

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 71
(19 August 2005)**

**Joseph A. Weinstock
v.
Asian Development Bank**

**Flerida Ruth P. Romero, President
Yuji Iwasawa
Arnold M. Zack**

Basic Facts and Contentions

1. The Applicant impugns a decision of the President of the Respondent organization which he alleged denied him an employment opportunity “in an open position, on the basis of statements by them made with willful or reckless disregard for the truth, and [which] resulted in injury to [the Applicant’s] career, and denial of a promotion to which he was entitled under the circumstances of his application.”
2. The Applicant, a Level 5 Senior Environment Specialist in the Department of Regional and Sustainable Development (RSDD) of the Respondent Bank, applied with six others (three Level 5 staff members and three Level 4 staff members) for the vacancy advertised internally and externally on 7 October 2003 for the post of Principal Environment Specialist, Level 6. The vacancy posting contained a description of the responsibilities of the position, reporting requirements and selection criteria.
3. On 29 October, a Selection Panel met to evaluate first the three Level 5 candidates, after which it decided to recommend Mr. P on the basis of the following considerations: (1) his advanced degree in Natural Resources Management; (2) his ADB mission leadership experience and significant experience in processing loan and TA projects; (3) his strong expertise in the fields of environmental economics, policy, planning and management; and (4) his good leadership and interpersonal skills while employed at ADB.
4. On 27 November, the Applicant was informed of his non-selection. Upon his request, on 3 December, the Director, Human Resource Division (BPHR), sent him the part of the Selection Panel minutes pertaining to his application which states at the outset: “He is a sociologist with no formal environmental training.”
5. Inasmuch as the successful candidate was to have assumed the position on 12 November, the Applicant asked that the filling of the position be suspended pending a request he planned to make for an administrative review of the selection decision. However, he was advised that this was not possible in view of paragraph 4 of Administrative Order No. 2.06 which specifically provides that “a request for compulsory conciliation or administrative review shall not suspend the implementation of the decision subject to administrative review.”
6. On 1 February 2004, the Applicant wrote to the Tribunal through the President informing the latter that he wished to apply directly to the Tribunal pursuant to Article II, para. 3(a) of the Statute as an exception to the general rule that staff members must first exhaust internal administrative procedures. He alleged that his case involved slander and defamation of

character by the Director General, Budget, Personnel and Management System Department (BPMSD), and the Director, BPHR; hence, submission to them for Administrative Review would create serious conflict of interest.

7. In a memorandum dated 12 February, the President rejected the request since he “cannot find justification for bypassing the procedures established under Administrative Order No. 2.06 for internal administrative review.” In particular, he would welcome the report and recommendation of the Appeals Committee on the matter. Despite this disapproval, the Applicant submitted his Application to the Tribunal on 26 February, adding a request for a formal reprimand of the ADB President “for improper behavior in this matter.”

8. In its Order of 5 April, the Tribunal ordered the Respondent to comment within 15 days, but the latter submitted its comments only on 12 May, whereupon the Tribunal issued another Order on 18 May returning its comments to the Respondent for failure to file them on time and without any explanation on the cause of its substantial delay. The Tribunal further recognized that, as regards the requirement of exhaustion of internal grievance mechanism, indeed “exceptional circumstances” existed under the Statute arising from the alleged conflict of interest on the part of the Director, BPMSD, and the Manager, BPHR, in hearing the Applicant’s grievance since they are the very persons who are the subject of the complaint. However, this did not apply with respect to the Appeals Committee against whom no conflict of interest had been alleged. The Tribunal, therefore, dismissed the Application for failure to exhaust the internal remedy before the Appeals Committee “without prejudice to the re-filing of the case after the exhaustion of internal remedies before the Appeals Committee.”

9. Through a memorandum dated 7 June, the Applicant filed an appeal with the Appeals Committee against the decision related to the promotion and selection procedures for the position he had applied for. After examining the Appeal against the relevant Administrative Orders in effect at the time of the events leading to it and reviewing the process of the selection, the Appeals Committee concluded in its Report of 15 September 2004 that “the Bank’s Staff Regulations, Administrative Orders and policies and procedures have been correctly applied in selection of staff. The decision to recommend a particular staff was that of the duly constituted Selection Panel, and was made within the scope of its terms of reference. The Committee has not found any actions by the Respondent which can be considered as abuse of discretion, arbitrariness, discrimination, improper motivation, or violation of fair and reasonable procedure. The Committee recommends that the President reject all of the Appellant’s claims and the relief sought by him as without merit.” On the same day, that is, 15 September 2004, the President approved the Committee’s Report and Recommendation.

10. On 6 October, the Applicant resubmitted his case, now identified as Appeal No. 2, to the Tribunal asking that it reverse the Appeals Committee and grant him full relief with respect to the last promotion decision and address all other phases of his grievance. He alleged that “the irregular acts and decision of the Appeals Committee further reinforced the impression of ‘systemic corruption’ prevailing within the management of the Asian Development Bank.” His motion for disposition as in a case of default was denied by the Tribunal in its Order of 8 November 2004, and it treated his resubmission as a fresh Application.

