

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**DECISION NO. 73
(19 August 2005)**

**Ismail Dalla
v.
Asian Development Bank
(Nos. 1 and 2)**

**Flerida Ruth P. Romero, President
Claude Wantiez
Arnold M. Zack**

Factual Background

1. In this case, the Applicant challenges the ADB's mid-year Performance Evaluation Review (PER) and its failure to confirm his employment at the end of his probationary period.

2. On 11 April 2003, the Applicant Ismail Dalla, a citizen of the United States, while a consultant to the ADB, was offered a three-year fixed-term appointment as a Principal Financial Sector Specialist, Level 6, in the Finance and Infrastructure Division (RSFI) of the Regional and Sustainable Development Department (RSDD). He accepted the appointment on 1 May 2003 and commenced his service on 10 July 2003 under the supervision of the Director, RSFI. After some discussion over the content and budgeting of a proposed work program, it was finalized on 22 October 2003, effective for the period July 2003 to July 2004.

Performance Evaluation Review (PER)

3. The Applicant's mid-year PER took place on 29 January 2004. Following discussions of the Applicant's performance, the Director, RSFI, provided the Applicant with a draft Part 2, Section A (Brief evaluation and comments on performance checklists) of the PER reading in part as follows:

The second major study on Asset Backed Securities covered Korea and Malaysia. The study was discussed at a peer review meeting and was well received. The meeting suggested that the study needs to be strengthened by providing operational linkages to regional departments and private sector groups.

The Part 2, Section B draft (Actions proposed to enhance effectiveness) read in part as follows:

Given his background and previous work experience he brought to bear as Principal Financial Specialist in RSFI, Mr. Dalla is expected to contribute to knowledge products, but also be an important source of support for ADB's operational work. To be effective Mr. Dalla needs to understand, learn and accept ADB's procedures, practices and budget constraints both for travel and consulting as also for supporting new initiatives through technical assistance.

It is important for Mr. Dalla to prioritize his work plan and initiatives/participation in external events and then work accordingly. I appreciate his efforts at resource

mobilization to support a much more expanded work program, however, all these need to be tied into overall RSDD work program and resources and following ADB's practices.

He needs to listen and enhance his efforts working in teams. It would be useful if Mr. Dalla can work with his Director and other financial sector colleagues both within RSDD and in RDs.

4. In a 30 January 2004 response, the Applicant proposed the following addition to Section A:

Mr. Dalla is trying to enhance visibility for financial sector both within and outside ADB and this is a very good initiative. My suggestion is that he needs to do this carrying the rest of ADB with him.

He also proposed the following replacement after the first sentence of Section B:

To further enhance his effectiveness. Mr. Dalla, as a new staff, should strive to gain familiarity with ADB's policies and procedures. He should prioritize his work program consistent with RSDD's vision and work program under the overall guidance of the Director.

5. On 5 February 2004 the Director, RSFI met with the Applicant to discuss the following proposed revision to her earlier evaluation Section A read in part as follows:

The second major study on Asset Backed Securities covered Korea and Malaysia. The study was discussed at a peer review meeting. Though the study was well received, at the meeting some peer reviewers suggested that the study needs to be strengthened by providing operational linkages to regional departments and private sector groups. It was considered that Chapter 7 was weak and needed to be substantially worked upon to bring value addition to operational work of ADB.

Mr. Dalla has a good network with financial sector experts in Asia. He has also taken a number of initiatives to expand financial sector work in RSDD

Section B was shortened to the following:

Given his background and previous work experience he brought to bear as a Principal Financial Specialist in RSFI, Mr. Dalla is expected to contribute to knowledge products, but also be an important source of support for ADB's operational work.

To be effective, Mr. Dalla needs to understand, learn, and accept ADB's procedures, practices and budget constraints both for travel and consulting as also for supporting new initiatives through technical assistance. He needs to work within the framework established for the division by his Director and broader RSDD work program. He also needs to work effectively in teams both in RSFL and outside RSDD.

The Director signed and submitted the revision to the Director, RSFI, and provided a signed copy to the Applicant which he was asked to sign and return. The next day, 6 February 2004, the Applicant wrote the Director, noting that the final document differed from that discussed on 29 January. Later that day the Director confirmed that was so, but noted that the revision had

been discussed with him for an hour on 5 February 2004 before it had been signed and provided to him.

6. At 5:35 a.m. on 9 February 2004 Applicant wrote the Director, with copies to the Director General, RSDD and several others, in part as follows:

During our meeting on February 5, 2004, we never discussed Part A of the [P]ER as there was no issue. It is your obligation as a manager to point out the material changes in Part A of the PER. In any negotiation of this type, the counterparty needs to be explicit in pointing out material changes that were different than the ones in the document which were agreed earlier. You never did. In fact, you changed the assessment in Part A of the [P]ER from positive to negative. I wonder what objective criteria were used. I am also not sure whether you have read Mr. Chintakananda's evaluation of my work, I also wonder whether you have looked at my work program which was sent to BPHR on October 22, 2003 and circulated to the directors responsible for financial sector and governance on Nov 19, 2003.

I am sure that the ADB's personnel management policy and good governance require its managers to be ethical and transparent in dealing with ADB staff especially in the case of PER. ADB advocates good governance to our DMC's so I assume that its management adheres to the same principle in dealing with its managers and staff members.

The integrity of the PER process has been compromised. We now need to discuss this together with DG as the PER process needs to be objective, transparent and fair. Evaluation needs to be carried out against the agreed work program and the benchmarks needs to be consistently applied. How is my performance compared to other level 6 professionals in the same professional area? There is also an issue of due process and fairness. I am afraid I will not be able to sign off on the document which is tainted, lacks objectivity and [is] discriminatory. I do not believe that the ADB's personnel policies and procedures can be discriminatory to its staff

I hope that there won't be any reprisal against me in terms of my on-going work program, planned publication of the Study of Asset-Backed Securities Report for broader dissemination and for the planned work program for the next six months for requesting the due process.

I have complete trust in our DG and I look forward to discussing and resolving these issues jointly with him. I remain fully committed to carry out my assignment with ADB for the rest of my employment contract and beyond with the highest professional standards in conformity with ADB's objectives, policies and procedures.

