

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 80
(17 August 2007)**

**Muktadir Ahmad
v.
Asian Development Bank**

**Arnold Zack, Vice-President
Claude Wantiez
Yuji Iwasawa**

1. The Applicant seeks to reverse the decision of the President to impose the penalty of dismissal.

I. FACTS

Background

2. On 6 January 2003, the Applicant was appointed to the post of Counsel in the Office of the General Counsel (OGC).

3. Prior to joining the Bank, in 2001, the Applicant helped set up the Asian University for Women Support Foundation (AUWSF), a non-profit organization committed to the higher education of poor women in Bangladesh. He was Vice Chairman of the Board of Directors of AUWSF responsible for fundraising and carried out those duties on a *pro bono* basis.

4. Shortly after joining ADB, the Applicant asked Mr. Donald Kidd, Senior Counsel of OGC, whether he had to secure the approval of the President of the Bank in order to continue his work with AUWSF while he was working for ADB. Mr. Kidd advised the Applicant that the President's approval was unnecessary according to the exclusion provided under Section 4.6(i)(a) of the Asian Development Bank (ADB)'s Code of Conduct for the "services performed as a Director ... for a charitable ... entity". At the same time, the Applicant asked Mr. Hamid Sharif, Assistant General Counsel, and the General Counsel whether it would be possible to include his work for the AUWSF under his work program with ADB. The General Counsel and Mr Sharif declined the latter request but "informed (the Applicant) that he was free to work for AUWSF on his own time, i.e. outside of his regular ADB office hours" (Statement of the General Counsel of 11 November 2005).

5. In late June or July 2005, the General Counsel was informed by Ms. Eveline Fischer, Deputy General Counsel, that an officer of the Office of the General Counsel (OGC) was concerned about excessive photocopying use by the Applicant for the AUWSF project. The General Counsel met with the Applicant in early August 2005 and spoke with him about this complaint. The General Counsel told him "that only very 'incidental' or 'minimal' use of ADB resources for personal matters would not raise questions" (Statement of the General Counsel of 11 November 2005).

6. According to the above statement of the General Counsel, at the meeting on 30 August 2005, "[t]he Applicant assured us that he was neither abusing ADB's resources nor working on AUWSF matters during his office hours in any substantial way".

7. On 30 August 2005, the Office of the Auditor General Integrity Division (OAGI) received a complaint from a staff member alleging a conflict of interest between the Applicant's *pro bono* work for the AUWSF and his duties as a regular employee of ADB. The Director of OAGI assigned a member of his staff to conduct the investigation.

8. On 9 September 2005, the investigator met with the Applicant, in the presence of the Director, Human Resources Division (BPHR), to discuss the results of OAGI's preliminary inquiry.

9. On 14 September 2005, OAGI issued its final report and provided it to the Director General, Budget, Personal and Management Systems Department (BPMSD). The report concluded that the Applicant had "an established pattern and practice of deliberate misconduct on behalf of AUWSF". On 28 September 2005, a copy of the report was given to the Applicant by Director, BPHR. On 10 October 2005, the Applicant provided a written response. In this "preliminary response", he denied misconduct, admitting only to occasional "lapses of judgment".

10. On 13 October 2005, the Director General, BPSMD, having taken into consideration the OAGI report and the preliminary response of the Applicant, decided to charge the Applicant with six counts of misconduct:

- “(i) solicitation of financial and other support from ADB for AUWSF, his prospective employer, in violation of para.4.6 (iii) of the Code of Conduct;

- (ii) disclosure of the 22 August 2005 memorandum from DG, RSDD to the President concerning AUWSF, and the draft response for the President's signature to persons outside of ADB when they were not authorized to receive such information, in violation of para.4.4(i)(a) of the Code of Conduct;
- (iii) disclosure of ADB's LEXIS legal database password to a person who was not authorized to have such information, also in violation of para.4.4(i)(a) of the Code of Conduct;
- (iv) extensive work on non-ADB related matters during working hours, in violation of his duty to ADB under para.4.3(i) of the Code of Conduct;
- (v) misuse of ADB's diplomatic pouch;
- (vi) engagement of Ms. Nadia Kondratiev, a dependent of an ADB staff member, for work related to an ADB transaction, when he had been warned by her that this was not permissible (a violation by her of para.4.8(vi) of the Code of Conduct)".

