

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 79
(17 August 2007)**

**Nagarajah Gnanathurai
v.
Asian Development Bank**

**Florentino P. Feliciano, President
Khaja Samdani
Yuji Iwasawa**

I. THE FACTS

1. The Applicant joined the Asian Development Bank (the “Bank” or “ADB”) on 31 August 1990 as a Programs Economist. He later became Senior Programs Economist and, after some time, was appointed Country Director, Uzbekistan, where he set up a Resident Mission for the ADB. After his return to the Bank’s Headquarters as Assistant Chief Economist, he was made Country Director, Afghanistan Resident Mission (“AFRM”), and served as such from 22 January 2003 to 18 February 2005. Back once more at the Bank’s Headquarters, he was designated Advisor, Office of the Director General, South Asia Department (SARD) Level 8. There he remained until his dismissal from the service of the Bank on 16 November 2005.

Procedural History

2. A preliminary inquiry was conducted by the Office of the Auditor General, Integrity (OAGI) into allegations about possible violation by the Applicant of Administrative

Order (A.O.) No. 2.02 while he was Country Director, AFRM. The OAGI's preliminary findings, set out in a memorandum dated 24 June 2005 by the Auditor General to the Director General, Budget, Personnel and Management Systems Department (BPMSD), were that the Applicant had obtained an improper payment from Kjaer & Kjaer A/S (Kjaer) (a Danish transportation company represented in Kabul) in the form of reimbursement by Kjaer for the cost of the airline travel of the Applicant's wife from Manila to Oslo to Manila in August 2003. On 28 June 2005, the Deputy Director General, BPMSD and the Director, Human Resources Division (BPHR) met with the Applicant to advise him of the charges against him and to seek his explanations concerning OAGI's findings. At this meeting, the Applicant denied having sought or received any reimbursement for his wife's August 2003 travel from any third party, including Kjaer.

3. On 22 July 2005, the Director General, BPMSD informed the Applicant of the initiation by the Bank of formal disciplinary proceedings against him pursuant to paragraph 9.2(a) of A.O. 2.04, on the basis of the preliminary findings of OAGI. A Review Committee of three persons was established by the Bank under paragraph 9.3 of A.O. 2.04 to review and investigate the charges.

4. On 4 November 2005, the Review Committee submitted its Report to the President of the ADB. The majority of the Committee concluded that the available evidence, viewed in its totality, sufficiently established that the Applicant had committed the acts with which he was charged and that he should be dismissed from service for misconduct. The third member of the Committee dissented because he believed that there was lack of "direct witness

testimony or documentary evidence” that the Applicant had been reimbursed by Kjaer. The dissenting member instead urged that disciplinary proceedings be commenced against the Applicant for having misrepresented his participation or involvement in the procurement process at the AFRM. If such misrepresentation were proven, the third member stated, then dismissal of the Applicant would be warranted, considering that misrepresentation to the ADB by a senior official vested with management authority was unacceptable conduct.

5. In a Decision dated 15 November 2005, the President accepted the Review Committee’s majority recommendation. Considering that receiving an improper payment from a supplier amounted to serious misconduct and in view of all the circumstances of the Applicant’s case, the President decided to dismiss him for misconduct. His services with the ADB were terminated with effect from 16 November 2005.

6. The Applicant contested the President’s decision by filing an Appeal with the Appeals Committee on 23 January 2006. The principal contention of the Applicant in his Appeal was that the President’s decision had disregarded the basic rules of evidence and denied him due process. When the Appeals Committee was constituted, the Applicant objected to the inclusion of one of the members of the Committee, upon the ground that such member reported directly to a staff member who had sat in the Review Committee. The Appeals Committee stated that there was no reason to doubt that the challenged member would discharge his duties as such with independence and integrity. Nevertheless, the Committee acceded to the request of the Applicant to replace the challenged member.

7. In the proceedings before the reconstituted Appeals Committee, the Director General, BPMSD submitted the Respondent's Statement on 24 February 2006. Thereafter, on 9 March 2006, the Applicant filed his Counter Statement to which the Respondent in turn submitted a Reply. The Applicant filed his Rejoinder on 11 April 2006 and the Respondent submitted a Reply (or Sur Rejoinder) on 20 April 2006. The Appeals Committee then asked the Respondent to provide further comments on the Applicant's claim that he had been discriminated against because the Bank had not initiated disciplinary proceedings against another staff member who, the Applicant claimed, had been implicated by direct evidence in a fraudulent claim. The Respondent submitted its written comment which it requested be considered *in camera* because of the confidential nature of the information contained. The Committee granted this request.

8. On 23 May 2006, the Appeals Committee submitted its Report and Recommendation to the ADB President. The Committee found no evidence of abuse of discretion, arbitrariness, discrimination, improper motivation or violation of fair and reasonable procedures in the conduct of the investigation and examination of the evidence. The Appeals Committee recommended rejection of the Appeal, and this recommendation was adopted by the President.

