

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 44
(7 January 1999)**

**John P. Rive
v.
Asian Development Bank**

**Robert Gorman, Vice-President
Martti Koskenniemi
Shinya Murase**

1. The Applicant began his service with the Bank on 16 November 1978 as a Level 3 Country Officer in the Country Department. After some ten years at that level, the Applicant still a Country Officer, but having moved to Programs Department West (PWD) was promoted to Level 4, as a result of the Bank's decision to elevate the minimum grade for the Country Officer position from 3 to 4. The Applicant continued to serve in that position at that level until 1993, during which time his suggestions, reflected in his Performance Evaluation Reports (PERs), that he be promoted were sometimes endorsed by his supervisors but in fact no such promotion eventuated. In 1993, the Applicant was transferred to the Bangladesh Resident Office (BRO) for a three-year assignment through mid-June 1996, as a Level 4 Project Officer/Economist.

2. Beginning with his PER covering the year 1985 and continuing during his service with BRO more than ten years later, the Applicant was given positive performance ratings. As to the specific qualities noted in his performance checklist, his ratings were almost always at the first or second level (amongst sometimes three and sometimes five possible rating levels); and his overall comparative performance rating each year was typically fully satisfactory, which usually left him one notch (sometimes two) below the top performance category.

3. At the end of his term in BRO, the Applicant returned to Headquarters, where efforts proved unsuccessful to place him in departments other than PWD, which at the time had no vacancies. He ultimately returned to PWD, which as the originating Department was required to accept him into a position there. That transfer was supported in a 3 June 1996 inter-office Transfer and Redesignation memorandum from the Director, Budget, Personnel and Management Systems Department (BPMSD) to the President of the Bank. Amidst generally positive comments about the Applicant, including that his involvement in project supervision and implementation [at BRO] has given him the experience that will be useful in his return to Headquarters, the Director, BPMSD added:

[I]t may be noted that while Mr. Rives performance has been rated satisfactorily, he is not considered a strong staff member. We have brought this to Mr. Rives attention and his performance in PW1 will be closely monitored.

This inter-office memorandum of 3 June 1996 was placed in the Applicant's personal career file; however, no copy was sent to him.

4. Shortly before and shortly after the Applicant's transfer from BRO to Headquarters in June 1996, the Deputy Director (Personnel), BPMSD was in communication with him regarding transfer alternatives and prospects for future promotion. Most pertinently, on 9 July 1996, after a meeting with the Applicant, the Deputy Director (Personnel) in an e-mail message hereinafter referred to as the cc:Mail to the Officer-in-Charge, Human Resources Division (OIC-BPHR),

noted that the Applicant had stated to her that he was happy with his assignment to Division West 1 (PW1), but that she had told the Applicant that BPMSD would consider a lateral transfer if an appropriate opening were to become available. She continued:

I also indicated that if he had not been promoted, after all these years, it was probably because there was a general view that he was at his level and he should not have great hopes for future promotion. He acknowledged the point.

A copy of the 9 July 1996 cc:Mail was sent to the Applicant's personal career file; once again, however, no copy was sent to the Applicant.

5. In his initial PER in PW1, for 1996, the Applicant's overall performance was rated fully satisfactory, but his overall pay increase (OPI) which reflects the comparative standing of staff members within the work unit was 4.7 percent when the average for his Division was 7.8 percent. In late 1996 and early 1997, the Applicant applied for a number of promotions. These included two to the Level 5 position of Senior Programs Officer in Division West 2 and Division West 3, which were considered by a selection panel on 2 May 1997. In all instances, another staff member was selected for the post.

6. In connection with a conversation with his Manager relating to his August 1997 PER, the Applicant, on 4 September 1997 more than one year after the Directors, BPMSD, Transfer and Redesignation memorandum and the Deputy Directors (Personnel), BPMSD, cc:Mail were written reviewed his personal file. Staff members are permitted to do so by virtue of Section 4 of Administrative Order (A.O.) No. 2.08. For the first time, he saw those two documents. Believing them to be willfully misleading statements, the Applicant on 12 September 1997 submitted a grievance to the Manager, BPHR. In a response dated 29 September 1997, the Director, BPMSD, among other things, stated that since 1985 you have consistently received very good reports; assured the Applicant that the sentences to which he had objected in the 3 June 1996 memorandum (quoted above) had been deleted; noted his intention to inform the President of the Bank of this change and the reason therefor; and advised the Applicant that the 9 July cc:Mail had been removed from his personal file. The Director, BPMSD also responded to other grievances asserted by the Applicant relating to alleged discrimination throughout the Applicant's career and particularly in connection with the denial of promotion to Level 5 positions.