7. At 2 p.m. that same day the Director General, RSDD, advised the Applicant that he might seek informal feedback from others prior to another meeting. A second meeting was held on 10 March 2004 at which the Director General informed Mr. Dalla that he had spoken to five individuals who had worked with Mr. Dalla and received uniform feedback that the Applicant's technical skills were of high quality, but that, according to the Director's notes of the earlier meeting, the Applicant was found to be a difficult person to work with and he was not a team player. Mr. Dalla suggested [the Director General] speak to five other individuals who have a different opinion than this.

The Director General cited three performance issues which required improved efforts: 1) the Applicant's failure to work within the framework and directions set by the Director; 2) the need for more effort to understand ADB procedures, culture and working environment; and 3) the need to improve teamwork. The Applicant was then given the options of accepting the draft write up of 29 January 2004, accepting the signed PER form of 10 February 2004 adding his comments in Part 3, or starting the PER process all over again.

Transfer Request

8. Applicant's response was to be provided the next morning, 11 March 2004. Mr. Dalla then requested transfer out of RSFI on the grounds that he could not work with the Director. The Director General responded on 26 March 2004 that since the Applicant was hired as a financial sector expert for RSFI, any adjustment would be "likely to create an imbalance in the internal priorities and distribution of work" and that although there were no other openings possible within RSDD, interdepartmental staff transfers are vacancy driven and that BPMSD would review whether his "skills are required in any other department." He added that the actual possibility of a transfer would depend on the current skill mix needs of the bank.

9. In the absence of the Applicant's signature on the PER, even when the deadline had been extended to 23 March 2004, the Director General, RSDD, sent on 26 March 2004 the incomplete PER form dated 5 February 2004 to Officer-in-Charge, Human Resources Division (BPHR), with a recitation of events in the foregoing meetings and citing the three options provided to Mr. Dalla.

10. On 29 March 2004 Applicant met with OIC, BPHR, and Head, BPHR-CS, reiterating his desire to move out of RSFI either to RSDD's front office or elsewhere in ADB. He was told there was still a specific need for his skill-mix in the division for which he was hired, that there had been adequate consideration of the issues he raised regarding the PER and that there was need to finalize the 6 month PER as well as the 2004 work plan as soon as possible. Mr. Dalla was offered and declined, the advice of the External Counselor, but did agree to the use of Ms. Sally Pedersen, Human Relations Specialist to act as facilitator during discussions with the Director, RSFI.

11. On 30 March 2004 the Applicant expressed his desire to accept the PER proposed on 29 January 2004 and stated he would record his comments in part 3(ii) thereof. The next day he was advised that the 29 January 2004 option had expired and that the only PER version then available to him was the signed version dated 5 February 2004 which had been sent to BPMSD. He also asked for a copy of his job description or the advertisement for his position.

12. Later that day he provided his completed comments on Part 3 (ii) with the notation that he "had not been given an opportunity to revert to the 29 January 2004 version 1 of the PER as advised in the memo dated March 16, 2004."

13. In his Comments on Part 3(ii) he noted that he had been given no definite work program on his arrival and that his inquiry about ADB's financial sector strategy had been met with a response by the Director that it did not have a written financial sector strategy which was not needed in ADB. He cited the four areas of his work program and his participation therein, as well as other events he had taken part in. He also recited his complaints over the ethical issues he had raised, his desire to be an important source for ADB's work by providing operational support to country departments, noted his repeated request to meet with directors of the

Finance and Governance Divisions, and the failure to give him opportunities to participate in operational missions.

14. Mr. Dalla stated his disagreement with the suggestion that he did not understand and learn ADB's procedures practices and budget constraints by noting that all of ADB's procedures are available on the Lotus notes and are not difficult to understand and that he had read the relevant documents and appreciated the importance of procedures. He complained that there had been "very little guidance in the area" and that he had worked within the budgetary allocation. As to the note that he needed to work effectively in teams both in RSFI and outside RSDD, the Applicant noted that the Director is a micro manager and believes in divide and rule. She cannot accept that fact that there are other professionals who are more competent in their fields. An independent assessment of her management style would reveal this.

Charge of Unethical Behavior

15. On 1 April 2004 Mr. Dalla emailed the Auditor General suggesting talks with several staff members "to get an overall perspective of the situation and the track record of RSFI in personnel management" and suggesting that "an independent investigation of the manager (Director RSFI) by a non-Indian should reveal a pattern of unethical behaviors."

16. On 13 April 2004 the Director General sent the completed Part 4 of the PER form to BPHR which read as follows:

I concur with the Director, RSFI's evaluation in Part 2. As brought out in the discussions [I] had with Mr. Dalla on 9 Feb. and 10 March 2004, he should focus in the next six months on (i) working within the framework and directions set by Director, RSFI, (ii) expending more efforts on understanding ADB procedures, culture and working environment, and (iii) improving team work and making efforts in this regard.

17. On 21 April 2004 the Applicant circulated to all RSFI staff an email which was asserted to contain an attachment of the World Bank (WB) Code of Professional Conduct, but which instead forwarded his email exchange with the Auditor General including the ethical charges in the above quoted excerpt of 1 April 2004.

Performance Improvement Plan

18. On 26 April 2004 the Head, BPHR-CS, suggested that RSDD prepare a Performance Improvement Plan (PIP) not only to monitor his ability to deliver specific outputs but also to reflect the following performance standards that will determine his suitability for further employment in ADB:

- a. working within the framework and directions set by Director, RSFI;
- b. expending more efforts on understanding ADB procedures, culture and working environment;
- c. improving team work and making efforts in this regard.