On 28 October 2005 and 4 November 2005, the Applicant submitted two detailed responses to the charges. In his second response of 4 November 2005, he argued about:

- the compatibility of mission between AUWSF and ADB and the encouragement that he had received from the highest levels of ADB management;
- his full disclosure and consultation with senior ADB staff and the OGC's affirmation that no further disclosure or approval was required;
- the OGC support for "reasonable use" of resources;
- his performance as a regular ADB officer;
- his prospective employment outside the ADB;
- his request for recusal of BPMSD's counsel;
- the ADB's improper access to his computer;
- his alleged extensive work on non-ADB matters;

- the alleged misuse of ADB's diplomatic pouch; and
- the engagement of a dependent spouse.

He concluded that:

“... at no time did my engagement with the AUW project compromise or supersede any of my duties to ADB... Under the circumstances and in recognition of the fact that no harm or damage may have been done to ADB, I respectfully request that the Charge Memo dated October 13, 2005... be withdrawn ..., may I please be given another opportunity to continue to work at ADB in full compliance of its regulation...?”

11. On 16 November 2005, the Director General, BPMSD advised the Applicant “that the President has decided on 15 November 2005 to impose the disciplinary measure of summary dismissal effective on the date this decision is communicated to you”. On 14 February 2006, the Applicant filed an appeal against the President's decision to the Appeals Committee.

12. On 17 August 2006, the Appeals Committee recommended “that the President reject the Appellant's claims”. Nevertheless, in its report, the Appeals Committee raised some concerns about the conduct of the investigation.

13. On 27 September 2006, the President wrote to the Appeals Committee accepting its recommendation to reject the claims of the Applicant but rejecting the concerns related to the conduct of the investigation. On 11 October 2006, the Vice President of the Bank conveyed the decision to the Applicant.

Application to the Tribunal

14. On 8 January 2007, Mr. Ahmad brought an Application to the Tribunal. He requests the Tribunal:

1. “With respect to competence and procedure:

...

(c) *to decide* to hold oral proceedings on the present application in accordance with Article VIII of its Statute and 14 of its Rules;

(d) *to decide* pursuant to Rule 5A (2) that the present case be heard by all members of the Tribunal due to the unique and potentially far reaching legal issues it has raised”.

2. “On the merits ...

(a) *to rescind* the decision of the President sustaining the Applicant’s summary dismissal and rejecting the Applicant’s claims; ...

...

(d) *to order* that the Applicant be reinstated in service with retroactive effect from 15 November 2005;

(e) *to award* the Applicant appropriate and adequate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent’s actions or lack thereof;

(f) *to fix* pursuant to Article X of the Statute, the amount of compensation to be paid in lieu of specific performance at three years’ basis salary in view of the special circumstances of the case;

(g) *to award* the Applicant as cost, the sum of \$40,000.00 in legal fees and \$500.00 in expenses and disbursements”.

II. FINDINGS

Procedure

The oral proceedings

15. According to Rule 14 paragraph 1 of the Rules of Procedure of the Tribunal, “Oral proceedings ... may be held only if the Tribunal so decides”. In his Application, the Applicant does not give any supporting justification as to why the Tribunal should decide to hold oral proceedings. His request is accordingly denied.

The panel of all the members of the Tribunal

16. According to Rule 5A of the Rules of Procedure of the Tribunal,

“A party may make a written request, giving reasons therefore that the case be heard by a panel consisting of all the members of the Tribunal”.

The reasons given by the Applicant, “the unique and potentially far reaching legal issues it has raised”, are not sufficient without any further exposition for the Tribunal to grant his request.

Alleged Violations of Due Process

17. The Applicant challenges the Bank’s decision because of (1) its unauthorized intrusion into his personal computer; (2) conflict of interest on the part of the investigator who led the initial inquiry; and (3) the inappropriate advice of the Senior Counsel of OGC.

