

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 52
(10 August 2001)**

**Mariam S. Pal
v.
Asian Development Bank**

**Mark Fernando, President
Thio Su Mien
Shinya Murase**

1. The Applicant joined the Bank on 1 April 1996 as an Economist (Social Sector) in the Programs Department (West) ("PWD"), Division 1, with a three-year fixed-term appointment. In November 1998 her appointment was extended for another two years from 1 April 1999, instead of being converted to a regular position.

2. The Applicant challenged that decision on the ground that it was in violation of the terms and conditions of her appointment, alleging that:

- a. established Bank procedures were not followed, and instead a performance evaluation which had no basis in relation to these procedures was used, and that this was in breach of the requirement of due process under Administrative Order ("A.O.") 2.02, para. 2.14;
- b. the decision not to regularize her fixed-term appointment was not made in a transparent and fair manner as required under A.O. 2.02, para. 2.1 and A.O. 2.03, paras. 2.3 and 2.4; and
- c. the Bank violated the Applicant's terms of employment and its own rules and regulations, including the Personnel Policy Statement and Performance Evaluation Guidelines.

3. The Applicant sought the following reliefs:

- a. an order converting her fixed-term appointment into a regular appointment effective 1 April 1999;
- b. a retroactive salary increase of 20% effective 1 April 1999;
- c. reimbursement of costs for the purchase of a computer and printer which were acquired for the preparation of her case; and
- d. an order directing the Bank to amend A.O. 2.01 and A.O. 2.07 in order to establish a formal procedure regarding extension, regularization and termination of initial fixed-term appointments.

4. In January 1998, the Applicant received her performance evaluation report ("PER") for the calendar year 1997 which noted that she needed improvement in the area of planning and organizing work, as well as in the quality, accuracy and timeliness of work. The Applicant gave her comments explaining why she disagreed with this evaluation. The Applicant was given an overall performance assessment of "performance generally meets the requirements of the position but improvements are warranted in some areas", the second of three possible ratings.

5. On 19 May 1998, the Head of the Operations Support Unit of the Human Resources Division ("BPHR-OS") in the Budget, Personnel and Management Systems Department ("BPMSD"), met with the Applicant to discuss her work program for 1998 and in particular, the areas in which her performance required improvement. He advised the Applicant that he was meeting all staff whose 1997 PER rating was "performance generally meets the requirements of the position but improvements are warranted in some areas." He further informed the Applicant that she did not meet the basic criteria for a regular appointment with the Bank, namely a "fully satisfactory" performance rating, and that as such, she should seek the advice of her Manager and Director as to how she should improve her performance. She produced her record, dated 29 May 1998, of that meeting.

6. On 20 May 1998, the Manager, Human Resources Division ("BPHR") wrote a memorandum to the Director, PWD, copied to the Applicant, asking him to assist the Applicant to overcome her shortcomings by giving her guidance and feedback in those areas where her performance required improvement, including training where necessary. He also asked to be informed by mid-July 1998 whether the Applicant's performance had improved to a "fully satisfactory" level during the first six months of 1998.

7. On 4 June 1998, the Applicant met with her supervisor, the Programs Manager, Programs Department (West), Division 1 ("PW1"), to discuss progress on her 1998 work program. This led to a Note to File which indicated that the Applicant's work in 1998 was proceeding smoothly except for delays due to circumstances beyond her control. In respect of ten major tasks, no delays due to factors within the control of the Applicant were noted and no mention was made of any problems with the accuracy of her work, or with the quality of her analysis. The Programs Manager, PW1 prepared the Note to File and invited the Applicant to give her comments prior to making it final. The amendments proposed by the Applicant were incorporated into the Note to File.

8. On 14 July 1998, the Applicant sent a memorandum to the Programs Manager, PW1, copied to the Director, PWD, the Manager, BPHR and Head, BPHR-OS giving her own assessment of her performance since her last PER as she was aware of the need for the mid-July report as to whether her performance had improved to a "fully satisfactory" level. She pointed out that there had been considerable improvement in the quality, accuracy and timeliness of her work since her last PER, and that the 4 June 1998 Note to File showed that there was no significant problem with her work during the first half of 1998 nor any new areas of concern. The Applicant personally delivered that memorandum to Head, BPHR-OS who told her that a decision had been made to terminate her employment effective 31 March 1999. The Applicant did not discuss the matter further with him, but informed him that she was going on approved home leave from 15 July to 11 August. There was no response to her memorandum.