Charge of Reprisal

19. On 26 April 2004, at a meeting requested by Mr. Dalla, he protested that an effort to stop his home leave constituted a form of reprisal and asked how to report a protest. He also questioned the basis for proposing a PIP claiming that inasmuch as the PER process was flawed, the issuance of the PIP memo was inappropriate, noting this in his comments attached to the PER for an investigation of the PER process. He was told that a separate request for an administrative review was the proper channel for such a request while the PIP proceeded, and was told to send a memo to Director, BPHR, requesting compulsory conciliation under Administrative Order No. 2.06 as the initial step in an administrative review. He indicated his intention to pursue administrative review

20. On 28 April 2004, the Officer-in-Charge, BPHR, sent a memo to Mr. Dalla criticizing him for sending the earlier emails claiming that the content "appears to constitute a written attack on the reputation and integrity of Director, RSFI, and seriously calls into question your suitability as an ADB staff member", and requesting a written explanation of his actions by 5 May 2004. Mr. Dalla responded on 6 May 2004 that he had intended to send the WB Code but had "inadvertently attached the wrong file" and subsequently sent along the correct file as well as an apology for his error noting that "I had no intention of maligning the person adverted to in the attached file."

21. On 17 May 2004 Mr. Dalla met with Director and the facilitator to discuss the proposed PIP. He objected to the unreasonable time constraints and limited budgetary resources to hire consultants for the institutional investors study in the work plan and asserted his belief that the review of the status of the Islamic Bank was beyond his capacity in respect of specialty and sensitivity. He also noted the failure to provide the oft requested job description, and noted that he would be contesting the imposition of the PIP as being based on a flawed PER.

22. On 4 June 2004 the Director General wrote the Applicant a memorandum entitled "Unprofessional Behavior" challenging his "accidental" email forwarding assertion, noting his lack of explanation when challenged on his failure to fulfill his responsibilities to his supervisor; raising questions of potential copyright infringement and potential embarrassment to the ADB by using some 60% of the content of a report he had prepared for the World Bank in what had been assumed to be a completely new piece of work; challenging the manner in which he had failed to properly mentor the Young Professional assigned to work with him on his Asset Backed Security Market report; criticizing his intention to litigate regarding the proposed imposition of the PIP; and leading the Director General "to seriously question whether you are suitable as a staff member."

Compulsory Conciliation

23. On 15 June 2004 Dalla requested compulsory conciliation by Robert May. May was appointed on 28 June 2004, but on 9 July reported that the compulsory conciliation had not been successful.

Twelve-Month Performance Evaluation Review

24. Also on 15 June 2004 Head, Central and Administrative Support Unit, BPHR, wrote the Director General, RSDD, requesting completion of the twelve-month PER noting that the Director General could recommend (i) confirmation, (ii) extension of the probationary period, or

(iii) non-confirmation, noting that a recommendation of non-confirmation would result in termination.

25. On 18 June 2004 the Applicant, wrote the Director General, RSDD, and Director, RSFI, complaining of the failure to call a meeting to discuss their differences, noting that he had not received his job description until 31 May 2004, which had several omissions and which was inconsistent with the recent competency report, objecting to his proposed work program as being deliberately compressed and different from an earlier version, noting that the discussions on his proposed PIP had not been concluded and were improper since his six-month PER had been flawed, and reminding them that his request for transfer had not been implemented. He also complained that he did not understand the allegation that he had mobilized resources for his work without following ADB procedures, and defending his study on Asset Backed Securities, reiterating his apology for improperly sending the emails, and objecting to the actions taken since 4 June 2004 as an "attack on my professional integrity" which caused him "severe professional and moral damage" and challenging the "validity and legality" of the effort to initiate formal disciplinary procedures against him. He also defended his work with the Young Professional noting that he had ceased to be his supervisor in February and that the Young Professional had taken too long to provide his required comments. On 25 June 2004 the Officer-in-Charge, RSDD, responded with relevant examples of the Applicant's unprofessional behavior, to which Applicant responded on 30 June 2004 setting forth the bases for his disagreement.

Request for Administrative Review

26. On 14 July 2004 the Applicant submitted a request for administrative review to the Director General, BPMSD, seeking an independent review of the six-month PER by an independent panel to assure that it was fair and not discriminatory, requesting the performance rating be changed to "fully satisfactory", and proposing that the proposed PIP be quashed and that he be given a "suitable assignment outside RSFI." He also wrote Director, BPHR, challenging the eligibility of his supervisors to carry out the year-end performance evaluation, noting that the proposal that he go through another evaluation by the same people would be "an utter waste of time, labor and good white paper", rejecting the likelihood of the same evaluators "changing their minds", and reiterating his request for a transfer. That request was denied on 15 July 2004 in a memorandum from the Director, BPHR, noting that the Director, RSFI, and Director General, RSDD, were concerned about his suitability for service in ADB, noting the various areas in which improvement was needed and that "during the upcoming PER process, [his] supervisors will decide whether the necessary improvement has taken place." He was advised that Part I of the Applicant's PER was due that day and if not submitted would be construed as indicating unwillingness to participate in the PER process leading to a recommendation to the Director General, RSDD, to proceed on any extension of the Applicant's probationary period, confirmation or termination of the Applicant's employment.

27. The next day, 16 July 2004, Applicant wrote the then President requesting his intervention and reminding him of the earlier request for a transfer.

Charge of Collusion between RSDD and BPHR

28. On 19 July 2004 the Applicant responded to the Director, BPHR, memorandum of 15 July 2004 expressing his desire to participate in a performance evaluation that is "fair impartial and nondiscriminatory and has no predetermined agenda", claiming it would be "a gross abuse of discretionary power if the same biased supervisors were to carry out the performance

evaluation" and asserting that "it is quite clear that there is a collusion between RSDD and BPHR and that there is an attempt to use the 'rules' to not confirm me and going through a process to create an appearance of fairness and transparency. The entire process is a sham." He then repeated his request for transfer. That same day the Director, BPHR, informed the Applicant that the standard ADB procedures for evaluation would be followed, assuring him of close review and giving him a final extension to submit his part of the PER, which he submitted on 21 July 2004 asserting that his performance had been fully satisfactory.

Twelve-Month Performance Evaluation Review form

29. On 30 July 2004 the Director, RSFI, filled out her portion of the Twelve-Month PER form. The Applicant had listed among his Accomplishments/Outputs the completion of a "major study" on the Harmonization of Bond Market Rules and Regulations in Selected APEC Economies, which she noted was substantially carried out prior to joining the ADB. He also listed the study on Asset Backed Securities in Selected East Asian Economies which his Director noted had been discussed in draft report on January 2004 when suggestions were made to improve the recommendations and lessons learned, but that these issues had not yet been addressed. The other listed items had been noted as validated by the Director.