The intrusion into the computer

18. Most of the support for the charges against the Applicant is founded on emails he sent or received on his computer. The Applicant argues that OAGI's access to his computer was improper. First, the Tribunal emphasizes the fact that the computer was the property of the Bank. It was essentially a work tool. At the time of the investigation, Administrative Order (A.O.) 4.17 dated 3 August 2000 stipulated the rules for the use of computers as follows:

“6.1 Proprietary: All electronic information originating in ADB, including electronic mail, is the property of ADB, and is therefore governed by ADB's policy, rules and procedures for access to and disclosure of information. ADB reserves the right to access them where there is an authentic business need to do so. Other than the user, only the Head of Department/Office or the Manager of the user has the authority to access messages in a user's mailbox and only in those circumstances when there is an urgent business need.

6.2 These circumstances are the same as users would expect in the case of other types of business correspondence stored in their office.

...

(c) There is an official investigation which requires access to a user's mailbox.

6.3 In the event where the Head of Department/Office or the Manager must access a user's mailbox, a request stating the justification to do so must be sent to Director, BPMSSD, Chief, OIST and Chief, OAS and copied to the user concerned. Upon agreement of two of these three Department/Office Heads, the Email Administrator will reset the password of the user's mailbox and provide the requested information by copying the relevant message(s) to the Head of Department/Office or Manager, and informing the user concerned”.

The A.O. does not require notification to an employee when, as here, the access is required as part of an official investigation. With regard to this interpretation, the Tribunal shares the

opinion of the Bank. If the employee was notified of access to his mail account in the course of an official investigation, it would risk destruction of the evidence through the deletion of the emails. While A.O. 4.17 gives no special definition of an “official investigation”, the Tribunal considers that an investigation officially as here started and led by the Office of the Auditor General after approval of the Director General, BPMSD is an “official investigation” for the purpose of paragraph 6.2(c) of the A.O. After receiving on 30 August 2005 the complaint from a staff member, the Officers in Charge of OAG requested approval of the Director General, BPMSD to access the emails of the Applicant:

“1. In accordance with current interpretations of AO 4.17, we request your approval for OAGI to access [the Applicant’s] email account as part of an OAGI investigation, without notice to [the Applicant].

2. OAGI is investigating an allegation that [the Applicant] is abusing his position as Counsel, OGC through a conflict with a personal interest involving the Asian University for Women. The Applicant is the Vice Chair of the University Board of Directors.

4. As part of its investigation, OAGI seeks approval to examine [the Applicant’s] ADB email account to ascertain whether there is evidence of improper influence as well as the scope of his activities on behalf of the university while working at ADB. OAGI considers this investigative step to be urgent to ensure that evidence is not destroyed.

5. Upon receiving your approval, OAGI will contact the Principal Director, OIST to fulfill its request”.

The signature of Director General, BPMSD beside his name on this mail indicated his approval. Taking into consideration the fact that “all electronic information originating in ADB, including electronic mail” is the property of the Bank, that in the case of an official investigation neither a notification to the user nor *a fortiori* his authorization is required, and

that the investigation started on 31 August 2005 was an official investigation, the Tribunal decides that the email evidence was properly obtained.

19. Thus, despite the procedural arguments made by the Applicant, the Tribunal finds the requirements of A.O. 6.1 and 6.2 (c) were fully complied with and that the access to the disputed emails was appropriate.

Alleged bias of the investigator

20. The Applicant raises a second issue of due process – the appointment of Ms. “X”, a former colleague, as investigator. The burden is on the Applicant to introduce evidence that the investigations were not conducted in the most objective manner. In his Application, the Applicant invokes two challenges to the appointment of the investigator: that he had had “a strained relationship (with this investigator) in the past”; and that both he and the investigator “were candidates for a Level 4 post in the OGC for which she was passed over in favor of the Applicant”. The Bank disputes the allegation that the Applicant and Ms. X were both candidates for the same post in the OGC. At the time of the investigation Ms. X was in a different office of ADB – the Office of the General Auditor and not the Office of the General Counsel – and, at that time, Ms. X was also promoted to an L4 position. Contrary to the suggestion of the Applicant, at the time of the investigation, he and Ms. X were on different career paths and on the same level (Level 4). This situation did not raise the fear that he was prejudiced by bias of the investigator against him. In 2003, Ms. X and the Applicant had a disagreement about a work assignment. She could have denied the prior incident but, it is not

disputed, she disclosed the fact to the Director, OAGI, before being appointed as investigator.