9. The Applicant filed with the Tribunal his present Application on 14 September 2006. In this Application, he asks the Tribunal to set aside the Decision of the President of 15 November 2005 and to order his immediate reinstatement and payment of full backwages and other benefits from the date of dismissal up to actual reinstatement. In addition, he asks for actual damages equivalent to his salary from the time of his dismissal until his reinstatement,

plus moral damages in the amount of US Dollars One Million (US\$1,000,000.00) for violating his rights to due process and for causing him mental anguish, humiliation and impairment of future employment opportunities. Still further, the Applicant seeks exemplary damages of not less than US Dollars One Million (US\$1,000,000.00), together with all legal costs incurred by him in all the proceedings up to and including those before this Tribunal.

10. The Respondent, on 17 November 2006, submitted its Answer through the Office of the General Counsel. On 3 January 2007 the Applicant filed his Reply and on 23 February 2007, the Respondent submitted a Rejoinder. On the same day, 3 January 2007, that he filed his Reply, the Applicant submitted an “Omnibus Motion” asking firstly, that this case be heard by the members of the Tribunal *en banc* and secondly, that the Tribunal hold an oral hearing where the Auditor General, Mr. Peter Egens Pedersen, and Mr. Stephen Almsteier, former Resident Security Coordinator, AFRM should be called to present themselves for cross examination. The Tribunal denied the request to refer this case to the *banc* but forwarded the Applicant’s request for an oral hearing to the Respondent requesting its comment thereon. The Respondent interposed no objection to the calling of Mr. Pedersen and Mr. Almsteier, although the latter was no longer an ADB staff member but rather a consultant to the ADB. On 10 and 11 May 2007, the Tribunal, through its President, convened the oral hearing. At this hearing, both Mr. Pedersen and Mr. Almsteier appeared. Counsel for the Applicant cross-examined Mr. Pedersen on the statements and testimony he had given or otherwise made available to the Review Committee and the Appeals Committee. Mr. Almsteier was also cross-examined by the Applicant’s lawyers. The Applicant himself testified at the hearing and was questioned by the Bank’s General Counsel. The Respondent submitted a post-hearing Memorandum on 6 July

2007 while the Applicant filed his Memorandum on 11 July 2007. Thus, on 23 July 2007, the present Application was ready for deliberation by the Tribunal.

Summary of Facts

11. During the period between August 2004 and February 2005, while the Applicant was Country Director, AFRM, a number of allegations were made against him and forwarded to the ADB Headquarters.¹ However, the Bank upon informal inquiry found that except for the allegations of disclosure of ADB internal emails, none were sufficiently substantiated nor of sufficient importance as to warrant charging the Applicant with unsatisfactory conduct or misconduct. In respect of the allegations of improperly disclosing internal ADB emails to the Afghanistan Minister of Public Works, the Respondent found evidence indicating that the Applicant's conduct was unsatisfactory. Taking all circumstances into account, however, the Respondent decided not to bring disciplinary charges against the Applicant.

¹ The allegations made by Mr. Almsteier against the Applicant during the period August 2004 to February 2005, are set out in a Memorandum entitled ADB's Clarifications of Events Referred to in the Applicant's Submission to the Review Committee dated 5 October 2005. This memorandum is included in the Respondent's Answer as Annex 2 thereof:

"[The Applicant]:

- (a) engaged Mr. Hasham Saad as Northern Security Coordinator without an adequate background check, and without following established recruitment procedures;
- (b) breached UN Security rules by traveling with the Minister of Public Works to Pul e Kumri without necessary clearance from UNSECOORD, and did not follow prescribed security procedures (HF/VHR radios switched on and radio checks and information given to AFRM every 30 minutes);
- (c) attempted to cover up the above trip by having AFRM staff alter the logbook and falsely state that they had not accompanied him to Pul e Kumri;
- (d) disclosed internal ADB emails to the Minister of Public Works;
- (e) attempted to damage the reputation of Mr. Stephen Almsteier, the Regional Security Coordinator ("RSC") by having a statement circulated at AFRM for signature that stated that RSC had engaged in homosexual activities in his room at the AFRM guesthouse with young boys;
- (f) engaged in reprisals against certain male AFRM staff by encouraging female AFRM staff to make sexual harassment claims against such male staff;
- (g) was involved in producing a forged letter from the Ministry of Interior that expressed concern about AFRM's engagement of Mr. Stephen Almsteier, the Regional Security Coordinator."