9. On 24 July 1998, Head, BPHR-OS wrote to the Director, PWD requesting an interim evaluation report on the Applicant's performance during the first six months of 1998, and suggesting that, if her performance had not reached a "fully satisfactory" level, PWD should

develop a work program for the remaining six months of 1998. No such work program was developed.

10. This was followed by a second memorandum on 30 July 1998, in which the Head, BPHR-OS asked the Director, PWD for his recommendation - after considering her overall performance, utility, and trainability, and PWD work plans - in respect of the extension or conversion of the Applicant's appointment.

11. On 3 August 1998, the Programs Manager, PW1 sent a performance evaluation for the period 1 January 1998 to 30 June 1998 to Manager, BPHR, with a copy to the Applicant which she received only upon her return to the office (after approved home leave) on 12 August 1998. That evaluation had been prepared and finalized without any notice to or discussion with the Applicant.

12. At 2:00 p.m. on 13 August 1998, the Programs Manager, PW1 verbally informed the Applicant that based on the 3 August 1998 PER, he would be recommending that her appointment be extended for a period of two years. On the same day, he wrote to the Officer-in-Charge ("OIC"), PWD, recommending the extension of the Applicant's contract in view of her performance as evaluated on 3 August 1998. No other reason was given. The Applicant received a copy of that memorandum later that day.

13. At about 8:00 a.m. on 14 August 1998, the Applicant personally handed her comments on the 3 August 1998 PER to the Manager, BPHR. In her comments, she made the point that the said PER had been made without giving her a chance to give her comments as required by A.O. 2.03, paras. 2.3 and 2.4. She also pointed out errors, omissions and inconsistencies therein. She referred to the recommendation of the Programs Manager, PW1 to extend her contract, of which he had verbally informed her on 13 August 1998, and stated that as she was leaving on mission that morning, she would submit her comments on that recommendation within five days after her return from mission on 31 August 1998. The receipt of the Applicant's memorandum of 14 August 1998 was acknowledged by the Bank the next day, but her allegations were never rebutted.

14. The OIC, PWD requested the Programs Manager, PW1 to prepare a recommendation to BPMSD, and accordingly on 14 August 1998 the latter made a recommendation to Head, BPHR-OS (routed through OIC, PWD). This was similar to his previous recommendation except that he added: "During this extension period, her performance will need to be monitored, specifically in the areas of timeliness of assignments, quality of analysis, and accuracy."

15. The Tribunal notes that although that recommendation was in response to the memorandum dated 30 July 1998 from Head, BPHR-OS to Director, PWD it made no reference to overall performance, utility, trainability, and PWD's work plans, all of which were crucial to the decision whether to terminate, extend or regularize the Applicant's appointment.

16. On 25 August 1998, the Director, BPMSD, based on the opinion of PWD formed without any input from the Applicant, prepared a memorandum for submission to the President of the Bank, recommending a two-year extension of the Applicant's fixed-term appointment, thus virtually pre-judging the issue. This memorandum was only sent to the President on 4 September 1998. According to the Bank, the memorandum was held back as the Bank was awaiting the Applicant's comments which were to be submitted within five days after her return to the office. When the Applicant did not submit her comments by 4 September 1998, the memorandum was released to the President through the relevant Vice-Presidents before it reached the President

on 8 September 1998. The President endorsed BPMSD's recommendation on 8 September 1998. On 23 October 1998 the Applicant wrote to the Head, BPHR-OS that she had not yet received a letter from BPMSD as to her employment status, which should have been received by 30 September 1998, namely, six months prior to the expiry date of her fixed-term appointment, as provided in A.O. 2.01, para. 13.2.

17. The recommendation made by the Director, BPMSD on 25 August 1998 was not disclosed by the Bank to the Applicant or to the Tribunal at any stage before the pleadings were closed. It was produced only thereafter, upon the order of the Tribunal.