7. Because these assurances by the Director, BPMSD failed fully to satisfy the Applicant's requests for redress, he took an appeal to the Appeals Committee. After rejecting the Respondent's challenge to its jurisdiction, the Appeals Committee decided that the Bank had acted improperly in placing the two challenged documents in the Applicant's personal file without providing him with a copy, and in including the two challenged sentences in the 3 June 1996 memorandum. The Appeals Committee concluded that the already implemented removal of the offending material was inadequate redress and that the Applicant should be awarded US\$5,000 and BPMSD should be instructed to follow the pertinent requirements of the administrative orders. The Respondent proffered US\$5,000 to the Applicant as a final and all-inclusive settlement of all your claims. The Applicant declined to accept, and filed a timely Application with the Tribunal.

8. The Applicant's contentions before the Tribunal are diffuse and wide-ranging. He focuses upon the 3 June 1996 memorandum and 9 July 1996 cc:Mail, but views them as confirming what in his view has been a pattern of intentional deprivation of his contractual rights as a staff member. He refers, for example, to actions against my interests that have been perpetrated

over several years resulting in failure to obtain a normal career path and progression of promotions. He claims that the Respondent's actions were carried out discriminatorily and under improper outside influence, and he adverts to the acceptance of interference and accommodation of ill motivated requests to falsify an important personnel document that was submitted to the highest officers of the Bank for purposes in breach of my contract of employment.... He challenges inconsistencies in the particular and overall ratings in his PERs, reaching as far back as 1988, and also his June 1996 re-assignment to PWD upon his return to Headquarters from his assignment in BRO. He summarizes by stating that:

[W]ith my record of performance, I had every reason to expect transparency, due process, and the benefits of normal career progress, including promotions to senior level during my career in the Bank. All of this has caused me tension, demoralization, loss of face among colleagues, and financial loss.

Among the Applicant's requests for redress are: a correction of the 3 June 1996 memorandum so as to state, among other things, that he has consistently performed strongly; and immediate promotion to Level 5 Programs Officer, PWD, accompanied by higher annual performance ratings and salary increases between 1992 and 1996; compensation in the amount of three times his basic annual salary; and written confirmation from the Respondent that stipulated A.O. requirements will be implemented.

9. It is necessary for the Tribunal to identify with greater precision the nature of the legal claims that are properly before it. Article II, Section 3(a) of the Statute of the Tribunal 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 Tribunal has frequently held that, in order to exhaust remedies, applicants must timely comply with A.O. No. 2.06, which requires that a grievance be submitted within six months of the date of notification of the challenged decision.

10. To the extent the Applicant is claiming that the performance ratings in his PERs over many years, and the accompanying salary increases, fail adequately to reflect the high quality of his performance, such discrepancies could well have been known by the Applicant, and challenged by him, promptly after the issuance of the respective PERs. This was never done, let alone done within the six-month period stipulated in A.O. No. 2.06 for the filing of grievances. The same is true for the several promotions that were sought by, and denied to, the Applicant, both before and after his assignment to BRO from 1993 to 1996. The fundamental requirement of timeliness, set forth in the Statute and the Administrative Orders, would be too readily circumvented if a staff member were permitted to use current adverse statements by supervisors here, the 3 June 1996 memorandum and the 9 July cc:Mail as allegedly evidencing illicit motivation to be imputed to decisions made by the Respondent many years before. See Alcartado, ADBAT Decision No. 41 [1998], para. 20.

11. To the extent that the Applicant is claiming that the Appeals Committee misunderstood certain of his contentions and misapplied the facts in the record before it, this claim too is not properly before the Tribunal. The Tribunal has often stated that proceedings before the Appeals Committee are intended to lead to recommendations that are an advisory component of the Bank's internal grievance procedure, and that the conclusions of the Appeals Committee are not of an adjudicatory nature so as to be subject to review by the Tribunal. Under Article I of the

Statute, the Tribunal has jurisdiction to decide whether personnel decisions by the Bank violate a staff members contract of employment or terms of appointment; the Tribunal is not given appellate jurisdiction over the Appeals Committee. See Alcartado, supra, para. 18.