She also commented that the Applicant:

For Planning and Organizing Work - Has difficulties adapting work program to the available resource envelope of the division.

For Application of Analytical, Technical and Conceptual Skills - His work does not demonstrate the level of analytical depth expected for his background especially linking sectoral knowledge and insights to ADB's operations.

For Quality, Accuracy and Timeliness of work - Excellent written communication skills.

For Productivity and Initiative - Has completed tasks in given time frame. However, does not show energy, enterprise, or commitment. Continuously argues about every time frame and resources allocated to each task.

For Innovativeness - Meets requirements

For Client Orientation - Meets requirements with external clients.

For Teamwork - Unsatisfactory interpersonal skills are a major barrier to [the Applicant] making an effective contribution to RSDD's program.

For Leadership and Managerial Skills - Not applicable generally. He was not able to be an effective mentor to a Young Professional he selected and brought to RSFI to help him with the ABS study.

The Director's narrative Assessment included the following:

Mr. Dalla had a problem adjusting to ADB's work environment and procedures, and planning and adapting work to the divisional resources available. He seems more comfortable managing tasks rather than doing them himself.

An interdepartmental meeting ... discussed the first draft of the [ABS] report and suggested areas of improvement; however, Mr. Dalla did not address these suggestions. The paper remains weak with respect to lessons learned but until today, he has not revised the paper to address this. He does not seem to accept suggestions for changes

The six month PER identified three areas for improvement: working within the framework and directions set by Director RSFI; expending more efforts on understanding ADB procedures, culture and work environment; and improving team work and making efforts in this regard. There has been no material improvement in any of these three areas. Instead of addressing these aspects, Mr. Dalla has adopted a confrontational attitude and this has prevented him from making the appropriate contribution to RSFI's work objectives. He argues extensively about everything and anything. His value addition for the division remains marginal.

She then provided the document to the Applicant that same day. According to the Director's notes of that meeting, Mr. Dalla did not agree with any of the negative comments and emphasized that they were part of a predetermined agenda. He accused the Director of having a bias against him and not being objective in her assessment, reiterated that she had no knowledge of his sector and that he saw the whole exercise as a set up. She noted that she had not blocked his requested transfer and that she had very little influence over finding a suitable vacancy for his move.

Charges of reprisals and systematic discrimination

30. On 3 August 2004 the Applicant wrote the Director General, BMPSD, setting forth "seven examples of reprisals and systematic discrimination that have been carried out against me by the Director, RSFI and DG, RSDD" including: an attempt to stop home leave to attend his son's graduation on 7-11 June 2004; preventing him from accepting an invitation to participate in an Inter-American Development Bank (IADB) Workshop on the Bond Market in Washington 9-11 June 2004; refusing to allow him to accept an invitation to speak at the Asia Pacific Economic Conference (APEC) Finance and Development Forum in Shanghai; removing him from the opportunity to work on the financial sector strategy of the Financial Sector Study; excluding him from participation in the Asian Bond Market Asian+3 committee; denying use of a consultant and travel funds for the Institutional Investor Study; and stalling implementation of the Workshop on the government Bond Market.

31. On 6 August 2004 the Applicant advised the Director that the foregoing memo of 3 August constituted part of his comments in Part 2.3 of the PER and reiterated the views expressed in his 14 July 2004 memorandum on the legitimacy of carrying out a 12-month PER by the same supervisors and ultimatum given him to comply with the process as "a sham, and it is a set up to justify a predetermined decision." He repeated his claim that the six-month evaluation report was fatally flawed, that he had been the victim of reprisals and a malicious campaign intended to harm him personally and professionally and that the 12-month performance review was likewise unjustified. He again requested "an independent and impartial evaluation by ADB management."

32. On 9 August 2004 the Applicant's PER was submitted to BPHR, and on 11 August 2004 he was advised that his comments were being incorporated into Part 2.3 of the PER which was being forwarded to the Director General, RSDD, for completion.

33. On 13 August the Applicant sent the Auditor General the foregoing memorandum and inquired as to whether there would be an independent review by the Auditor General. That same day the Director General, BPMSD, responded, denying the Applicant's 3 August 2004 memorandum alleging reprisals.

Denial of Request for Administrative Review

34. On 16 August 2004 the Applicant's request for administrative review was denied by the Officer-in-Charge, BPMSD, with the finding that on both substantive and procedural grounds the PER and PIP proposal were undertaken with due regard to the Applicant's rights and that the "allegation that the PER process lacked objectivity and was tainted are baseless." That same day, the Director General, RSDD, met with the Applicant for additional information.

Response of Auditor General

35. On 20 August 2004 the Auditor General wrote the Applicant that he had reviewed the several issues raised and stated that he did not find sufficient reason to establish that you have been treated in a manner that falls in the categories fraud, corruption or unethical behavior, in a manner that requires my intervention or calls for an actual investigation by this office.

36. On 23 August Mr. Dalla was again told that his request for transfer had been denied. And on 30 August 2004 the Director General, RSDD, informed him that he intended to recommend that the Applicant not be confirmed at the end of his probationary period.

Appeal to the Appeals Committee

37. On 1 September 2004 the Applicant filed an appeal with the Appeals Committee against the decision by the Officer-in-Charge, BPMSD, to deny his request for an administrative review.

Request for Compulsory Conciliation on request to Transfer

38. The next day the Applicant requested compulsory conciliation regarding the decision not to transfer him, asserting that the Director, BPHR, had the discretion to make an exception to the rules preventing staff members on probation from applying for advertised vacancies or seek approval from the President to make such an exception.

39. On 3 September 2004 the Applicant provided his comments on the 16 August 2004 draft recommendation of the Officer-in-Charge, BPMSD, maintaining that the twelve-month PER was not an objective, independent and impartial evaluation of his performance, and that the recommendation was illegitimate. He also challenged the failure to permit his transfer. Mr. Dalla forwarded these same comments to the Director General, BPMSD, for the purpose of an independent review.

