

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

DECISION NO. 75
(11 January 2006)

Michael Bristol
vs.
Asian Development Bank

Khaja Samdani, Vice-President
Arnold M. Zack
Yuji Iwasawa

1. The Applicant seeks a reversal of the decision of the President to impose on him a penalty of dismissal and to take administrative action to recover US\$116,863.81, the entire amount of rental subsidies paid to him from September 1996 to August 2002, plus interest.

I. THE FACTS

Background

2. The Applicant, a British national, was offered an appointment as a Level 4 project engineer at the Asian Development Bank on 31 May 1996. He accepted the appointment on 17 June 1996 and joined the ADB on 14 August 1996.

3. On 27 June 1996, prior to his joining the ADB but after he had accepted the appointment, he incorporated Richland Property and Management Corporation (hereinafter "Richland") together with his present wife, then Ms. Editha Litan whom he was to marry on 18 December 1997. He was a director of the corporation and owned 40% of its stocks, with Ms. Litan owning another 40%. The remaining 20% was owned by three other individuals, two having the same surname as Ms. Litan.

4. Between 3 July and 24 August 1996, Richland bought a house in Merville Park, Parañaque City. Title to the property was registered on 11 September 1996.

5. On 1 September 1996, the Applicant leased the house for one year. He applied for rental subsidy, providing a receipt for a rental payment of P910,000, and received subsidy from the ADB under Administrative Order (hereinafter "A.O.") 3.07. At that time, the A.O. provided that the "subsidy will be payable only if a staff member or spouse does not own a residential property ... within reasonable commuting distance from the Headquarters of the Bank" (A.O. 3.07, revised 1 November 1993).

6. On 1 September 1997, the Applicant renewed the lease for the next year, and again applied for, and received, a rental subsidy with a receipt for a payment of P1,105,000.

7. On 28 May 1998 (effective 1 January 1999), the Respondent revised A.O. 2.02 on responsibilities of staff members to require that:

Staff members ... shall not serve as a director, officer or partner of any entity, other than as an authorized representative of the Bank or with the prior approval of the President. Such prior

approval shall not be required with respect to services performed as a director or officer for a charitable, social or religious entity. (A.O. 2.02, para. 4.6(i)(a))

8. On 1 July 1998, the Respondent revised A.O. 3.07 on housing subsidies to read:

Staff members are not eligible for housing assistance if they own residential property for self accommodation within reasonable commuting distance from the Bank's HQ, whether such property is owned in their own name, in the name of the staff member's spouse, or jointly by the staff member and his/her spouse. (A.O. 3.07, para. 2.3)

9. On 1 September 1998, the Applicant, by this time married to Editha Litan, renewed the lease for the next year, and applied for, and received, a rental subsidy with a receipt for a payment of P1,150,000. Likewise on 1 September 1999, renewing the lease, the Applicant applied for, and received, a rental subsidy with a receipt for a payment of P1,140,000.

10. On 22 June 2000, A.O. 3.07 was once again revised to read:

A staff member requesting rental subsidy for a residential property owned by one or more relatives as defined in A.O. 2.01 or owned by a company in which the staff member has a substantial financial interest, has an obligation to disclose such information. As a general rule, in these cases, the staff member will not be eligible for rental subsidy unless otherwise authorized by the Director, BPMSD [Budget, Personnel, and Management Systems Department]. (A.O. 3.07, para. 4.2)

The definition of "relatives" in A.O. 2.01 included one's spouse. On 27 June 2000, the Respondent circulated an office-wide email titled "revisions and refinements to benefits related administrative orders" in which A.O. 3.07 was listed amongst other amended A.O.s. The reference to A.O. 3.07 said: "Refinements include clarification on documents and information required to facilitate processing of applications." The rental subsidy application included a notice advising staff to review the A.O.s before completing the form, all of which were available from the ADB intranet.

11. In 2000 and again in 2001, the Applicant applied for, and received a rental subsidy with a receipt for a payment for each year of P1,140,000. The Applicant claims that he did not become aware of the 27 June 2000 revision to A.O. 3.07 until August 2002. Realizing then that he was not eligible for rental subsidies, he made no further applications, but retained the rental subsidy received for 2000 and 2001.