12. In the course of OAGI's preliminary inquiries into the then proposed purchase in 2003 from Kjaer of an armored vehicle for AFRM's use and into allegations that the Applicant had asked Kjaer for money in view of that potential purchase, OAGI had contacted Mr. Jeff Rosenberg, Kjaer's representative in Kabul. Mr. Rosenberg confirmed to OAGI that the Applicant had asked for money but was informed that that would not be possible. At the same time, Mr. Rosenberg had mentioned to the Applicant the possibility of providing him with airline tickets to Denmark. These tickets were considered complimentary tickets intended to promote visits by potential customers of Kjaer's factory in Denmark. Upon further inquiries by OAGI at Kjaer's HQ in Copenhagen, Kjaer's Managing Director provided OAGI by email with a scanned copy of a provisional receipt issued by the King of Travel, Inc., Makati, to the Applicant's wife in the amount of US\$2,427. The Managing Director also informed OAGI that the provisional receipt had been presented by and reimbursed to the Applicant from Kjaer's petty cash fund in Kabul.²

13. OAGI verified from the King of Travel agency that an airline ticket Manila-Singapore-Copenhagen-Singapore-Manila was issued to the Applicant's wife. The cost of the ticket was US\$2,427.00. Thereupon, OAGI recommended commencement of formal proceedings against Applicant and his suspension with pay pending such proceedings.

14. On 28 June 2005, three days after receiving OAGI's preliminary investigation report, the Deputy Director General, BPMSD and the Director, BPHR met with the Applicant to

² Email message from Kim Vandbaek, Managing Director, Kjaer to Renadi Budiman, Integrity Specialist, ADB, OAGI. Part of Attachment No. 2 to Respondent's Answer.

inform him of the charges against him and to seek his explanation concerning OAGI's preliminary findings. In that meeting, the Applicant stated that he and his wife had indeed traveled to Oslo in the summer of 2003, availing themselves of the Applicant's exceptional leave travel entitlement, to visit his daughter who was studying in Oslo. His wife had traveled from Manila to Oslo via Copenhagen, taking a train from Copenhagen to Oslo. The Applicant vigorously denied having sought or received any reimbursement for the cost of his wife's trip from any private party, including Kjaer. The Applicant submitted a photocopy of his personal Citibank check no. 5104 paid to "King of Travel Inc." for US\$4,557.00 dated 3 July 2003 with which, he claimed, he had paid for his wife's travel tickets to Oslo. He also stated that he had submitted all the receipts relating to his August 2003 family trip to Oslo to the Finance and Administration Unit of AFRM, so that his reimbursement claims could be processed upon his return to Kabul. He added that the ADB Headquarters Controller's Department had paid the amounts due to him, explaining that if the original documentation had not been submitted to the Controller's Department, he would not have been reimbursed for his family's Oslo trip of August 2003.³

15. Continuing its investigation, OAGI found that in support of his claim for reimbursement for his wife's leave travel in August 2003, the Applicant had attached two

³ In Applicant's Statement of Appeal submitted to the Appeals Committee on 20 January 2006, Applicant attached a "[The Applicant's] Claims Reconciliation Table" (Annex E to Application). In this table, the following comment of the Applicant appears in respect of the 20 January 2003 and 13 January 2003 tickets of his daughter and wife on their education travel Manila-Oslo and Manila-Oslo-Manila, respectively:

"2. Receipts are not required to be submitted as reimbursements are made on fixed % of Full Economy Class travel."

"3. Only boarding passes are required to be submitted to liquidate advances."

This comment of the Applicant is very difficult to reconcile with his explanation given at his meeting on 28 June 2005 with BPMSD and BPHR.

receipts dated 13 and 20 January 2003 from the Marco Polo Travel Company, Manila totaling US\$1,660.00. In other words, Applicant had submitted with his request for reimbursement of the August 2003 leave travel of his wife to Oslo and back, receipts pertaining to an earlier unrelated journey of his wife and daughter also to Oslo made in January 2003. The Applicant attached to his Reply of 3 January 2007 a receipt for US\$2,427.00 from the King of Travel dated 7 July 2003, stating that this was the “official receipt” which he had obtained when his check issued to King of Travel had cleared, whereas the King of Travel receipt (dated 3 July 2003) which Kjaer had stated was in its possession, was a “provisional receipt.” The Applicant said that he had submitted the “official receipt” to the AFRM Finance and Administration Unit when he requested liquidation of his wife’s leave travel. The “official receipt” which Applicant attached to his Reply was not among the documents he received from the BPMSD in response to his request for all relevant documents on file with the ADB Controller’s Department.

16. The Applicant offered the explanation that the AFRM Finance and Administration Unit in Kabul must have made an “honest mistake” in processing his travel claims. This explanation, however, is controverted by the AFRM Finance and Administration Unit staff member who had actually prepared the Applicant’s request for reimbursement (“Travel Reimbursement Authority” [TRA]), and who stated that he had not seen either the King of Travel receipt nor the airline ticket used by the Applicant’s wife in her Manila-Oslo-Manila trip in [August] 2003.⁴ Finally, the Applicant had personally signed the TRA relating to the August 2003 trip of his wife to which the January 2003 receipts, totaling US\$1,660.00 were attached. He was reimbursed by the ADB US\$1,660 for the August 2003 trip; he did not protest in 2003

⁴ See Respondent’s Answer, Annex 24, Attachment 3 thereto.

nor subsequently, until the commencement of this case, that he had been under-reimbursed by the ADB.