11. The Applicant has asked for leave to appear before the Tribunal through counsel pursuant to Rule 13 of the Rules of Procedure. This would require oral proceedings which, under Rule 14, “may be held only if the Tribunal so decides.” The Tribunal has determined that the record before it is sufficient and that oral proceedings are not warranted. The Tribunal also dismisses all other requests by the Applicant for additional information inasmuch as the Respondent has

produced all documents requested by the Applicant that are relevant to this case. Those documents provided to the Tribunal for in camera review concern personnel information which is barred from distribution inasmuch as they concern staff members of ADB other than the Applicant.

12. The Respondent has consistently denied the Applicant's unsubstantiated claim that he was not granted a promotion because he was a victim of corruption on the part of the Management. In the first place, the Selection Panel observed the rules prescribed in paragraph 4 of Administrative Order No. 2.03. The decision to recommend Mr. P for the position was made by consensus among all the members of the Panel with the Director General, BPMSD, acting as its Chair and the Director, BPHR, as its Secretary. The minutes signed by all the members of the Selection Committee reflected the discussion that took place and the ensuing collective decision. It asserts that it accurately evaluated the Applicant's educational qualifications and experience against the selection criteria.

13. Moreover, the Respondent said that the Selection Panel's report stating that the Applicant was "a sociologist with no formal environmental training" was based on his own statements about his university education. Information regarding "formal" training was highly relevant to the selection criteria which required "a university degree in Natural Resources Management, Environmental Sciences, Environmental and Resource Economics or related discipline preferable at post-graduate level." In his application for the position, the Applicant stated that he had a Bachelor's Degree in Anthropology and a Master of Science and Ph.D. in Development Sociology although in his pleadings, he claimed that he had a degree in Environmental Sciences, as shown by the subjects of his Master's and Ph.D. theses. The Respondent asserted that a degree in Development Sociology cannot be equated with a degree in Environmental Sciences which requires a range of courses specifically dealing with the environment. Nor can the Applicant's work experience in the environmental field be equated with "formal environmental training."

14. The minutes of the Selection Panel weighed the Applicant's experience prior to and during employment at ADB against the selection criterion of "experience as a mission leader in loan and technical assistance processing" and noted that he had no experience in this area. While he had designed and implemented loan and technical assistance projects prior to joining ADB, during his six years thereat, he processed technical assistance but not loan projects. Moreover, Mr. P had an advanced degree in Natural Resources, thus meeting the set criterion for educational background, coupled with ADB mission leadership and significant experience in processing loan and technical assistance projects.

15. In making its decision to select a candidate other than the Applicant for the position concerned, the Respondent did not conclude that he was unsuitable for the position of Principal Environment Specialist, but that the candidate chosen was the most suitable, considering his qualifications cited in paragraph 3 above. In so doing, the Respondent did not act arbitrarily or abuse its discretion. It was merely exercising its broad discretion to select staff members for promotion.

16. The Tribunal finds that the Respondent, through its Selection Panel, did not violate any of the procedures laid down in its Rules or Administrative Orders or any of its policies. The final recommendation reached by consensus was based on facts accurately gathered and properly weighed. It did not act arbitrarily or with improper motivation as the decision arrived at, was that of the entire Panel and not merely that of the Director, BPMSD, who was the Chair, and the Manager, BPHR, who was the Secretary in accordance with Administrative Order 2.03,

paragraph 6.2(b). There is no evidence that the two officials, contrary to the Applicant's allegations, made "deliberate false and misleading statements about [his] professional training and experience in clearly malicious actions intended to bias the selection committee and cause damage to [his] professional career."

17. Confronted with such evidence, the Tribunal cannot overrule or substitute its own judgment for that of the Respondent. While the Applicant may consider himself qualified for the position in question, his self-assessment cannot prevail over that of the Respondent Bank. The Tribunal is not persuaded that he was the victim of a misrepresentation made before the Selection Panel such that he was "denied a promotion to which he would otherwise have been entitled." There can be no acquired right within an administrative hierarchy, nor any right to promotion, such promotion being within the exclusive authority of the official's superiors. Such a promotion decision can only be challenged on limited grounds before the Tribunal. "The Tribunal cannot say that the substance of a policy decision is sound or unsound. It can only say that the decision has or has not been reached by the proper processes, or that the decision either is or is not arbitrary, discriminatory or improperly motivated, or that it is one that could or could not reasonably have been taken on the basis of facts accurately gathered and properly weighed." (Lindsey, Decision No. 1, [1992], I ADBAT Reports 5, para. 12).

Decision:

For these reasons the Tribunal unanimously decides to dismiss the Application.