12. The Tribunal concludes that the only decisions of the Respondent that may be properly challenged in this proceeding relate to the 3 June 1996 memorandum and the 9 July 1996 cc:Mail, and more particularly their accuracy and their inclusion in the Applicant's personal file without providing him with copies thereof. It is noteworthy that these were the only issues that the Applicant had brought before the Appeals Committee, and thus the only ones as to which the Applicant's internal remedies have been exhausted. In support of his claims, the Applicant has relied principally upon Section 2.1 of A.O. No. 2.02, which in pertinent part provides that the Bank shall be guided by fair, impartial and transparent personnel policies and practices in the management of all its staff; and upon Section 5 of A.O. No. 2.08, which deals with disclosure to staff members of materials placed in their personal file and which will be set forth and discussed in detail below.

13. As to the accuracy of the negative statements made about the Applicant, the guiding principles may indeed be found in Section 2.1 of A.O. No. 2.02, requiring that management practices be fair, impartial and transparent. Moreover, the Tribunal has consistently declared that it may review actions by the Respondent that are alleged to be discriminatory, arbitrary, or altogether without basis in fact or otherwise in violation of due process. The Respondent asserts that the comments made about the Applicant and communicated respectively to the President of the Bank and to the OIC-BPHR were made ... objectively, accurately and in good faith, and were in any event within the scope of the Respondent's discretion. Perhaps the key language challenged by the Applicant is contained in the 3 June 1996 memorandum:

In this regard it may be noted that while Mr. Rives performance has been rated satisfactorily, he is not considered a strong staff member.

14. The Respondent claims, indeed, that [W]hen his performance was compared to that of his colleagues, the Applicant could not be considered a strong staff member. The word strong is a relative term. The complimentary narrative terms and performance ratings in the Applicant's PERs for more than ten years since 1985 were meant only to determine whether or not the Applicant had met the standard required by the Bank for fully satisfactory performance with regard to the work assigned to him, but not to compare his performance with that of other Bank staff members receiving fully satisfactory (or above) overall performance ratings. The Respondent points to the consistency with which the Applicant, for comparative purposes, was given overall performance ratings and salary increases that were not at the highest levels and that, although using terms such as fully satisfactory, those ratings actually placed the Applicant at or below the mid-range of quality when tested against his peers, a significant number of whom received ratings such as exceptional and above average. The Respondent also points to the Applicant's overall pay increases relating to years 1992-97, all of which were below the average increase awarded to staff members in his Division.

15. There is some force in the Respondent's contention. On the other hand, the phrase strong staff member is by no means, as the Respondent asserts, reasonably understood to reflect clearly a comparative or relative assessment of the Applicant's performance, as distinguished from an assessment in absolute terms of how satisfactorily he discharged the responsibilities of his post through the years. Had the Director, BPMSD meant to characterize the Applicant's performance in comparative terms, that could have been done more explicitly. Indeed, he effectively so acknowledged when, in writing to the President of the Bank on 15 October 1997,

shortly after the disputed passage was discovered and challenged by the Applicant, the Director himself stated that BPMSD agreed that the sentences would be deleted from his file, in view of the positive performance evaluation reports he has received since 1985. Nor is there evidence that buttresses the further assertion in the 3 June 1996 memorandum that We have brought this [not being considered a strong staff member] to Mr. Rives attention, or evidence of any practice or firm intention to justify the assertion that his performance in PW1 will be closely monitored. Under the circumstances, to set forth such negative statements in a communication to the President of the Bank is inconsistent not only with Section 2.1 of A.O. No. 2.02, but also with the Respondent's fundamental responsibilities to its staff members.

16. With respect to the 9 July cc:Mail, it should be recalled that the Deputy Director (Personnel), BPMSD asserted that the Applicant had acknowledged that his failure to be promoted after all these years supported a general view that he was at his level and ... should not have great hopes for future promotion. Unlike the Respondent's statements just discussed, this so-called general view is much more a statement of opinion than of fact, and can be said to have been reasonably based and therefore not arbitrary or unfounded. But the Applicant has denied that he acknowledged anything more than that promotions might well in the future be limited because of the possibly limited opening of vacancies.

17. In any event, as unwarranted as was most of the challenged language in these two passages, it does not appear that the Applicant suffered any resulting tangible injury. The recipients of the memorandum and the cc:Mail, respectively, may have temporarily been induced to think less of the Applicant's abilities, but there is no evidence that this was manifested in any personnel decision. Nor is there evidence that other staff members or supervisors had access to the Applicant's personal record during the time those documents were filed there. The Respondent has asserted, without contradiction, that the personal career file of a staff member is viewed by others only when BPHR has a specific reason to do so, such as to determine whether a promotion or transfer application has previously been made or discipline previously imposed; such files are typically opened only when adding additional documents relating to the staff members employment.