17. On 9 August 2005, the Auditor General, then on his home leave in Denmark, visited Kjaer's Headquarters in Svendborg, Denmark. There he met with the Kjaer Managing Director, who showed him the original King of Travel provisional receipt, a scanned copy of which had been earlier emailed to OAGI upon its request. This original provisional receipt had "1500" and "927" manually written on its upper portion. The Managing Director explained to the Auditor General that the Kjaer representative in Kabul had reimbursed the amounts written on the receipt to the Applicant out of petty cash. The Auditor General was later informed by a Kjaer administrative assistant that the sum of US\$1,500 had been entered into Kjaer's account ledger in its Headquarters, against the King of Travel receipt as of 19 July 2003 and that no other amount had been entered in the Kjaer ledger account against that receipt. The Auditor General mentioned the "1500" and "927" figures in reporting on his visit in a Note to File on 18 August 2005, a copy of which was furnished to the Applicant on 22 August 2005. The Auditor General expressed his belief that US\$1,500 was the maximum amount that Kjaer could pay out of its petty cash fund in Kabul and that splitting the reimbursement into two sums became necessary. The scanned copy of the original provisional receipt emailed by Kjaer to OAGI, does not exhibit the figures "1500" and "927." The Managing Director explained that those figures were covered when the receipt was scanned and emailed to OAGI.

18. In its Report dated 4 November 2005 to the ADB President, the Review Committee stated that the Applicant had misrepresented his involvement in procurement matters

in the AFRM. In his memorandum dated 3 August 2005 to the Review Committee commenting on the findings of OAGI, the Applicant wrote:

“[I]n AFRM, the procurement process and other pertinent requirements were always handled by the Finance and Administrative Unit, which had the primary responsibility for all procurement and not by me when I was Country Director.” (Emphasis added)

19. The Review Committee, however, found the above statement of the Applicant to be simply untrue. The Applicant signed the order for the purchase of a Nissan Patrol 4x4 from Kjaer in March-April 2003. He claimed that he had “vetted” the order before signing it. It also appears that the Applicant had met a Kjaer representative before the purchase order was signed. The purchase order was the final act that committed the AFRM to purchase the vehicle. In its Post-hearing Memorandum of 6 July 2007, the Bank stated that the Applicant, as Country Director, acted as Chairman of the AFRM Procurement Committee. On the face of the purchase order, the Applicant had added in his own handwriting instructions to AFRM staff that the purchase was to be charged to “TAP RETA” and that payment was to be expedited. All the members of the Review Committee found it “wholly” unacceptable that a staff member, particularly one in the Applicant’s position of authority, would lie to the ADB under any circumstance. Such a lie severely erodes the credibility of his denial of wrongdoing and all other statements he had made in his defense.⁵

20. The basic explanation submitted by the Applicant was that he had been the victim of a prolonged and complex conspiracy to destroy his career in the ADB and his personal

⁵ Review Committee Report dated 4 November 2003 attached to Annex D of the Application.

reputation. The Applicant essentially ascribes leadership of this conspiracy to Mr. Stephen Almsteier, the former Resident Security Coordinator, AFRM who regarded himself as “a whistleblower” and who had brought to the attention of officials in the ADB Headquarters, certain acts of the Applicant. The Applicant in turn made to the ADB Headquarters deplorable insinuations and allegations concerning the background and activities of Mr. Almsteier before he joined the ADB, and his private life. The Applicant, moreover, alleged that Mr. Almsteier had without authority ransacked his quarters at the AFRM offices in Kabul while he was away from Kabul. The Applicant was in effect suggesting that Mr. Almsteier had thereby found and taken away the 3 July 2003 provisional receipt and forwarded the same to Kjaer.

21. The Tribunal considers that there is no need to address in any detail the above explanation which the Applicant proffered to the Review and Appeals Committees and has continued to stress in his submissions to this Tribunal. It seems sufficient to note that the Applicant has not submitted any evidence tending to show that Mr. Almsteier, who joined the Bank only in 2004, had anything to do with the 2003 King of Travel provisional receipt finding its way into the files of Kjaer. In addition, the Applicant has not provided any evidence that any of the ADB Headquarters staff were conspiring either *inter se* or with Mr. Almsteier or anyone else, to damage the Applicant’s career in ADB, to blacken his name and to undermine and erode his authority in AFRM as Country Director. The Applicant has reiterated many times that Mr. Almsteier was directed by ADB Headquarters to report to the Deputy Country Director in Kabul, rather than to the Applicant. While this clearly distressed the Applicant, no reasonable connection with his case and no arbitrariness on the part of ADB Headquarters are visible to the Tribunal.