18. On 6 November 1998, Director, BPMSD wrote to the Applicant informing her of the extension of her appointment and highlighting three areas in which she needed to improve: (a) planning and organizing work, (b) quality and timeliness of work, and (c) accuracy. The Applicant in her reply of 1 December 1998, queried that assessment, as the 3 August 1998 PER only mentioned the need to improve on "quality of analysis" thus implying that there had been no problem with regard to timeliness of work. That evaluation did not indicate that accuracy as well as planning and organizing work remained problematic during the first six months of 1998. In a separate memorandum dated 6 November 1998, the Head, BPHR-OS requested the Director, PWD to monitor the Applicant's performance in the area of timeliness, quality of analysis and accuracy, but made no reference to "planning and organizing work" as stated in the letter from the Director, BPMSD to the Applicant.

19. After the pleadings were closed, the Tribunal called for, inter alia, the recommendation made on 25 August 1998 by the Director, BPMSD to the President. That recommendation stated:

PWD indicated that [the Applicant's] performance needs improvement in the areas of teamwork and co-operation, and that she should improve her initiative, creativity and the quality and timeliness of her work. . . [the Applicant] has been given a special work plan and her performance against it is being closely monitored. (emphases supplied)

20. The Tribunal notes that the Applicant had not been found wanting in respect of teamwork, co-operation, initiative, and creativity. Indeed, her 1997 PER discloses that she met the requirements in these respects.

21. On 9 February 1999, the Applicant sought administrative review of the decision to extend her contract of employment instead of converting it to a regular appointment. This was unsuccessful. The Applicant then appealed to the Appeals Committee which recommended the dismissal of all her claims as being without merit.

22. On 16 June 2000, the Applicant filed her Application to the Tribunal for the reliefs set out in para. 2 above.

23. On 24 August 2000, the Bank approved the conversion of the Applicant's appointment which was due to expire in 31 March 2001 from fixed-term to regular, effective 1 April 2001. The Bank contended that this rendered the Applicant's claim for retrospective conversion of her appointment moot. The Tribunal rejects that contention as conversion with effect from 1 April 2001 did not dispose of the Applicant's claim to regularization as from 1 April 1999.

24. The Tribunal notes that the main issue raised in this Application is whether the decision to extend the Applicant's appointment instead of regularizing it was made in breach of her terms of

employment. The Tribunal has thus to evaluate the following:

- a. was the 3 August 1998 performance evaluation flawed in that it was carried out in violation of A.O. 2.03, paras. 2.3 and 2.4;
- b. was the Bank's decision to extend the Applicant's appointment made in breach of A.O. 2.01, para. 13.2; and
- c. was the delay in notifying the Applicant of the Bank's decision to extend her contract instead of regularizing her employment a breach of A.O. 2.01, para. 13.2.

25. A.O. 2.03, paras. 2.3 and 2.4, requires the Bank when conducting a staff performance review to give a staff member an opportunity to formally discuss the review with her supervisor. Such performance reviews pertain, inter alia, to decisions on extension or regularization of fixed-term appointments.

26. The Tribunal notes that the 3 August 1998 PER for the first six months of 1998 did not receive any input from the Applicant as it was made during her absence on leave. The Tribunal finds that her comments on the 3 August 1998 PER were made on 14 August 1998 after the evaluation had been finalized and submitted by PWD to BPMSD and not before, as prescribed by A.O. 2.03, paras. 2.3 and 2.4. The Bank was thus in breach of the procedural rules prescribed for such assessments.

27. On the question whether the Bank's decision to extend the Applicant's contract for two years was flawed, the Tribunal has to determine whether the decision-making process complied with A.O. 2.01, para. 13.2.