40. On 6 September 2004 the Applicant met with the Director General, RSDD, to discuss his PER and the draft recommendation not to confirm his appointment. According to the DG, RSDD, the Applicant indicated that he had nothing to add to the memoranda dated 3 and 6 September 2004.

Recommendation not to confirm the Applicant's appointment

41. On 8 September 2004 the Director General, RSDD, submitted the completed probationary PER to Director, BPHR, with an attachment supporting his recommendation not to confirm. In the document he noted that the Applicant had substantial difficulties in adjusting to work in ADB. During the six month PER process Mr. Dalla was informed that there were concerns about his work performance, particularly in relation to teamwork and his overall work conduct

Mr. Dalla refused to accept that guidance and warning, and, indeed, that any improvement was needed. On the contrary, his overall work conduct further deteriorated to the extent that it became a matter of serious concern for the Department. Rather than working within the framework and directions set by the Director, RSFI, Mr. Dalla continued denigrating the Director RSFI publicly within ADB regarding so called "unethical behaviors." He was also not willing to take comments or suggestions on board and has not been able to work effectively in a team.

Having given careful attention to Mr. Dalla's comments, it is my firm opinion that his behavior towards the Director, RSFI is unacceptable. Moreover, [the Applicant] failed to improve his team work and work relationships despite repeated warnings and the guidance given to him by his supervisors. Under the circumstances, his value addition remains marginal to RSDD's work objectives and it is my conclusion that Mr. Dalla is not suitable for further employment. I therefore recommend that Mr. Dalla not be confirmed.

He also sent a separate memo on the same day to the Director General, BPMSD, elaborating on this recommendation not to confirm the Applicant's probationary period.

42. On 10 September 2004 Director General, BPMSD, reviewed the various allegations and concluded:

Overall, I note that you have perceived every bureaucratic requirement and management action, reasonable as they were under the circumstances, as a personal affront It is reasonable to conclude that contrary to your claims of reprisal and discrimination, Director General, RSDD and Director, RSFI acted appropriately as they have both the right and duty to organize the activities of their staff consistent with individual and departmental work plans, and to ensure that such activities are aligned with the departmental resources and budget in ways it considers are in the best interest of the Department and of ADB. Thus, after careful consideration, I find no basis in any of your claims of reprisal or discrimination.

43. On 17 September 2004 the Director General, BPMSD, wrote to the President recommending non-confirmation, in part as follows:

[The Applicant's] performance during his probationary year clearly demonstrates an inability to accept suggestions for improvement in his performance by his supervisors. Moreover, [he] reacted to Director, RSFI's efforts to provide him with direction by publicly criticizing her character and her professional competence, without any substantiation for such allegations I investigated these allegations [that he had been subject to reprisal by Director, RSFI] and found that he had no basis for such a complaint. In view of all the circumstances of this case, I am of the view that Mr. Dalla is unsuitable for service in ADB.

44. On 19 September 2004 the Applicant challenged the 10 September 2004 memorandum as "a carefully crafted defense prepared by high caliber counsel against reprisals and discriminatory practices that have been committed by RSDD management" and reiterating his request for an independent panel review composed of "two to three VPs and Director, BPHR." That request was denied on 23 September 2004.

45. On 22 September 2004 the Applicant was informed that his employment with ADB would be terminated effective 30 September 2004 with payment of a lump-sum equivalent to three months of his basic salary and benefits in lieu of notice. That same day the Applicant requested compulsory conciliation of the recommendation of the Director General, RSDD, not to confirm his employment at the end of his probationary period.

Request for Administrative Review on denial of request to transfer and non confirmation

46. On 29 September the External Conciliator informed the Applicant that the conciliation was not successful. That same day the Applicant submitted a request for administrative review with respect to the decision not to transfer him, and on 7 October 2004 sought review of the decision not to confirm his appointment. Both requests were denied on the grounds that the proper procedures had been followed, that the appropriate decisions had been made and that there had been no violation of his due process rights. The Applicant requested a minimum notice of 30 days, and the effective date of the Applicant's termination was extended to 9 October 2004.

47. On 2 November 2004 the Director General, BPMSD, responded to the Applicant's request for administrative review regarding his request for a transfer, and concluded that the decision to deny his request for a transfer from RSFI did not violate his due process rights.

Appeal to Appeals committee on decision not to confirm

48. On 29 November 2004 the Applicant filed an appeal with the Appeals Committee against the decision not to confirm his appointment.

Appeals Committee Report on Six-Month Performance Evaluation Review

49. On 2 December 2004 the Appeals Committee issued its report finding that the Applicant's six month PER was conducted in accordance with the applicable rules and "found no evidence of abuse of discretion, arbitrariness, discrimination, improper motivation or violation of fair and reasonable procedure in this regard. It also endorsed the recommendation to place the Applicant on a PIP.

Appeals Committee Report on Twelve-Month Performance Evaluation Review

50. On 18 February 2005 the Appeals Committee report, adopted by the President on 22 February 2005, found that the one-year PER was conducted in accordance with Administrative Order No. 2.01. Given that due process was followed and that the Applicant was given sufficient opportunities to comment and provide feedback, the Committee found no evidence of abuse of discretion, arbitrariness, discrimination, improper motivation, or violation of fair and reasonable procedure. The Committee also found that the Respondent had correctly applied the governing rules to then non-confirm the Applicant's appointment. It also found that the failure to transfer the applicant was not an abuse of discretion or dictated by arbitrariness, discrimination, improper motivation or violation of fair and reasonable procedure.

51. On 22 February 2005 the President adopted the Appeals Committee's conclusions that the Respondent had acted in accordance with the applicable Administrative Orders. The consolidated cases were thereafter appealed to this Tribunal.

Positions of the Applicant and Respondent

52. In his Application and replies the Applicant sets forth the rationale for his preliminary rulings and his claims of Respondent's impropriety in handling his initial hire, the six-month PER, the imposition of the PIP, the refusal to transfer, the failure to apply ethical standards, the twelve-month PER, and the decision not to confirm. The Bank has replied and responded to each of those claims. We address the several issues in the following Tribunal's Rulings.