22. The Tribunal would note, finally, that the Respondent procured the attendance of Mr. Almsteier at the oral hearing requested by the Applicant, held on 11-12 March 2007. Applicant's counsel questioned Mr. Almsteier at length. In the Tribunal's view, nothing persuasive and supportive of the Applicant's explanations and pertinent to the present case, was elicited from Mr. Almsteier.

II. FINDINGS

The Applicant's Principal Contentions

23. In his Application, the Applicant listed the following as his principal legal pleas:

“Respondent, ADB, violated the basic terms and conditions of Applicant's contract of employment and terms of appointment by:

a. Dismissing him from the service without justifiable cause and without observance of due process;

b. Failing to observe fair, impartial and transparent personnel policies and undermining and sidelining the Applicant by surreptitiously changing the chain of command thus creating an invective environment in the Afghanistan Resident Mission where Applicant was Country Director. The surreptitious changing of the reporting arrangements and disrupting the chain of command by the then new Senior Advisor, Mr. Edward Haugh Jr. was a recipe for disaster and the beginning of all the trumped up allegations made by Mr. Almsteier and others against the Applicant.

c. Failing to observe fair, impartial and transparent personnel policies in the imposition of penalties in violation of A.O. 2.04 para. 6;

d. Subjecting Applicant to unfair treatment and undue harassment by allowing the Resident Security Coordinator at the Afghanistan Resident Mission to levy frivolous and trumped up charges in

a piecemeal basis, seven of which were dismissed later by the Respondent;”⁶

The above pleas may be consolidated into three principal contentions: firstly, the Respondent dismissed the Applicant from the service without justifiable cause; secondly, the Respondent dismissed him from the service without observance of due process, and thirdly, the Respondent failed to observe fairness and impartiality in imposing the penalty of dismissal.

Considerations

24. It is well to begin by noting that the task of the Tribunal is not to pass upon the sound or unsound nature of the President’s decision to dismiss the Applicant. The task of the Tribunal has been described in *Lindsey*, Decision No. 1 [1991] 1 ADBAT Reports 5, para. 12 in the following terms:

“...The Tribunal cannot say that the substance of a policy decision is sound or unsound. It can only say that the decision has or has not been reached by the proper processes, or that the decision either is or is not arbitrary, discriminatory, or improperly motivated, or that it is one that could or could not reasonably have been taken on the basis of facts accurately gathered and properly weighed.” (Emphasis supplied)

25. In *Carew*, WBAT Decision No. 142, [19 May 1995], para. 12, the World Bank Administrative Tribunal provided the following summary of the essential tasks of the Tribunal in disciplinary cases, that is, in determining whether the disciplinary proceedings had been attended by arbitrariness, discrimination or improper motivation:

⁶ Application, page 5

"In [disciplinary] cases the Tribunal examines (i) the existence of the facts, (ii) whether they legally amount to misconduct, (iii) whether the sanction imposed is provided for in the law of the Bank, (iv) whether the sanction is not significantly disproportionate to the offence, and (v) whether the requirements of due process were observed."

Items (i) and (v) of the *Carew* listing may be consolidated into one: whether the procedures followed for the determination of the operative facts were consistent with the requirements of due process.

26. Determination of whether the facts in the present case, assuming they have been ascertained conformably with applicable requirements of due process, legally amount to misconduct on the part of the Applicant, may be addressed fairly quickly. The relevant basic norm found in A.O. 2.02 (30 June 2003) includes among the duties and responsibilities of staff members the following:

“(4.8)(vi) Benefit from ADB Transactions prohibited

Neither staff members nor members of their immediate family shall accept benefits, favors or gifts from sources external to ADB with respect to any ADB transaction, whether by way of compensation, commission, favorable buying or selling arrangements, gift, employment or otherwise...” (Emphasis added)

A.O. 2.04 (as it existed in 9 July 1998) expresses the underlying policy of disciplinary sanctions and describes “misconduct” and “unsatisfactory conduct” in the following manner:

“1. Policy

(1.2): The purpose of the disciplinary measures is to protect the integrity and efficiency of the Bank which may be jeopardized by the unsatisfactory

conduct or misconduct of a staff member. Disciplinary measures shall be imposed only following a thorough investigation of the facts and after affording the staff member concerns an opportunity to state his/her case.

2. Examples of Unsatisfactory Conduct or Misconduct

(2.1): Disciplinary measures may be imposed whenever there is a finding of unsatisfactory conduct or misconduct. Misconduct constitutes unsatisfactory conduct which is particularly serious and may warrant the staff member's dismissal or summary dismissal in accordance with paragraphs 4.2 (g) and (h), 6.3 and 6.4. Unsatisfactory conduct or misconduct does not require malice or guilty purpose. Unsatisfactory conduct or misconduct includes, but is not limited to, the following acts and omissions:

...