Furthermore, the Tribunal emphasizes the following elements:

(a) A professional disagreement occurring two years before the start of the investigation is not *per se* the proof of an “extremely antagonistic relationship” or “of the self-interest (of the investigator) in the outcome”

(b) The investigator had only to proceed in a systematic fact-finding, which she did.

(c) The only discretion the investigator had was whether to recommend that the Director General, BPSMD proceed with disciplinary action.

(d) The final decision was taken by the President on the recommendation of the Director General, BPSMD and with potential appeal to the Tribunal.

(e) The Applicant had never denied the authenticity of most of the information contained in the report.

For those reasons, the Tribunal is of the opinion that the Applicant fails to prove bias by the investigator.

The recusal of Mr. Kidd

21. As stated above, Mr. Kidd, Senior Counsel of the Office of the General Counsel, advised the Applicant that he did not have to obtain Presidential approval to continue his *pro bono* work with AUWSF while working at his regular ADB position because of the exception in Art. 4.6(i)(a) of ADB's Code of Conduct. Weeks after the investigator's report was submitted, Mr. Kidd advised BPMSD about it, and, after the OGC staff consultant in charge of the documents handed over to the Appeals Committee had moved to Egypt, Mr. Kidd reassumed responsibility for preparing pleadings. The Applicant argues:

“the Senior Counsel, Donald Kidd, should have recused himself from any involvement in the subsequent investigation since he had opened himself up to a possible conflict of interest over his role in advising the Applicant that he did not need to seek the President's clearance for his *pro bono* involvement with the AUWSF. The Senior Counsel's subsequent role in proceedings, in which he himself was a participant and potential witness, created the appearance if not the reality of a further conflict of interest”.

The Tribunal does not agree with the Applicant. Indeed, the Applicant asked Mr. Kidd a narrow question – whether he was entitled to do *pro bono* work for AUWSF without Presidential approval. He does not contend that he gave to Mr. Kidd information on the extent of his *pro bono* activities for AUWSF or the extent in which they were conducted during regular work hours when he was being paid as a regular ADB employee. So, the alleged conflict of interest – or possibility of such conflict – does not exist. Mr. Kidd gave advice in response to a general question as to the propriety of doing any *pro bono* work before any knowledge of the extent to which the Applicant was engaging in that *pro bono* work instead of performing his ADB tasks. In summary, the Tribunal finds that there is no basis upon which the Applicant could claim a violation of his rights to due process.

Charges

22. As stated above, the Applicant was charged with six counts of misconduct. The Tribunal examines below each of these issues.

Solicitation of financial support from ADB for AUWSF, a prospective employer

23. Section 4.6(iii) of A.O. 2.02 states that:

“(iii) Prospective Employment

Staff members who are seeking, negotiating or have an arrangement concerning prospective employment other than at ADB shall not exercise any responsibility with respect to an ADB transaction in which a prospective employer has or may have an interest of the kind set forth in the preceding paragraph.”

The “preceding paragraph” lists the following “interests”:

- “(i) a recipient or beneficiary of ADB financing, investments or guarantees
- (ii) a guarantor of any such financing; or
- (iii) a supplier of good or services to ADB, except as authorized by the President”.

The paragraph 4.6(iii) quoted above does not give a definition of the “transaction”. The meaning of this word has to be sought in the light of the purpose aimed at by the rule. It is obvious for the Tribunal that this paragraph is intended to prevent a possible conflict of interest:

“Staff members who are ... negotiating ... an arrangement concerning prospective employment ... shall not exercise any responsibility with

respect to an ADB transaction in which a prospective employer ... may have an interest.”

The fact that the transaction was unsuccessful does not remove the conflict or the possibility of conflict of interest. So, for the application of paragraph 4.6(iii) of A.O. 2.02, a transaction does not necessarily require an “agreement” between ADB and the prospective employer. It can be merely “the act of transacting or conducting any business” (Black’s Law Dictionary quoted by ADB) and includes negotiation among its meanings.