Tribunal's Rulings Preliminary measures

53. We consider each of the preliminary requests in turn:

A. The Applicant requests the Tribunal to summon the Senior Advisor, RSDD, whom he asserts had been his supervisor during the study done prior to his employment, and during his first few months of employment. The Applicant was recruited to fill a vacancy in RSFI, where his immediate supervisor was the Director, RSFI, who was responsible for the preparation of the PER. The Senior Advisor did provide a memorandum dated 8 January 2004 regarding the Applicant's performance, but the content thereof establishes that it focused on his work during the time he was a consultant on the Harmonization project rather than his work in RSFI which was the focus of the PER. Examination of the PER shows that the Applicant did call attention to the Harmonization study, and that the Director, RSFI, acknowledged that work as substantially having been done prior to his recruitment to RSFI. Applicant did not challenge that assessment in his undertaking to revise Section B. We find that given the timing of the Applicant's work with the Senior Advisor RSDD, and the responsibility entrusted to the Director, RSFI, for assessing the Applicant's performance for the full period of the PER that the testimony sought would have no bearing on the matter before this Tribunal. The request for that testimony is denied.

B. The Applicant requests the Tribunal to summon the Auditor General of ADB to testify on enforcement of ethical standards within the ADB. The record is clear that the WB Code of Ethics is unique to that institution, and that ADB employees are governed by the duties, rights and responsibilities of staff members as set forth in Administrative Order No. 2.02. The Applicant's request for factual testimony is superfluous, given the documentation provided on the record. As to his request for his view on the complaints of reprisal, that view is set forth in the Auditor General's memorandum of 20 August 2004, and will be considered by this Tribunal in that format. The request for testimony of the Auditor General is denied.

C. The Applicant requests the Tribunal to secure affidavits from the Director, Finance and Governance, Mekong Department, from the Assistant Chief Economist, ADB on their withdrawal of verbal offers for transfer to their divisions. The issue to be considered on the requested transfer is the propriety of the Respondent's denial of the request for transfer, and not the availability of positions to which transfer could be approved. Thus, even if the two individuals were to provide evidence that they had offered to accept the Applicant as a transfer, such testimony or affidavits would be irrelevant to the issue of

whether or not the denial of the request for transfer was proper. The request for provision of such affidavits is denied.

D. The Applicant requests the Tribunal to request the Director, BPHR, for an affidavit as to his role in handling the Applicant's case and in particular whether he was acting in good faith. The record is replete with documentation to and from the Director, BPHR, and concerning his involvement and it is the function of this Tribunal to weigh that evidence as well as the charge that he was not acting in good faith and was merely implementing a predetermined decision. We deny the request on the grounds that the record is sufficiently detailed as to the role of the Director and sufficient as well for us to determine the propriety of his actions.

E. The Applicant requests the Tribunal to seek an account from the Executive Director for Thailand as one who is "very familiar" with the Applicant's case. In the light of the extensive documentation in this case, and in the absence of any specific indication as to how the testimony of the Executive Director for Thailand is related to the actions of the Respondent or to the allegations raised by the Applicant, this request is denied.

F. The Applicant seeks the production of email communication related to him and his employment, between the Director, RSFI, Senior Counsel, and Head, BPHR-CS, from 14 March to 2 May, 2004. Such email communication, if it exists, we find to be covered by Section 2.3 of Administrative Order No. 2.08 which defines privileged documents as: communications within the Office of the General Counsel and/or between OGC and other Departments/Offices/Divisions, providing legal advice on disciplinary matters, grievances, appeals, applications to the Administrative Tribunal and other personnel issues.

Inasmuch as Section 4 of Administrative Order No. 2.08 precludes staff member access to such privileged communication, the request is denied.

G. The Applicant seeks minutes of a meeting which allegedly took place in mid-March, chaired by then Assistant General Counsel to decide on the Applicant's future employment with ADB. There is no evidence that any such meeting occurred, and in the absence of any proof of the meeting or of minutes thereof, the request must be denied.

H. The Applicant seeks production of statistics organized by nationality of ADB staff members who have not been confirmed at the end of their probationary period during the past five years. In the absence of any demonstration that the action taken by the Respondent was based on nationality, the requested data are irrelevant and the request is denied.

I. The Applicant asks the Tribunal to request a statement from the United States' Executive Director who allegedly wrote a letter on the Applicant's behalf to the Deputy Director General, BPMSD. Such letter even if introduced in evidence would not impact on the responsibility of the Respondent to make its determinations here under challenge on the basis of the appropriate law of the ADB. The statement thus requested by the Applicant is irrelevant and the request is denied.

54. In addition to the foregoing, it should also be noted that the Applicant had the opportunity to present the foregoing testimony and documentation in his numerous contacts and discussions with representatives of the Respondent in a much more timely fashion both prior to and during the earlier stages of these proceedings rather than through seeking to have this Tribunal solicit those inputs on his behalf. The Applicant bore the onus for their introduction and we find his efforts at this stage to be inappropriate and tardy.

The Merits

55. The consolidated cases submitted to the Tribunal concern the propriety of the performance evaluations of the Applicant during his probationary period and the decision not to confirm his appointment at the end thereof.

Initial Hiring

56. The record is clear that the Applicant was hired as a probationary employee, with prior experience in the field into which he was hired, at a time when he was working as an external consultant to the ADB, and that he developed his work plan to prepare proposals for studies on regional bond markets and mortgage-backed securities within a week of his beginning work on 10 July 2003.