(d) Abuse of authority or trust to the detriment of the Bank, or any conduct of such character as may be detrimental to the name of the Bank;

(e) Misuse of official position, authority, Bank funds or other public funds for improper purposes, pecuniary gain or advantage for the staff member or others;"

... (Emphasis supplied)

27. It is scarcely open to disputation that an ADB official's act of receiving money from a supplier to the ADB in connection with an ADB transaction, would constitute serious misconduct within the meaning of A.O. 2.04. The amount of the money received may be comparatively modest but receipt thereof may nevertheless constitute misconduct or unsatisfactory conduct. The Applicant also argues that no causal connection between accepting (assuming *arguendo* that he had accepted) reimbursement from Kjaer of the amount of the provisional receipt, and an ADB transaction, has been shown by the Respondent. The purchase of the Nissan Patrol 4x4 in March-April 2003 took place before any putative reimbursement of the 3 July 2003 provisional receipt. Moreover, the Applicant contends that in 2004, Kjaer was a losing bidder in the procurement of an armored car for the use of the AFRM. The Tribunal

considers that receipt of money which directly leads to favoring of the donor-supplier in a specific transaction with the ADB, is not essential for such receipt to constitute misconduct. Causal connection in the context of alleged corruption is rarely identifiable with certainty or precision. But with or without proof of such causality, receipt of financial benefits in whatever form from a supplier by a senior ADB official is bound to impair the reputation of the ADB. Reputational damage is necessarily a serious matter for a multilateral financial institution mandated to serve the needs of poor and developing countries.

28. The question whether the sanction imposed (i.e., dismissal from the service) is provided for in the law of the Bank, may similarly be disposed of quickly. A.O. 2.04, Section 4 provides in part as follows:

“4. Disciplinary Measures

...

(4.2): Depending on the circumstances of the case, one or more of the following disciplinary measures may be taken by the Bank when unsatisfactory conduct or misconduct is determined to have occurred, provided the disciplinary procedure against the staff member is initiated within one year from the date the unsatisfactory conduct or misconduct is discovered and brought to the attention of the Director, Budget, Personnel and Management Systems Department (BPMSD):

...

(g) Dismissal for misconduct"
(Emphasis supplied)

A.O. 2.04, Section 4 outlines criteria for imposing disciplinary measures including dismissal. The basic requirement is proportionality between the offense and the penalty:

“6. Criteria for imposing disciplinary measures

6.1 The disciplinary measure should be proportionate to the seriousness of the unsatisfactory conduct."
(Emphasis added)

In applying the requirement of proportionality, A.O. 2.04 identifies factors to be taken into account by the decision maker:

"6.2 In assessing the seriousness of the unsatisfactory conduct, the following criteria should be taken into consideration:

- (a) the degree to which the standard of conduct has been breached by the staff member;
- (b) the gravity of the adverse consequences and damage caused to the Bank, its staff or any third party;
- (c) the recurrence of unsatisfactory conduct by the staff member, particularly when there is a repetition of unsatisfactory conduct of a similar nature;
- (d) the official position held by the staff member and the extent to which the staff member was entrusted with responsibilities in matters to which the unsatisfactory conduct relates;
- (e) collusion with other staff members in the act of unsatisfactory conduct;
- (f) whether the unsatisfactory conduct was a deliberate act;
- (g) the situation of the staff member and the staff member's length of satisfactory service; and
- (h) the staff member's admission of the unsatisfactory conduct prior to the date the unsatisfactory conduct is discovered and any action taken by the staff member to mitigate any adverse consequences resulting from his/her unsatisfactory conduct."
(Emphasis supplied)

29. A.O. 2.04, Section 6 goes on to say:

"6.3 The disciplinary measure of dismissal for misconduct is particularly appropriate when the unsatisfactory conduct is serious or recurrent, or has jeopardized, or would in the future be likely to jeopardize, the reputation of the Bank and its staff, in case of serious

threats of staff members against their supervisors or other staff members, when it is found that a staff member has misused funds of the Bank or other public funds, or if the staff member has, prior or subsequent to appointment, deliberately misled the Bank through false statement, misrepresentation or fraud (including a misleading omission from a Personal History Form or a Medical history Form). Dismissal for misconduct is also appropriate when the breach of trust is so serious that continuation of the staff member's service is not in the interest of the Bank." (Emphasis supplied)

30. The standard of conduct here at stake was very substantially breached by the act with which the Applicant was charged: receiving an improper payment from a supplier of the ADB. The consequences for the Bank and its reputation in the international community, especially the international financial and development community, were regarded by the ADB President as grave indeed. This appraisal on the part of the President cannot be regarded as merely arbitrary or unwarranted. The Applicant's position as Country Director AFRM was a senior one and carried with it weighty responsibilities. That the alleged receipt of money by the Applicant was a deliberate act, and not somehow an unintended accident, is not open to question. The fifteen (15) years service by the Applicant to ADB led the President to believe that the Applicant should have known better. The Tribunal is unable to say that that was a clearly arbitrary appraisal.