Investigation

12. On 23 December 2002, a spot review of the Applicant's rental subsidy application revealed the Applicant's substantial financial interest in Richland and the apparent violation of A.O. 3.07.

13. On 25 February 2003, the Anti-corruption Unit of the Office of the General Auditor (OGAU) submitted a report to the Human Resources Division, finding that the Applicant was a substantial shareholder (owner) of a company that owned the property for which he was receiving rental subsidy and that this appeared to be a violation of A.O. 3.07. The OGAU concluded that the Applicant and his wife indirectly owned the property, and that the Applicant might have improperly received rental subsidies for the period from 22 June 2000 to 31 August 2002 (the OGAU reserved its finding for the period prior to the 22 June 2000 revision of the A.O. 3.07 pending the outcome of de Alwis case then before this Tribunal). See de Alwis, ADBAT

Decision No. 57 (18 August 2003). The OGAU recommended formal disciplinary action under A.O. 2.04 to determine if the Applicant failed to comply with A.O. 3.07.

14. On 17 March 2003, the Applicant explained that the property was owned by Richland and never by himself or his spouse and was therefore in accordance with A.O. 3.07 prior to its June 2000 revision; that the revision was not communicated to him; and that once he became aware of his ineligibility, he stopped applying for the rental subsidy benefit.

15. On 25 March 2003, the Director, BPCB, asked him for further proof of payments made to Richland. On 11 April, he explained the payments he had made since 1996. There was some discrepancy between his explanation and the earlier provided receipts.

16. On 7 May 2003, the Respondent initiated formal disciplinary proceedings under A.O. 2.04, leading to meetings held on 25 and 28 July between the Director, BPCB, and the Applicant, which were recorded in minutes dated 13 August 2003.

Review Committee

17. In November 2003, the President appointed a Review Committee under A.O. 2.04 to investigate the charges. The Applicant explained to the Review Committee that he had made a loan to Richland in 1996 to finance the purchase of the rental property and that the rental payments were offset against the loan. He noted that as a result of this "offsetting arrangement there were no changes in the cash position of either myself or Richland, so none could appear on the respective Bank statements."

18. In February 2004, the Review Committee submitted its report to the President. The Committee did not find credible the Applicant's excuse that the revised rules were not well communicated. The Committee concluded that the Applicant had a "substantial financial interest" in Richland which violated A.O. 3.07 as revised on 22 June 2000, but held that he did not violate A.O. 3.07 in its pre-2000 version which, it found, was "ambiguous." On whether the Applicant should have disclosed his corporate directorship, the Committee found that "it would have been prudent" for the Applicant to consult with the Bank as required under A.O. 2.02. With regard to payment, the Committee "could not provide clear opinion on the underlying flow of funds." The Committee concluded that the Applicant had violated A.O. 3.07, revised 22 June 2000, and that all rental subsidies received since 1 September 2000, amounting to US\$31,980.52 plus applicable interest, should be returned to the ADB. It also found that the Applicant's failure to report and discuss with BPMSD his circumstances at that time constituted an undue enrichment and abuse or misuse of ADB's benefits, and imposed the disciplinary sanction of withholding the salary increase due him in 2004, which would also impact on his future pension benefits.

President's Decision

19. On 30 June 2004, the President concurred with the bulk of the findings by the Review Committee but considered the recommended sanction inadequate. The President found that the Applicant committed misconduct under A.O. 2.04, in relation to A.O.s 2.02 and 3.07 for the misrepresentations committed in 2000 and 2001 in connection with his requests for payment of rental subsidy by failing to provide complete and accurate information on the underlying transactions that transpired in his lease agreement, all the more given his "substantial financial interest" in the rented property which led to his undue enrichment and abuse of an ADB benefit.

.... Furthermore, there were serious irregularities in his claims for rental subsidy even before 2000.