57. We are persuaded that the Applicant at the time of his commencement of work had a clear sense of his expected responsibilities, that his duties were well defined and that he was provided a reasonable opportunity to demonstrate his suitability to the position for which he had been hired. The extent of his awareness of his anticipated duties is his apparent ready agreement on content of his projects. The delay in finalization until 27 October 2003 was due solely to his displeasure with the amount budgeted thereof. Although the Applicant requested provision of a written job description, there is no evidence of any requirement of a pre-existing job description as a condition for hire. We find that the Bank met the requirements of Administrative Order No. 2.01, para. 11 by the Applicant's supervisor establishing his work program in a timely manner "as soon as possible after the staff member's entry on dut

Six-Month Performance Evaluation Review

58. Administrative Order No. 2.01, para. 11.3 provides: "The performance of a staff member is first reviewed after six months of service." As noted in the case of Salle, WBAT Reports 1982, Decision No. 19, para. 26 It is of the essence of probation that the organization be vested with the power both to define its own needs, requirements and interests and to decide whether, judging by the staff member's performance during the probationary period he does or does not qualify for permanent Bank employment. These determinations necessarily lie within the responsibility and discretion of the Respondent

Here, the record shows that the Applicant filled out the Performance Evaluation Review process on 19 January 2004 by submitting Part 1 listing his accomplishments. Instead of merely completing Part 2 of the evaluation with assessment and recommendations for improvement and providing it to the applicant for comment as anticipated in the wording of the form, the Director RSFI met with him twice to discuss his performance before providing a draft Part 2 on 29 January 2004. There is no requirement for offering such a draft Part 2, nor for providing an employee an opportunity to discuss the draft before the PER is signed by the supervisor and submitted to the Officer-in-Charge, BPHR. Administrative Order No. 2.02, para. 2.3 allows the staff member "the opportunity to formally discuss" the content of the evaluation. It does not

require negotiations and certainly there is no requirement for the staff member's agreement to the content provided by the supervisor in Part 2, and there is no right granted to the staff member to veto the proper exercise of the authority of the supervisor to complete the PER. Here, after the discussion, the Director did amend her entry at Part 2 and again discussed it with the Applicant for an hour on 2 February 2004, before signing it and soliciting the Applicant's signature at Part 3. The Applicant apparently failed to fully read the revised Part 2 provided him at that meeting, but the Director was under no obligation to secure his agreement to the changes from the earlier draft, and was fully within her responsibility in signing it and in providing it to the Applicant for completion of Part 3. From that date until 31 March 2004 when he finally completed Part 3, the Applicant repeatedly challenged the due process, fairness and transparency of the process, met twice with the Director General, RSDD, and despite being given the option of accepting the Part 2 of 29 January 2004, or that of 5 February 2004 or indeed restarting the PER review, the Applicant missed the deadline, even extended, for exercising that option, and the signed 5 February 2004 evaluation was properly processed.

59. As noted in Haider, Decision No. 43 [1999], V ADBAT Reports 6, para. 18: In previous decisions, this Tribunal has consistently ruled that the evaluation of the performance of employees is a matter of managerial discretion, and that the Tribunal may not substitute its discretion for that of the management (Lindsey, Decision No.1 [1992], I ADBAT Reports 5 para. 12). The Tribunal may intervene only when there is an abuse of discretion or if the decision is arbitrary, discriminatory or improperly motivated, or if it is one that could not reasonably have been taken on the basis of facts accurately gathered and fairly weighed.

In the case before us, it is evident that the Bank went far beyond the requirements of the law in providing the Applicant an opportunity to discuss his performance and the Bank's proposals for enhancing his effectiveness. It met with him repeatedly, it responded to his memoranda, it offered him a choice of avenues to pursue for the conduct of the evaluation, it provided a facilitator to help in the discussions, and it explicitly advised him of the areas where he needed improvement. The onus is on the Applicant to establish through the presentation of evidence that the imposition of the six-month evaluation constituted an abuse of discretion. (see Alexander, Decision No. 40 [1998], IV ADBAT Reports 52, para. 38). It was the responsibility of the Applicant and not of this Tribunal to garner such testimonials or corroborative documentation in timely fashion to prove his case. The record shows numerous allegations, but we find no credible evidence to support those allegations. Accordingly we must deny the claims of procedural irregularity in the imposition of the six-month evaluation.

Independent Review

60. In turning to the substance thereof, the Applicant urges that such evaluation be conducted by an independent body, rather than by the Bank itself. The Administrative Orders and prior rulings of this Tribunal vest in the employer the right to evaluate the performance of a staff member. If there is proof that the evaluation has been done in violation of the law of the Bank, then it is within the province of this Tribunal to correct such wrong. However, there is no provision in the law, practice or tradition of the Bank to provide independent assessment of staff member performance except perhaps in this forum, and the request therefore must be denied.

Code of Professional Ethics

61. The Applicant also raised the ethical issue of the Director changing her earlier evaluation and noted the absence of any Code of Professional Ethics within the ADB. The evidence shows that pursuant to AO 2.02 Section 2.1 the Bank is "guided by fair, impartial and transparent

personnel policies and practices"; it does not have a separate Code of Professional Ethics. That standard is the one by which the Respondent is bound, and in the absence of any specific Code at the Bank, it is inappropriate for the Applicant to claim the applicability of the Code created for the WB to the staff at the ADB.

Performance Improvement Plan

62. In compliance with its authority to remedy performance that is found to be deficient in the PER, the Bank prepared a Performance Improvement Plan (PIP) to assist in the improvement of his performance, as "a formal process that is geared towards enhancing performance of staff and helping realize full potential" as contemplated by the publication "Improving Performance - A Guide for Staff" issued by the Director, BPMSD, in August 1998. Although the Applicant protested the development of the PIP as being based on a flawed PER, our ruling that the PER was properly conducted leads us to endorse the right of the Bank to develop the PIP for the Applicant.

Transfer

63. The Applicant repeatedly sought transfer out of his position in RSDD to other departments which he felt could better utilize his skills and to assure an independent assessment of his work during the remainder of his probationary period, alleging a violation of Administrative Order No. 2.03, para. 3.1. We have examined that provision, and while it does permit reassignment on a lateral basis to a new activity or office, the authority to make such a move is not mandatory at the instigation of the staff member but rather is within the sole discretion of the ADB if it determines that "the interests of the ADB or the staff member's development needs so warrant." In that respect the fact that supervisors in other departments or divisions might be willing to accept a staff member as a transfer does not constitute grounds for requiring his current supervisor to initiate such transfer. In addition it should be noted that relative to advertised openings, para 5.6 specifies that "staff members are not eligible to apply for an advertised position if they are on probation."