31. The Tribunal turns to the most important contention of the Applicant: that the procedures followed by the Bank in the establishment and evaluation of the operative facts were not consistent with the requirements of due process. The claim of the Applicant that he was denied due process has more than one dimension. He asserts that he was required by the Respondent to prove that he was innocent, that the burden of proof in the disciplinary

proceedings was improperly laid on his back. In disciplinary proceedings, the respondent organization must of course bear the burden of showing that the official or employee charged did commit the acts constituting the misconduct or unsatisfactory conduct imputed to him. It is a widely recognised rule that where the respondent establishes a *prima facie* case that the staff member did commit the misconduct or unsatisfactory conduct, the staff member must thereupon provide a reasonable and countervailing demonstration that the misconduct is not fairly or properly attributed to him. The Applicant has several times insisted in his submissions that there was no direct evidence showing that he had received an improper payment from Kjaer. His contention is that the evidence against him was merely hearsay or double hearsay and that he had no opportunity to confront the Kjaer officials in respect of their statements that Kjaer had reimbursed to the Applicant the amount of the provisional receipt.

32. For its part, the Respondent stresses that the Applicant was given the full measure of due process and had availed himself fully of all the procedures provided for in the ADB staff rules. Thus, the OAGI had carried out extensive preliminary investigation of the allegations that the Applicant had received an improper payment from Kjaer. Firstly, OAGI personnel had contacted both Kjaer officials in Copenhagen and Kabul. Secondly, when the BPMSD decided to commence formal disciplinary proceedings against the Applicant, a Review Committee was constituted to review and evaluate the findings adduced by the OAGI. The ADB President did not act until the Review Committee had finished its work and made its formal recommendation to him. After the President's Decision, the Applicant went before the Appeals Committee which then reviewed once more the evidence submitted by the Respondent and the explanations offered

by the Applicant. There is no question that the Applicant had full opportunity to present and did present his defenses and explanations concerning the charges made against him.

33. Administrative tribunals established by international organizations have almost universally held that administrative disciplinary proceedings are not criminal in nature and that the standard of proof necessary in criminal cases does not apply to such proceedings. In *Ogalle v. Secretary General of the United Nations*, UNAT Judgment No. 484 (1990), the UN Tribunal held:

“... the Secretary-General is not required to establish beyond a reasonable doubt a patent intent to commit the irregularities, or that the Applicant was solely responsible for them. The Tribunal has held that once a prima facie case of misconduct is established, the staff member must provide satisfactory evidence to justify the conduct in question.” (Emphasis added)

A.O. 2.04 (as revised on 13 December 2006) which governs ADB disciplinary procedures, provides that for the initiation of disciplinary proceedings, there must be a “preponderance of evidence” that the staff member has engaged in misconduct. Appendix 1 of the revised A.O. 2.04 describes preponderance of evidence as: “[e]vidence which is more credible and convincing than that presented by the other party....the Evidence as a whole shows that it is more probable than not that the staff member committed misconduct.” In *Domdom* Decision No. 47 [2000] V ADBAT Reports 42, para. 27 this Tribunal, discussing the appropriate standard of proof in disciplinary proceedings, found that:

“... there was credible evidence that the Applicant had participated in the bid manipulation scheme and had received some benefits, and that such conduct constituted ‘serious misconduct’ which entitled the Bank to dismiss him...”. (Emphasis added)

In other words, the evidence adduced must be credible to a reasonable person. In another UNAT case *Edongo*, UNAT Judgment No. 987 (2000) the Tribunal said:

“[i]n disciplinary cases, when the Administration produces evidence that raises a reasonable inference that the Applicant is guilty of the alleged misconduct, generally termed a *prima facie* case of misconduct, that conclusion will stand. The exception is if the Tribunal chooses not to accept the evidence, or the Applicant provides a credible explanation or other evidence, that makes such a conclusion improbable ... the Tribunal stated in Judgment No. 484 *Omosola* (1990), paragraph II, that ‘once a *prima facie* case of misconduct is established, the staff member must provide satisfactory proof justifying the conduct in question’” (Emphasis supplied)

34. Drawing upon the above case law of other administrative tribunals, the Tribunal considers that when the facts in a case are of such nature, and are established in such manner, as to give rise to a reasonable inference that an applicant is guilty of the alleged misconduct, a *prima facie* case is established. At that point, the applicant must present his own arguments and credible evidence to justify the acts alleged by the Respondent to constitute misconduct. In the present case, the Applicant claims that the Respondent must establish by proof beyond reasonable doubt that the Applicant did indeed receive an improper payment from Kjaer in connection with an ADB transaction. The Tribunal disagrees. The applicable and widely held principle is that in administrative proceedings, proof beyond reasonable doubt is not the appropriate standard.