18. Most pertinently, despite the Applicant's assumption to the contrary, the record clearly indicates that the selection panel that in May 1997 passed upon his applications for promotion to a Level 5 position did not have before them his personal files, then still containing the negative commentary. Rather, the members of the selection panel were supplied only with a staff profile of the applicants for promotion, reflecting their education, work experience prior to the Bank, positions held at the Bank, Bank training, and the single figure showing overall relative performance ratings for each of the previous five years. The promotions in May 1997 were awarded to two staff members each of whom had had the topmost rating (C1) in one or more immediately preceding years; the Applicant had not received such rating at any time during the five year period under consideration by the selection panel. (In fact, his last distinguished rating dated back to 1987.)

19. Apart from the propriety of the substantive comments made in the two disputed documents, the Applicant claims that the Respondent clearly violated Section 5 of A.O. No. 2.08, when it included those documents in his personal file without so informing him or providing him with copies. The pertinent terms of that provision are as follows:

The contents of all documents and notes which form part of the personal file of a staff member, written by their [sic] Managers and other officers in various functions should be divulged to and made known to the staff member concerned at an early stage. It is,

therefore, essential that such documents or notes be copied to the concerned staff member upon the completion of said documents in order to avoid misinterpretation and to enable the staff member to comment or take such action as is allowed to rectify any inaccuracy contained in said documents.

The Respondent has explicitly acknowledged, in its pleadings, that it violated this Administrative Order. It denies, however, that this was done deceitfully, with an intent to hide the documents from the Applicant, and because of the intervention of persons external to the Bank. The Tribunal agrees that the Applicant's latter contentions are merely speculative and without factual basis in the record.

20. Even so, the Respondent's acknowledged violation is a serious one, particularly because it appears to have been done quite consciously and intentionally. During the proceedings before the Appeals Committee, the Committee directed a number of questions to BPMSD; as pertinent, BPMSD answered in part as follows:

Both the memorandum and the e-mail were included in the Appellants 201 file, [to] which he has access. It is not our practice to copy memoranda from Director, BPMSD to Management requesting approval of the transfer, redesignation, or promotion of staff in consideration of confidentiality, i.e. if we sent to staff such memoranda, it is possible that the contents may become common knowledge within the office. Therefore, we do not provide such memoranda directly to staff members.

Despite its concerns about loss of confidentiality, it is not for BPMSD unilaterally to ignore indeed systematically to overrule the mandates of an Administrative Order, the terms and rationale of which are stated unequivocally.

21. This case could hardly be bettered as an example of the circumstances for which the Administrative Order was intended. Had the Applicant promptly received a copy of the 3 June 1996 memorandum and the 9 July 1996 cc:Mail, he could just as promptly have challenged the evaluative comments, such as that he was not a strong performer, as well as the factual assertions, such as that he had been so informed and that he had acknowledged that his past performance was unlikely to warrant a future promotion. Because of the Respondent's failure to comply with the explicit requirements of A.O. No. 2.08, its withdrawal of the challenged material was delayed by more than a year, during which period there was some risk of unintended exposure of the material and, in any event, of the fading of recollections so as possibly, under other circumstances, to have made prompt correction difficult.

22. The Tribunal therefore concludes that the Bank acted improperly in failing contemporaneously to provide the Applicant with material placed in his personal file in June and July 1996, and that much of that material was at least misleading and at worst inaccurate. As noted above, however, there is no evidence of tangible injury suffered by the Applicant during the pertinent period, between June 1996 and September 1997. Moreover, the Respondent acted promptly to remove the challenged material when the Applicant brought the matter to its attention.

23. There is thus no basis for providing to the Applicant the full remedies that he seeks, in particular the amendment of the 3 June 1996 memorandum so as to state, inter alia, that he is considered to be a strong staff member; indeed, it is doubtful that the Tribunal has the authority to issue such an order. Nor is there a basis for his retroactive promotion to Level 5, or the award of damages in the amount of three times his basic salary. Nonetheless, the nonobservance by

the Respondent of the Applicant's contract of employment or terms of appointment is clear and was in significant measure a product of a consciously and systematically implemented policy. Surely it is reasonable to conclude that the Applicant suffered at least intangible injury when he discovered the negative comments in his personal career file upon a chance perusal in September 1997. For that he should be compensated.

Decision:

For these reasons, the Tribunal unanimously decides that:

- a. the Bank shall pay the Applicant equitable compensation in a sum of US\$15,000;
- b. the Bank shall pay the Applicant US\$1,500 in costs; and
- c. all other claims of the Applicant are dismissed.