24. On 8 April 2005, the Applicant contacted a real estate agent in the U.S., stating that he would “be moving back to Washington”. On 27 May 2005, the Applicant sent an email to Ms. Gray, Board Member of AUWSF:

“I am planning to resign from my job at the end of the year and return to the U.S. to work full time on the AOW project”.

On 13 July 2005, the Applicant wrote to Mr. Friedman, Chairman of the Board of AUWSF:

“We ... need to find some office space ... in Washington ... Do you have any good ideas?”

In response to this request, Mr. Friedman stated that he would do so “if you promise to move to N.Y. in December”. The Applicant responded immediately: “I promise. Thank you”. In a mail sent to Mr. Friedman on 20 July 2005, The Applicant reiterated his plan: “As you know, I am ... planning to resign from (his) ADB job” and “to wrap things up (at ADB) by December or so and start January 1 in the U.S. ... it will be helpful for me to have an employment agreement”. On 15 August 2005, the Applicant wrote: “Basically, I would propose to take a 2-

3 year leave of absence from the ADB and join AUWSF full time". In light of this email evidence, the Tribunal does not agree with the Applicant when he argues : "None of my exchanges about devoting full time to the AUWSF project ever rose to the level of seriousness" or "he never applied for any position" with AUWSF. On the contrary, this evidence clearly establishes that the Applicant intended to leave ADB to move back to the U.S., not to return to a private sector law firm, but to work full time for AUWSF¹. He was, at least, "seeking, negotiating ... an arrangement concerning prospective employment"; from that time, according to section 4.6(iii) of A.O. 2.02, and had to avoid the exercise of any responsibility with respect to an ADB transaction in which AUWSF may have interest.

25. On 17 June 2005, a meeting was held between the Applicant and a representative of the ADB on the subject of the "Asian University for Women". This fact is not disputed. As stated in the email sent by Ms. Sonomi Tanaka, Senior Social Specialist of ADB:

"Fyi, Daan Boom, J. Sarvi and I met with [the Applicant] on 17th June to discuss the draft concept paper prepared by [the Applicant] ... the concept itself was considered a good way to support pushing the poor women's entry into ... University Another question raised at the meeting was the potential conflict of interest between [the Applicant's] involvement as a board member to the AUW - hence, even if the proposal is found relevant for ADB assistance, this needs to be pushed by someone else".

¹ In fact, after leaving ADB, the Applicant did immediately assume the role of AUWSF President and CEO.

The result of the meeting held at the Office of the Director General, Regional and Sustainable Development Department (RSOD) on 29 August 2005 was the following response by the Applicant:

“although only an observer at the meeting, he would like to suggest that conflict would arise if there were a failure to disclose on his part his involvement with the project and he had a role in making the subject decision. Since he had fully disclosed his membership on the board of the AUW Support Foundation and he had no role in the decision making process; as a lawyer he could not discern a violation of any conflict of interest here”.

The Applicant did not disclose to his colleagues the fact that he was intending to work full time for AUWSF but merely his involvement as a member of the board of AUWSF.

26. In the Application, the Applicant writes:

“On 20 July 2005 the Applicant requested the advice of the Director General of RSDD (DG RSDD) on how to proceed (see Annex 5). Following discussions with senior officials, the Applicant, at the request for the DG RSDD, drafted a memorandum for the signature of the DG RSDD to the ADB President through the Vice President for Knowledge Management and Sustainable Development (VPKM) containing a proposal for ADB to support a donor conference for the AUW (Annex 6). Both the DG RSDD and the VPKM signed the memo as amended by RSDD staff who reviewed it”.

So, while without revealing that AUWSF was the prospective employer of the Applicant, he nevertheless continued to exercise “responsibility with respect to an ADB transaction”. For the reasons explained above, the fact that AUWSF was unsuccessful in obtaining ADB’s support is irrelevant. Nor is it relevant that he was not “in a position to make any decisions”. As consultant for ADB, he had the capacity to influence his employer: the conflict of interest was

evident, all the more because the Applicant, as a lawyer, should have been more sensitive to such a situation.