28. The A.O. provides that the recommendations made by Heads of Departments/Offices to the Director, BPMSD in respect of extension of fixed term appointment "shall be discussed with the staff member who shall be given five working days to submit comments. Furthermore, the Director, BPMSD in consultation with the concerned Vice-President, will make a recommendation to the President, to which the staff member's comments are to be attached." The Tribunal notes that A.O. 2.01, para. 13.2, envisages discussion between the Head of Department/Office and the staff member before the recommendation is sent to the Director, BPMSD. The Tribunal holds that the Applicant was not given an opportunity to discuss the recommendation prior to it being submitted to the Director, BPMSD. That recommendation was contained in a memorandum dated 14 August 1998 from the Programs Manager, PW1 to Head, BPHR-OS, through OIC, PWD which was only written after the Applicant had left Manila on mission for the Bank. The Applicant was not given any opportunity to give her comments after her return as the recommendation had already been finalized.

29. The Bank tried to rely on the discussion between the Applicant and the Programs Manager, PW1 on 13 August 1998, as satisfying the requirement of giving the Applicant an opportunity to give her comments. This argument fails because the discussion between the Applicant and the Programs Manager pertained to the 3 August 1998 PER and not the 14 August 1998 recommendation to renew her contract. On 13 August 1998, the letter of extension of contract had yet to be written, as the Programs Manager, PW1 informed the Applicant that he was going to write this recommendation, which he did only the next day. Thus, the memorandum recommending the extension of the Applicant's contract was not in existence on 13 August 1998 and hence there could not have been any discussion about it on that day between the Applicant and the Bank. There was thus a breach of A.O. 2.01. Furthermore, under A.O. 2.0, para. 13.2,

the discussion required was one with the Director, PWD and not one with her supervisor, the Programs Manager, PW1.

30. Under A.O. 2.01, para. 13.2, in making his recommendation to the President, the Director, BPMSD is required to attach the staff member's comments to his recommendation. The Bank contended that this could not be complied with because the Applicant had not submitted her comments after her return from mission and as such there were no comments from her to be attached to his recommendation. The Tribunal finds that although it was true that the Applicant had not submitted her written comments on the recommendations after her return, the material time to do so was prior to the submission of the recommendation to the Director, BPMSD and not after the decision-making process had been completed.

31. The Tribunal is of the view that the correct procedure was for the Bank to have waited for the Applicant to return, to have called a meeting to discuss the recommendation, to have given her the opportunity to comment on the recommendation, and only thereafter to have submitted the recommendation to the Director, BPMSD. The Bank's contention that the Applicant had failed to exercise her right to give her comments is not valid as the obligation to call for a discussion rested on the Bank and not on the staff member.

32. The function of the Tribunal is one of review and it does not intervene in the area of management discretion which is the prerogative of management. However, it will intervene if there is arbitrariness or an abuse of discretion. In the instant case, the Tribunal notes serious discrepancies in the Bank's documents purporting to evaluate the Applicant's shortcomings, and flaws in the decision-making process which resulted in the decision not to regularize the Applicant's appointment:

- a. In his recommendation to the Head, BPHR, through OIC, PWD dated 14 August 1998, the Programs Manager, PW1 mentioned "timeliness of assignments, quality of analysis, and accuracy" as areas of improvement required of the Applicant. He failed to consider the "overall performance, utility and trainability" of the Applicant and PWD's current and projected work plans, as requested by Head, BPHR-OS in his letter dated 30 July 1998.
- b. In the recommendation of the Director, BPMSD to the President, dated 25 August 1998, it was stated with reference to the Applicant that "PWD indicated that her performance needs improvement in the areas of teamwork and cooperation, and that she should improve her initiative, creativity and the quality and timeliness of her work." It was also stated that the Applicant had been given "a special work plan and her performance against it is being closely monitored." (emphases supplied)

The Tribunal did not find any evidence of any work plan having been given to the Applicant or of any monitoring of performance. Furthermore, there is no evidence as to how the Director, BPMSD concluded that the Applicant needed improvements in the areas of teamwork and cooperation, and initiative and creativity. Neither the Programs Manager, PW1 nor the Director, PWD made such allegations. Furthermore, the Applicant's 1997 PER showed that in these respects the Applicant had met the requirements.