Twelve-Month Performance Evaluation review (PER)

64. Administrative Order 2.01, para. 11.3 provides in part as follows:

On the basis of such second review, the Head of Department/Office concerned shall make a recommendation to the Director, BPMSD, in case of the professional staff...concerning confirmation of the staff member's appointment, extension of the staff member's probationary period or termination of the staff member's appointment. Such recommendation shall be copied to the staff member who shall be given the opportunity to submit comments concerning an extension of his/her probationary period or termination of appointment, which comments shall be discussed with him/her.

Paragraph 11.4 reads in part as follows: If after a second review of the staff member's performance, the decision is taken not to confirm the staff member's appointment, the staff member shall be separated on the day of the month which coincides with the end of the 15th month of his/her service with the ADB.

At the time of the six-month PER the Applicant was given clear verbal and written advice by the Officer-in-Charge, BPHR as to how to enhance his effectiveness:

He should focus in the next six months on: (i) working within the framework and directions set by Director, RSFI, (ii) expending more efforts on understanding ADB procedures, culture and working environment, and (iii) improving team work and making efforts in this regard.

The foregoing prescribed performance standards were then incorporated into his PIP. In the six-month period following the issuance of the six-month PER and imposition of the PIP, the Applicant engaged in the challenges, requests and appeals cited above.

65. The remaining issues to be considered arise from the twelve-month evaluation and the Respondents decision not to confirm the Applicant's appointment. Applicant contends that he has been the victim of reprisals, complains about the denial of his request for an independent performance evaluation, and protests his twelve-month review being conducted by the same person who did his fatally flawed six-month review as a "sham" to "justify a predetermined decision."

Propriety of the Twelve-Month Performance Evaluation review (PER)

66. The Applicant has failed to meet his burden of proving that the twelve-month PER "lacked objectivity, was improperly motivated and [was] a sham." The record shows that the Applicant was given an explicit and measurable program for improving his performance following the issuance of the six-month evaluation, and that he was provided full opportunity to express his position, provide evidence to support his allegations and repeated opportunity to discuss his complaints with members of management prior to the decision to not confirm his continued employment.

67. Yet the evidence shows that he continued to protest his allegedly unfair treatment and showed a distinct unwillingness to take advantage of the opportunity provided to improve his performance prior to the twelve-month PER. Indeed he even continued to protest the authority and legitimacy of the members of supervision charged with the authority for conducting his twelve-month review. That second review demonstrated that there had been no material improvement in any of the three areas identified as deficient in the six-month PER and requiring improvement as a condition for his continued employment. As demonstrated by his continued protests, and by his failure to meet the extended deadline of 15 July 2004 for completion of his portion of the PER form, he provided clear evidence that he failed to appreciate the importance of conformity to ADB procedures, culture and work environment.

68. The evaluation done by his supervisor was consistent with ADB rules and procedures, and appropriate considering her continued and on going responsibility for supervising the Applicant both prior to the six-month review and during the period between the six- and twelve-month PERs. She was most familiar with the requirements and performance of his job; she was best suited to determine whether he had conformed to the recommendations for improvement in the six-month PER and in the PIP. We find appropriate to our reasoning in this case the decision of the ADBAT in Behuria, ADBAT Decision No. 11 (No. 2) [1996], paras. 3 and 11:

3. Decisions with respect to the evaluation of staff members' performance are within the discretion of the Bank. Such discretion however, is not unlimited and the Tribunal must ensure that the exercise by the Bank of its discretion is not arbitrary, discriminatory, unreasonable, improperly motivated or adopted without due process.

11. It is true, as the Applicant says that prejudice is usually concealed and its existence has to be established by inference. Yet, in the view of the Tribunal, the allegations of the Applicant are not sufficient to establish bias or lack of responsibility on the part of his Manager or the Director with respect to the three items of the PER. The applicant, has, basically, asserted his disagreement with several of the Respondent's assessments of his performance, but this can not take the place of proof of discrimination or bias, which the Tribunal finds to be absent from the record.

69. We find that there has been a fair and balanced examination of the Applicant's qualifications and experience, and that although he has had obvious differences with supervision as to the assessments of his performance, he has failed to provide the requisite proof to sustain his charges of bias, discrimination or improper motivation. His recitations of alleged cases of reprisal are mere inferences, and, absent supportive documentation, we are unable to agree that they constitute proof of such misconduct. We find that the decision to non-confirm has been reached by proper processes in the absence of such proof of wrongdoing.

70. The record before us establishes the Applicant's professional competence. However, his difficulty in working under the assigned supervision, his tendency to level charges of bias, incompetence, and unethical conduct, and his inability to adequately fulfill his obligations under the Young Professional program, persuaded the Bank that the quality of his performance, beyond his acknowledged technical proficiency, continued to be deficient in his ability to get along with others (see Buranavanichkit, WBAT Reports 1982, Decision No. 7, para. 28). As noted in Matta, WBAT Reports 1982, Decision No. 12, para. 47, these are factors which relate "not only to the technical competence of the employee but also to his or her character personality and conduct generally, in so far as they bear on his ability to work harmoniously and to good effect with supervisor and other staff members."

71. We find that the Applicant has failed to meet his burden of proving his charges against the Respondent, that he has been given an ample opportunity to prove his ability to meet the requirements of his position through his six-month PER and the PIP, but that his performance during the second six months of his probationary period demonstrated that the action of the Respondent in determining not to confirm his continued employment was not unreasonable, and was not the result of bias or an abuse of discretion. The record supports the determination of the Respondent that the Applicant had not sufficiently met the requirements of the position in which he had been serving his probation. We find that the Respondent, in making its decision not to confirm the Applicant, has not abused its discretion in determining that the Applicant did not meet its requirements to qualify as a permanent staff member. We find also that the Applicant had failed to meet his burden of establishing that the Respondent was arbitrary or capricious in its determination not to confirm, that there was no proof of efforts at reprisal, or proof of improper action on the part of supervision when the decision was made to non-confirm. We find that the Respondent had followed the requirements of its statutes and that the alleged deficiencies in its handling of the Applicant's claims were unproven and failed to vitiate the decision to not confirm.

Decision:

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