Accordingly, the President imposed the penalty of dismissal for misconduct pursuant to paragraph 4.2 (g) of A.O. 2.04. He further called for administrative action for the Applicant's return of all rental subsidies paid to him from September 1996 to August 2002, amounting to US\$116,863.81 plus interest.

Appeals Committee

20. On 8 October 2004, the Applicant appealed the President's decision to the Appeals Committee. On 11 October 2004, the Applicant provided for the first time a ledger and "official" receipts for the payments made between 1996 and 2002. On 28 March 2005, the Appeals Committee affirmed the President's decision in toto.

21. The Appeals Committee found that the Applicant violated A.O. 3.07 in its 2000 version and A.O. 2.02 in its 1999 version, and that there were serious irregularities in the Applicant's claims for payment of rental subsidy. The Committee found that the ADB's staff regulations had been correctly applied, and that the decision "did not constitute abuse of discretion, arbitrariness, discrimination, improper motivation, or violation of fair and reasonable procedure."

22. The Appeals Committee held that the Applicant's 40% interest in Richland constituted a substantial financial interest, and that the Applicant was in breach of his duty to disclose under A.O. 3.07 of June 2000 when he claimed rental subsidy in 2000 and 2001. The Committee found that in 2002 he should not only have stopped submitting rental subsidy claims but should have immediately contacted BPMSD to inform ADB of his situation.

23. The Appeals Committee found the Applicant in breach of A.O. 2.02 for serving as a director of Richland. The Committee pointed out that A.O. 2.02 (amended in 1998) prohibited such corporate directorship and required the prior approval of the President therefor.

24. The Appeals Committee found that the lack of formal corporate documentation to show actual rental payments to Richland were "grounds to doubt that the Applicant paid rent to Richland, and constitute a serious irregularity in the [Applicant's] claims for payment of rental subsidy from 1996 to 2002."

25. With regard to the difference in the disciplinary measure imposed on the Applicant compared to that earlier imposed on Mr. de Alwis (de Alwis, supra), the Appeals Committee considered that there were substantial differences between the two. The Committee noted that the ADB had recently taken a much stronger stance in implementing its anti-corruption policy.

Application to the Administrative Tribunal

26. On 30 March 2005, the President affirmed his decision to impose a penalty of dismissal and to take administrative action to recover rental subsidies paid to the Applicant from September 1996 to August 2002.

27. On 30 June 2005, the Applicant brought an Application to the Administrative Tribunal, requesting it, inter alia, "[t]o invalidate, annul, or set aside the Decision of the Appeals Committee that upheld and affirmed the decision of the President." Since the function of the Tribunal is to review actions of the Bank, we focus on the decision of the President.

II. FINDINGS

Claims of Rental Subsidies in 2000 and 2001

28. A.O. 3.07 was revised on 22 June 2000 and provided: "A staff member requesting rental subsidy for a residential property owned by one or more relatives ... or owned by a company in which the staff member has a substantial financial interest, has an obligation to disclose such information. As a general rule, in these cases, the staff member will not be eligible for rental subsidy." Despite that obligation, the Applicant claimed rental subsidy in August 2000 and again in August 2001 without disclosing his financial interest in Richland. The Applicant argues that he did not know about the 2000 revision until August 2002, when he voluntarily stopped claiming rental subsidies.

29. Staff of the ADB have an obligation to become aware of and to abide by its administrative regulations. In fact, when the Applicant joined the ADB, he signed an Acceptance of Appointment in which he agreed to be governed by present and future administrative regulations. "[I]gnorance of the law is not an acceptable excuse for misconduct." See Planthara, WBAT Judgment No. 143, (19 May 1995), para. 35. More specifically, "[a] staff member who signs a false certification ... cannot shift [responsibility for having done so] to the Organisation or to others by claiming ignorance." (Liu, UNAT Judgment No. 490, (26 October 1990), para. VIII. Accord, Morales, UNAT Judgment No. 445, (24 May 1989), para. IV).

30. The Respondent advised staff of changes to A.O. 3.07 via an office-wide email distributed on 27 June 2000. The Applicant claimed that he did not receive the email. However, during a meeting with the Director, BPCB, in July 2003 when shown a copy of this email, the Applicant "accepted that [he] appeared to have been mistaken on this issue."

