank concludes that the Tribunal's direction that "the absence of a PER shall not prejudice him in any respect whatsoever" only means that "in future actions of the Bank, such as consideration of the Applicant for promotion, his lack of a PER for 1995 shall not be held against him" [emphases supplied].

9. The decision in Isip is of little relevance here because there (unlike in the Decision) the Tribunal did not consider that a meaningful re-evaluation was not feasible. In the present case, instead of re-evaluation, the Tribunal directed that the absence of a PER shall not prejudice the Applicant in any respect whatsoever; and not just in respect of future actions of the Bank. Article X of its Statute empowered the Tribunal to set aside the impugned PER, without ordering a re-evaluation, and to define the consequences of that order. The Tribunal directed that the Applicant was not to be prejudiced in any respect whatsoever, and not merely in respect of promotion or future actions.

10. There is no dispute that the Applicant was entitled to a pay increase based on his performance during 1995, under Administrative Order 2.03 (Section 2.4 (c)) and Administrative Order 3.01 (Sections 5.1 to 5.5). As Section 5.5 states, "[t]he higher the performance category, the higher the salary increase".

11. The salary increase which the Bank originally gave the Applicant, and which the Bank endeavours to maintain even now, was based on a C3 rating. The Tribunal has quashed that rating. As the Applicant argues:

BPMSD cannot use the C3 rating.... because [it] has been set aside. It does not exist any more. If the Bank maintains the increase based on C3 rating, then the Bank has effectively reinstated the C3 rating and supplanted the decision of the Tribunal to set aside the same.

12. The resulting position is that the Tribunal's decision requires that the Applicant must not be prejudiced, in respect of his salary increase, by the absence of a PER for 1995, and that that increase cannot be determined by reference to the C3 rating which the Tribunal quashed. His performance in 1994 was rated as C2, and in the absence of a valid PER for 1995, due to no fault whatever of his, it must be assumed in the absence of a proper appraisal to the contrary

that his performance continued at the same level. Following therefrom, the Bank is directed to adjust the Applicant's 1996 salary increase as if he had a C2 rating for 1995.

13. The Applicant has also requested the Tribunal to revise its decision as to the compensation awarded in the Decision in order to address the inherent inequities suffered by him by virtue of the abusive conduct of the assessors. This application must be rejected as Article IX, paragraph 1 of the Statute provides that the judgments of the Tribunal shall be final and binding. Article XI, paragraph 1 permits a request for revision in certain cases such as upon discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal. In this case, there are no circumstances warranting the Applicant's request for revision and hence the application for revision is dismissed.

Decision:

For the above reasons, the Tribunal:

- a. directs the Bank to adjust the Applicant's 1996 salary increase as if he had a C2 rating for 1995;
- b. directs the Bank to pay the Applicant a sum of US\$500 as costs;
- c. dismisses the Applicant's other claims.