

# ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**DECISION NO. 77**  
**(2 August 2006)**

**Mr. A**  
**v.**  
**Asian Development Bank**

**Khaja Samdani, Vice-President**  
**Claude Wantiez**  
**Arnold Zack**

## **Plea of the Applicant**

1. Alleging that the Asian Development Bank (ADB) violated a selection procedure, the Applicant seeks compensation consisting of three years' salary of service as Senior Liaison Specialist, actual damages (\$33,148), communication costs (\$38), and moral damages (\$50,000). The Applicant has requested confidentiality. This request is hereby granted and the Applicant is hereinafter referred to as "Mr. A."

## **I. THE FACTS**

### **Background**

2. Mr. A has been working at the ADB since 20 March 1991. In January 2004, he was Senior Country Specialist, a Level 5 position.

3. On 22 January 2004, ADB advertised for the position of "Senior Liaison Specialist/Liaison Specialist, North American Representative Office (NARO)." According to para. 5.3 of the Administrative Order ("A.O.") 2.03 relating to implementing guidelines on selection/promotion panel with staff representation, the vacancy posting contained "a brief description of the responsibilities of the position, reporting requirements and selection criteria."

4. Mr. A, whose function had the same title – Senior Specialist - as the title listed in the announcement, applied for the new position.

5. Fourteen other staff members – three at Level 6 positions, three others at Level 5, seven at Level 4 and one National Officer - also responded to the advertisement.

6. According to Appendix 1 of A.O. 2.03:

- A selection panel was set up.
- Director General, Budget, Personnel and Management Department (BPMSD), forwarded to the selection panel the advertisement and the fifteen applications, including that of Mr. A.
- On 15 April 2004, the selection panel examined all fifteen applications and decided to consider first the applications of Level 6.

- The three Level 6 applicants were interviewed on 26 April 2004.
- After these interviews, the selection panel decided unanimously to choose one of the Level 6 applicants, Mr. D.

7. On 27 May 2004, Mr. A received an e-mail from the Human Resource Section (BPHR) notifying him of the selection's panel decision choosing Mr. D for the position.

### **The procedure**

8. On 1 September 2004, BPHR received Mr. A's request for compulsory conciliation and administrative review.

9. On 6 December 2004, Director General, BPMSD, found Mr. A's request to be without basis.

10. On 2 January 2005, Mr. A requested administrative review seeking implementation of an amicable settlement.

11. On 14 January 2005, Director General, BPMSD, rejected this request on the grounds that no settlement had been reached and that the failure of the conciliation effort could not be considered an administrative decision.

12. On 11 January 2005, Mr. A filed an appeal before the Appeals Committee against the decision of 6 December 2004. In a report dated 27 April 2005, the Appeals Committee recommended to the President of the Bank that he reject the claims of Mr. A.

13. On 17 May 2005, the President approved this recommendation and rejected the claims.

14. On 14 June 2005, Mr. A received notice of the decision of the Appeals Committee.

15. On 6 September 2005, Mr. A sent – via courier from the United States – an Application before the Tribunal. This Application was received on 13 September 2005, a day after the expiration of the time limit required by Art. II, para. 3(b) of the Statute of the Tribunal; nevertheless, on 19 December 2005, the Tribunal ruled that the delay was due to exceptional circumstances and that the Application should be treated as validly filed.

### **II. FINDINGS**

16. At the outset, the Tribunal endorses some of the arguments or assertions of the Bank :

“The paramount importance of securing the highest standards of efficiency and technical competence” (para 4.1 of A.O. 2.03) is the overarching principle in appointment and promotion (para. 47, Answer).

“Appointment and promotion decisions are matters that are within the Bank's discretion” (Guioguo, ADBAT Decision No. 59 (8 August 2003)) for which the Tribunal cannot substitute its own (para. 32, Answer).

However, the Tribunal cannot admit completely the reasoning of the Bank when it asserts that it followed step by step “the prescribed procedure in A.O. 2.03 from the posting of the vacancy to the notification of candidates of the outcome” (para. 4, Answer).

17. Actually, the evidence shows that as stated above, the vacancy posting issued on 22 January 2004 was for a position of “Senior Specialist.”

18. According to the Bank, this announcement was an administrative oversight: in fact, the position was that of a “Principal Specialist”, Level 6, and should have been so listed. But,

- Neither Mr. A nor the other candidates were formally informed of the oversight at the time they applied.
- The advertisement did not mention the Level – 5 or 6 – of the position.
- According to para. 5.3 of Appendix 1 of A.O. 2.03, that announcement contained “a brief description of the responsibilities of the position, reporting requirements and selection criteria.”