31. The Applicant argued that "substantial" financial interest should be interpreted as majority interest and that 40% interest was not substantial. The A.O. could have specified that it applied to a "majority" rather than "substantial" financial interest. In using the term "substantial," it is clear that the intent was to apply the proscription to something less than a majority interest, and we find that 40% ownership is indeed a substantial interest. Moreover, the Applicant, together with his wife, owned 80% of Richland. Thus, there is no doubt that the Applicant had sufficient financial interest in the company precluding his eligibility for a rental subsidy. In fact, in a communication sent to the Director, BPCB, on 17 March 2003, the Applicant admitted that, upon learning of the revised A.O. 3.07, he "believ[ed] that the [revised] rules made [him] ineligible for rental subsidy."

32. Accordingly, the Tribunal finds that the Applicant violated A.O. 3.07 in 2000 and again in 2001 when he failed to disclose his substantial financial interest in Richland when requesting rental subsidy.

33. In the de Alwis case, this Tribunal held that the 1998 version of the A.O. 3.07 (that is, before the revision in 2000) did not exclude from rental subsidies staff members with some type of substantial involvement or control in an entity owning the property where the staff member lived, and that the 1998 version could not through interpretation be extended to cover cases which, on the face of it, it plainly did not cover (de Alwis, supra, para. 21). The penalty and administrative action imposed on the Applicant for rental subsidies in 2000 and 2001 was based on his violation of A.O. 3.07 in the 2000 version and not in the pre-2000 versions. Thus, the President's decision was not inconsistent with our holding in the de Alwis case.

Failure to Inform the ADB of the Subsidies Received in Violation of A.O. 3.07

34. In 2002, "upon learning of the revised A.O. 3.07" the Applicant stopped claiming rental subsidies, while retaining rental subsidies of approximately \$32,000 received for 2000 and 2001. With regard to his nondisclosure of the overpayments to the ADB, he stated to the Director, BPCB during a meeting in July 2003 that "as [I] considered [I was] in an ambiguous situation, [I] gave ADB the benefit of the doubt." The Applicant argued that had he not stopped availing himself of the rental subsidy, the ADB would perhaps have allowed him to draw rental subsidy continuously, and that he was being punished for his honesty. He also maintained that since he was no longer applying for rental subsidy, "there is no sense or logic" to inform the Bank.

35. As pointed out above (para. 31), the Applicant was aware in 2002 that the revised A.O. 3.07 made him ineligible for rental subsidy. Since that is the case, he must have been aware also that he had received rental subsidy in violation of A.O. 3.07 in 2000 and 2001. Even if he did not know about the revision to A.O. 3.07 until 2002, he was obligated not only to stop applying for rental subsidies but also to inform the ADB that he had received rental subsidies in violation of A.O. 3.07 in the previous two years. It is not up to the Applicant to give "ADB the benefit of the doubt." "When a staff member does not come forward immediately to bring to the attention of the Organisation [an error resulting in overpayment] and refund the overpayment, but waits until the situation is discovered by the Organisation before doing anything to rectify the situation, such conduct is per se intentional fraud and thus serious misconduct warranting summary dismissal." See Morales, UNAT Judgment No. 445, (24 May 1989), para. IV. The Applicant's failure to alert the ADB that he had received rental subsidies in 2000 and 2001 in violation of A.O. 3.07 while quietly keeping them was in fact a deliberate and intentional fraud and serious misconduct. His actions constituted improper retention of funds that were not his but belonged to the ADB.

Misrepresentation of Rental Payments

36. From 1996 until 2001, every time the Applicant applied for rental subsidy, he provided the ADB with a receipt which represented that Richland had received a rental payment in a certain amount on a specified date. The Applicant admitted later that these payments (in the form of transfer of cash or a check) did not take place. On 11 April 2003, the Applicant offered to the Director, BPCB, explanation of payments he had made since 1996. The explanation and proof provided by the Applicant at that time did not correspond with the receipts he had earlier submitted when claiming rental subsidies.