- c. The letter dated 6 November 1998, from the Director, BPMSD informing the Applicant of the extension of her contract mentioned that the Applicant needed improvements in the areas of (i) planning and organizing work, (ii) quality and timeliness of work, and (iii) accuracy. The Tribunal notes that these areas are quite different from those mentioned

in his letter of 25 August 1998 to the President. Moreover, the grounds given to the President in support of the recommendation to extend the Applicant's contract, and not to regularize her employment, were not disclosed to the Applicant, to her detriment. Neither was the President aware that the Applicant was kept in ignorance as to the grounds on which his decision was made.

33. Based on the evidence adduced before the Tribunal, the decision-making process, starting from the 3 August 1998 PER to the decision to extend the Applicant's contract and not convert it to regular employment, is flawed and in breach of the various Administrative Orders and consequently in breach of her contract of employment.

34. Furthermore, the Tribunal notes that there was a fundamental flaw in the Bank's position. Under para. 13.2 of A.O. 2.01, regularization and extension both depended on "fully satisfactory" performance. Since her Manager, the Head of her Department, the Director, BPMSD and the President all agreed that she should be extended, they must necessarily have considered that her performance was "fully satisfactory." Thus, if the Applicant had been wanting in all those characteristics listed in the memorandum of the Director, BPMSD dated 25 August 1998, her contract could not possibly have been extended. Moreover, the Applicant's 1998 PER fully supports her position that her performance in 1998 was "fully satisfactory."

35. The Bank has correctly submitted that whether a contract is regularized or not is a discretionary decision which is for the Bank to make, and that the Tribunal cannot substitute its discretion for that of the management of the Bank. The Tribunal acknowledges that it is not equipped to exercise that discretion. However, the evidence in this case plainly demonstrates that the President of the Bank did not have a proper opportunity to exercise his discretion, by reason of misrepresentations and suppression of facts. A grave and flagrant violation of the Applicant's rights has taken place, for which compensation is a poor remedy. It is essential that the Bank should make an endeavor, however difficult or inconvenient it may be, to do now what it should have done then.

36. The Tribunal therefore directs the Bank to order the Director, BPMSD to submit before 30 November 2001 a recommendation to the President of the Bank, in terms of Section 13.2 of A.O. 2.01, as to whether the Applicant's fixed-term appointment should have been regularized with effect from 1 April 1999. That report shall address the issues referred to in the memorandum dated 30 July 1998 from the Head, BPHR-OS to Director, PWD as well as the issues of timeliness, quality of analysis, and accuracy, raised in the memorandum dated 14 August 1998 from the Programs Manager, PW1 to Head, BPHR-OS. It shall take into account the Applicant's PER covering the period 1 April 1996 to 31 December 1997, to the extent required or permitted by Section 13.2 (but not the performance evaluation of 3 August 1998) as well as all memoranda and Notes (including those dated 29 May 1998, 4 June 1998, and 14 July 1998) containing records of discussion between the Applicant and Bank officials in regard to her performance during the first six months of 1998. It may also take note of the absence of work objectives, work plans, and special work plans, for the year 1998.

37. These regrettable lapses may tend to undermine the Bank's objective of promoting sound, just and transparent personnel relations, and the Bank will no doubt inquire into how and why they occurred, so that their recurrence may be prevented.

38. In conclusion, taking into account the several breaches on the part of the Bank, the Tribunal awards the Applicant compensation in the sum of US\$30,000. While not allowing the capital costs of the computer and printer, the Tribunal awards US\$2,000 as costs.

39. In respect of the Applicant's claim for amendment of A.O. 2.01 and A.O. 2.07, the Tribunal notes that the shortcomings disclosed in this case relate to the implementation of those Administrative Orders and not to any deficiency in the Administrative Orders themselves.

Decision

For these reasons, the Tribunal

- a. quashes the decision of the Bank communicated to the Applicant on 6 November 1998, in so far as it failed to convert her fixed-term appointment to a regular appointment with effect from 1 April 1999;
- b. directs the Bank to pay the Applicant equitable compensation in a sum of US\$30,000 not later than November 2001;
- c. directs the Bank to reconsider, as set out in para. 36 above, whether the Applicant's fixed-term appointment should be converted to a regular appointment with effect from 1 April 1999;
- d. directs the Bank to pay the Applicant costs in a sum of US\$2,000;
- e. dismisses the Applicant's other claims.