19. The selection criteria contained in the announcement were:

- “suitability to undertake the responsibilities mentioned above at the required level;
- a university degree ... ;
- at least five years of relevant professional experience ... ;
- experience working in development in multiple countries ... ;
- excellent oral and writing communications skills in English ...”

None of these criteria suggested that the vacancy posting was not a position of a senior specialist or that it was a position of principal specialist with priority access, to applicants of Level 6. Thus, Mr. A could reasonably have believed that he met the selection criteria mentioned in the vacancy.

20. According to para. 2(c) of Appendix 1 of A.O. 2.03 : “the selection panel shall first consider the applicants who are in the same levels as those of the vacant position. If the panel considers that none of those applicants are suitable for the vacant position, it will record its observations and will consider applicants who are one level below that of the vacant position ...” (emphasis supplied).

21. Contrary to the Bank’s assertion, that text set up a priority in the favor of the applicants who are in the same level as that of the vacant position.

22. Consequently, Mr. A – who, at the time of the announcement, had a position of Senior Specialist – could reasonably have believed that his application – as the applications of the three other applicants of Level 5 – would be considered first by the selection panel.

23. As stated above, on 15 April 2004, after examining all 15 applications and their accompanying documents against the selection criteria, the selection panel decided to take into consideration first the applicants of Level 6. The Tribunal is of the opinion that, because of the appearance created by the “clerical” oversight, the selection panel, having done so, did not abide by the selection process.

24. Before management approved the selection panel’s decision, Mr. A alerted BPMSD to an apparent oversight; instead of taking action and re-advising the position to correct the alleged mistake, the Bank decided not to do so. Because the Bank persisted in its mistake, Mr. A was compelled to bring this case before us.

25. We address the alleged material and alleged moral damages suffered by Mr. A.

### **The material damages**

26. Mr. A claims as follows (para. II. d, Application)

(i) the equivalent of 3 years’ salary (equal to the length of time I would have served at NARO) to facilitate my pursuing an experience, under a special leave of absence, similar to what I would have had at NARO; (ii) estimated actual damages of \$ 33,186 based on three years’ salary, escalated by 4% per year, divided by the number of level 4 and 5 applicants (11) meeting the selection criteria for the NARO position (\$33,148), representing an approximate value of (and the percent chance of receiving) the missed opportunity to be properly considered for a three-year assignment at NARO plus communications costs of \$38 involved in the tribunal application, administrative review, and appeal.

The Tribunal is of the opinion that these claims are without merit: even if the selection panel had decided to consider first the applicants of the level of Mr. A – Senior Specialist –there was no certainty that he would be selected for the vacant position.

27. Indeed:

According to para 5.7 of the A.O. 2.03 : “Staff members may apply for a position with a lower level than their current personal level.”

Thus, that text allowed staff members of Level 6 – Principal Specialist – to apply for a position of Senior Specialist – Level 5

Mr. A does not deny that the selection panel – on its first meeting of 15 April 2004 – reviewed all fifteen applications – (three at Level 6, four at Level 5, seven at Level 4 and one National Officer) forwarded – with all the required documents – by BPMSD.

There were – besides Mr. A’s application – three other candidates from Level 5: any one of whom could have been selected instead of Mr. A, a selection option which was within the Bank’s discretion. There was no assurance that Mr. A would have been selected among the applicants from his own level.

28. It follows that the decision of the panel committee to select Mr. D might have been taken even if the Level 5 description had been correct without the alleged mistake asserted by the Bank above.

29. Consequently, the Tribunal agrees with the Bank that the error in level listing constituted harmless error and that there is no causal link between the decision of the panel committee and the alleged damages and thus denies this portion of the claim.

### **The moral damage**

30. The Tribunal understands the disappointment of Mr. A. The offered position was very attractive for him: at the time of the announcement, he was a staff member of the East and Central Asia Department, People's Republic of China Resident Mission and the vacancy was for a job of "Senior Liaison Specialist ... North American Representative Office", with assignment to be in his country of origin.

31. The Applicant has failed to prove not only the fault of the defendant but also any causal link between that fault and the moral damages alleged. As the UN Administrative Tribunal noted in Rodriguez, UNAT Judgement No. 167 (23 March 1973), para. VI, "in awarding damages [the Tribunal] has to be satisfied that the damages claimed follow naturally as a consequence of the action contested."

32. It is true that the announcement contained a mistake. But, as seen above, even if the selection panel had decided to consider first the applicants of Mr. A's Level, there was no assurance that he would have been selected; he was just one candidate out of four candidates of the same level, none of whom protested, while the Bank retained the right to examine the candidacy of the Level 6 applicants as well. Each applicant runs the risk of not being selected and the Bank was not at fault for that fact, even if it created some disappointment.

33. Therefore, the Tribunal decides to dismiss this part of the claim.

### **DECISION**

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