37. The Applicant subsequently argued that he was offsetting rental payments due from him to Richland against the loan payments due to him from Richland. The Applicant claimed that he had loaned Richland 3.8 million pesos in 1996 to finance the purchase of the rental property, and that "offsetting does not result in a cash or check transaction in the amount, or at the time of, the offset."

38. This Tribunal has held that "[i]n case reasonable doubt emerges as to the correctness of the statements made by staff members when applying for a benefit, it is incumbent on the staff member to substantiate the basis for his claim." (de Alwis, supra, para. 27). The Applicant highlighted the phrase "when applying for a benefit" contained in this statement and argued that the rule did not apply to him because seven years had elapsed since he made his first claim. The self-serving interpretation put forward by the Applicant is unacceptable. When reasonable

doubt emerges as to the correctness of a staff member's claim of a benefit, it is incumbent on the staff member to substantiate the basis for his claim.

39. The Applicant has not discharged a burden to prove that he made the loan to Richland or that there was an offsetting arrangement between him and Richland. The Applicant submitted no document to substantiate the loan, arguing that "a formal loan agreement is neither a requirement for a loan to be made nor for it to be legitimately repaid." If the Applicant made the loan, he would presumably have prepaid rent. Yet, each lease suggests that pre-payment of rent is due within five days of signing of the lease and every year he applied for a salary advance so he could prepay his annual rent. Were the offsetting arrangement in place, the Applicant would not have had a need to apply for such a salary advance. The purportedly "original" receipts were provided by the Applicant only at the appeal stage, casting doubt on their authenticity. Thus, even if there was an offsetting arrangement, the Applicant never revealed the arrangement in claiming rental subsidies between 1996 and 2001 but instead submitted receipts which hid the arrangement from the ADB.

40. The Tribunal finds that the Applicant's submission of the fraudulent receipts from 1996 until 2001 was an "abuse or misuse of the Bank's benefits and allowances" in violation of A.O. 2.04, para. 2.1(a) and that the Applicant "deliberately misled the Bank through false statement, misrepresentation or fraud" in violation of A.O. 2.04, para. 6.3.

Failure to Seek Approval for Directorship

41. A.O. 2.02 was revised in May 1998 (effective in January 1999) and provided: "Staff members ... shall not serve as a director, officer or partner of any entity, other than as an authorized representative of the Bank or with the prior approval of the President. Such prior approval shall not be required with respect to services performed as a director or officer for a charitable, social or religious entity" (para. 4.6(i)(a)). The Applicant interpreted the 1998 amendment to mean that staff members who intend to apply or are applying for rental subsidy for the first time will not be allowed to seek a position of a director, and that it did not cover staff members who were already a director. He alleges that he did not seek approval for his directorship because he was already a director.

42. The restrictive interpretation of A.O. 2.02 put forward by the Applicant runs counter to the ordinary meaning of the terms of the provision in their context. The provision prescribes that staff members shall not "serve as" a director of any entity without the prior approval of the President and specifically makes exception for a director for "a charitable, social or religious entity." It is therefore logical to interpret the provision as requiring a staff member serving as a director of any entity other than a charitable, social or religious entity to obtain approval of the President, regardless of whether he is already a director or is seeking the position of a director.

43. Accordingly, the Tribunal finds that the Applicant violated A.O. 2.02 in its 1999 version for failing to seek approval for his directorship. It is not unreasonable to suspect that the Applicant had reasons for not wanting to reveal his link with Richland. The Tribunal notes that the Respondent did not argue that this breach only should constitute dismissal but that it confirmed the Applicant's disregard for ADB's regulations and "is consistent with (and indeed, facilitated) his fraudulent conduct under A.O. 3.07."

Dismissal

44. The Applicant argued that the penalty of dismissal was too harsh on the grounds that the Applicant in the de Alwis case (*supra*) had not been dismissed.