35. The Applicant has also insisted that the Respondent has not adequately shown his guilt of the misconduct imputed to him because no direct evidence has been presented by the

Respondent to show he did receive an improper payment from Kjaer. It is true that the Respondent did not present an eyewitness to the receipt of funds by the Applicant from a Kjaer representative. It is also true that there is no document constituting a receipt by the Applicant of such payment. Thus, the Applicant insists that he was deprived of due process because the evidence against him was circumstantial in nature and moreover – so far as concerns receipt of an improper payment – constituted mere hearsay, evidence which should be disregarded by the Tribunal.

36. The right of an accused person to confront witnesses against him and to cross-examine those witnesses is very widely recognised.⁷ The specific right to confront and cross-examine witnesses presented against a person is, however, generally prescribed only in criminal prosecutions⁸. As already noted, ADB disciplinary proceedings are administrative in nature and not criminal prosecutions.

37. The Applicant also claims, however, a more general right to due process and, inferentially at least, claims that the right to cross-examine witnesses testifying against him is part of the broader right to due process.

38. The Tribunal is the ultimate guarantor in the ADB system of due process in disciplinary proceedings. It considers, however, that the proposition advanced by the Applicant

⁷ In, e.g., the Republic of the Philippines, this right is embodied in its Constitution, see Art. III, Sec. 14(2), 1987 Constitution of the Philippines.

⁸ Article 14, paragraph 3 of the International Covenant on Civil and Political Rights provides that “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (e) To examine, or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.” (Emphasis added)

is too sweeping to be persuasive. The fact that a staff member charged with misconduct has had no realistic opportunity to cross-examine some of the witnesses against him does not, by that fact alone, automatically vitiate the disciplinary proceedings as a deprivation of due process. The applicable principle, in the view of the Tribunal, is simply that the evidence submitted against a staff member must be such as to give rise to a reasonable inference that the staff member is indeed guilty of the misconduct attributed to him, and that such staff member must have a reasonable opportunity to show that he did not commit such misconduct.

39. In the present case, the Respondent had established a *prima facie* case that the Applicant had received an improper payment from Kjaer although the Applicant had not had the opportunity to confront and cross-examine the two Kjaer officials. Those two officials were not subject to the authority of the Respondent. The burden was on the Applicant to overturn the *prima facie* case against him. At the May 2007 oral hearing, the Applicant cross-examined the Auditor General, Mr. Pedersen and Mr. Almsteier but failed to rebut the *prima facie* case against him. The Tribunal finds that the Auditor General was credible and persuasive when he conveyed the Kjaer officials' statements made to him to ADB Headquarters.

40. Further, the Applicant has not presented any persuasive reason why the Managing Director would have been simply lying about the Kjaer payment to the Applicant. The Applicant's suggestion that Kjaer was merely "a losing bidder" venting its resentment on him does not attract belief. Kjaer did participate in a subsequent bidding for the supply of an armored vehicle sometime in 2004 to the AFRM; because its bid was not the lowest one, the supply contract was not awarded to it. The record shows that Kjaer did not protest the result of that

bidding. It is also pertinent to note that the statements of the Kjaer officials to the Auditor General were in the nature of statements *contra proferentem*, contrary to the interest of Kjaer because by those statements, the officials opened Kjaer to possible suit or other adverse proceedings in Denmark or in Afghanistan. It is also *apropos* to note that the charges against the Applicant are charges of corruption. In cases of this kind, both parties to the transaction said to constitute corruption commonly have powerful incentives to conceal such transaction and to refrain from creating or leaving traces of it.

41. Finally, the efforts of the Applicant either to conceal or to misrepresent his role in the AFRM procurement process did not inspire confidence in the truthfulness of his explanations. The Applicant's account of what he did with the King of Travel provisional receipt of 3 July 2003 was also unsatisfactory.

42. Having regard to all the circumstances exhibited in this case, the Tribunal believes that the Applicant had a full and fair opportunity to present his defenses to the charges made against him and that the proceedings against him did not constitute or involve a denial of due process. The Tribunal further considers that the decision of the President to dismiss the Applicant was not vitiated by arbitrariness or improper motivation.

43. The Applicant finally alleges that the ADB has unfairly discriminated against him in imposing dismissal as a penalty, considering that another ADB staff member who was "implicated" in a "fraudulent claim" was not meted out the same penalty. The Appeals Committee examined *in camera* the files of the case alluded to by the Applicant. The Committee

concluded that that case was quite different from the Applicant's and that there was no arbitrary discrimination against him in imposing upon him the penalty of dismissal from the service. The applicable rule is succinctly stated in *Khelifati*, ILOAT Judgment No. 207 (14 May 1973) in the following terms: "[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." The Tribunal is satisfied that, regardless of the penalty in the other case, the penalty here, given the circumstances of the present case, is neither unfair nor discriminatory.

DECISION

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

Florentino P. Feliciano

/s/

President

Khaja Samdani

/s/

Member

Yuji Iwasawa

/s/

Member

Simeon V. Marcelo

/s/

Executive Secretary

At Manila, 17 August 2007.