45. The issue before this Tribunal is to determine the appropriateness of the President's action in this case, and the Tribunal assesses the President's action in the light of the governing law. In disciplinary cases "whether the sanction is not significantly disproportionate to the offence" and "whether the requirements of due process were observed" are among the factors to be considered. (Zaidi, ADBAT Decision No. 17, (13 August 1996), para. 10 quoting from Carew, WBAT Decision No. 142, (19 May 1995), para. 32). And, one of the requirements of due process is fair and equal treatment.

46. On the issue of proportionality, the Tribunal notes that the Respondent refers to the following facts to substantiate dismissal in this case: 1) the Applicant failed to disclose his ownership in Richland for two consecutive years in 2000 and 2001 in violation of A.O. 3.07; 2) once his ineligibility became known to him in 2002, he failed to advise the ADB of the overpayments previously made to him; 3) for six years the Applicant submitted receipts which falsely represented his rental payments. In the light of A.O. 2.04 (6.3), which provides that "[t]he disciplinary measure of dismissal for misconduct is particularly appropriate when the staff member has ... deliberately misled the Bank through false statement, misrepresentation or fraud," the Tribunal finds that the President's sanction was not significantly disproportionate to the Applicant's misconduct.

47. On the issue of fair and equal treatment, the Tribunal finds that disciplinary action has been taken in this case for different reasons and in different circumstances than in the de Alwis case. While in the de Alwis case the rental subsidy payments in question related entirely to the pre-2000 version of A.O. 3.07, in this case the Applicant violated A.O. 3.07 after the 2000 amendment. Moreover, the Applicant in this case intentionally omitted to advise the ADB of the overpayments to which he knew he was not entitled. "[O]fficials enjoy the protection ... of the rule of equality as between officials within the same category, but this rule does not apply to officials against whom disciplinary action has been or may be taken for different reasons and in different circumstances." (Khelifati, ILOAT Judgment No. 207 (14 May 1973)).

Recovery of Rental Subsidies from 1996 to 2002

48. The Applicant argued that there was confusion in the decision of the Appeals Committee. According to him, the Committee held that the Applicant was only liable for his alleged violation of the 2000 version of A.O. 3.07 and yet it affirmed the President's decision to recover the rental subsidy from 1996 up to 2002.

49. The focus of our attention is not the findings of the Appeals Committee but the decision of the President. The President did not decide to take administrative action to recover rental subsidies paid to him from 1996 to 2002 for violations of A.O. 3.07, but for submitting false and misleading receipts for those years. A.O. 2.04 provides that "[i]n case of overpayments that are due to staff members' false statements, fraud, misrepresentations or negligence, the Bank will recover the amounts so overpaid and the interest thereon." In the light of this provision, the Tribunal finds the President's decision to recover rental subsidies paid from 1996 to 2002 was appropriate.

Communication with Other International Financial Institutions

50. The Applicant maintained that he was unfairly "blacklisted" by the ADB with other International Financial Institutions, and demanded compensation for loss of earnings as a result of such "blacklisting." The Applicant referred to the memo from the Director of the Human Resources Division dated 1 October 2004: "On your request to remove you from the ADB blacklist, I am afraid that we cannot agree to this given that a mutually acceptable negotiated resignation was not reached with you." In response, the Bank asserted that "the Applicant's name is not on a list that will be circulated among other International Financial Institutions" and that "ADB does not have a blacklist of employees who have committed fraud." The Respondent denied that it "proactively share[s] information about employees who were terminated because of fraud," while maintaining that the ADB may "respond honestly to inquiries from prospective employers about the reasons for the Applicant's termination from ADB."

51. The Applicant declined the offer of the Respondent that the Applicant would resign and the Respondent would inform prospective employers that he had resigned. Under the circumstances, regardless of whether there was a "blacklist," the Tribunal finds that the Respondent is not barred from providing requesting prospective employers with information on the Applicant's dismissal. "No general principle of law bars one organisation from communicating to another information on its former employees, provided that such information is materially correct and related to the employees' professional qualifications and is not given with malicious intent." (In re Diaz, ILOAT Judgment No. 232 (6 May 1974)). Accordingly, the Tribunal denies the Applicant's demand for compensation.

DECISION

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