Disclosure of a memorandum to unauthorized persons

27. Section 4.4(i)(a) of A.O. 2.02 states that :

“ (i) ...
Except in the course of their official duties by express
authorization of the President, staff members may not :

(a) communicate any unpublished information known to them
by reason of their official position to any person within or outside
of ADB whom they know or should know is not authorized by
ADB to receive such information”.

On 22 August 2005, the Director General, Regional and Sustainable Development Department (RSDD) sent to the President of the Bank a memorandum referring to a letter of Mr. Friedman, chairman of AUWSF dated 31 May 2005, in which ADB’s assistance was sought “for convening a meeting of potential supporters”. Recommending the support of ADB, a draft letter of positive response to be signed and sent by the President to Mr. Friedman was attached to this memorandum. This letter was unsigned. The Director, RSDD gave the Applicant a copy of the memorandum and the draft response. The same day, on 22 August 2005, the Applicant provided without authorization the memorandum and the unsigned draft response to persons who were members of the board of the AUWSF, i.e. the Government of Korea; the Gates Foundation; Morgan Stanley; Goldman Sachs; Japan Healthcare Policy Institute; Pace Law School; Bangladesh Women’s Institute; Enterprise Institute; and UNDP. They were not “authorized persons” for the application of section 4 of A.O. 2.02 quoted above. The Applicant did not have the authorization of the President to send this document to anyone

outside the ADB. This behavior – not disputed by the Applicant in his Application – was a violation of staff rules. In his Reply, the Applicant writes:

“The Applicant was given the memorandum of 22 August 2005 recommending the sponsorship of a donor conference, signed by the VPKM and DGRSDD, by the VPKM himself. The Applicant maintains correctly that this was done in his capacity as an AUWSF Board member, not in any ADB official capacity. The Applicant then advised his AUWSF counterparts of ‘ADB Management’s recommendation’”.

This response shows, once again, the deliberate confusion created by the Applicant: asserting that he was acting as an ADB staff member, while in reality he was functioning on behalf of the AUWSF board.

Disclosure of ADB’s Lexis password

28. Twice, on 18 and 21 August 2005, the Applicant disclosed the ADB Lexis password to Mr. Whisnant, an employee of AUWSF. The fact, which is a violation of section 4.4(i)(a) of A.O. 2.02, is not disputed: in his Application and Reply, the Applicant acknowledges “having disclosed an ADB password to an unauthorized person”.

The work of the Applicant on non-ADB related matters during ADB working hours

29. Section 4.3(i) of A.O. 2.02 provides:

“General principles of conduct:

(1) ...

In the discharge of their functions, staff members owe their duty entirely to ADB and to no other authority”.

Shortly after he joined ADB, the Applicant was informed by the General Counsel and the Assistant General Counsel that “he was free to work for AUWSF on his own time i.e. outside of his regular ADB office hours” (Statement of the General Counsel of the 11 November 2005). Although he was clearly aware of the position of the Bank, the Applicant, between 6 April 2005 and 5 June, and in July and August 2005, sent or received from his ADB office computer 5,900 emails (2,600 + 3,300) related to AUWSF, the majority of which occurred during the ADB work hours of 9.00 a.m. to 6.00 p.m.

30. In his Reply, the Applicant explains that July and August 2005 was a period of “critical activity aimed at ensuring the survival of the AUWSF project”. But the emails were not sent only in July and August. From 6 April to 5 June 2005, the period preceding the “critical” period, the Applicant sent or received 2,600 AUWSF-related emails. In any case, the Applicant was aware that he was free to work for AUWSF “outside his regular ADB office hours”. Whatever the reason, he did not abide by this rule.

31. While on 30 August 2005 he told the General Counsel that he was not abusing ADB resources and assured him that he was not working on AUWSF matters during work, on the day before he had sent and received during office hours 57 emails related to AUWSF. From 3 January 2005 to 1 September 2005, he made 437 outgoing international phone calls related to personal or AUWSF matters. He used his ADB international direct dial access line. 235 of those calls were made during office hours. The cost for such calls was \$372. In his Application, the Applicant did not deny the facts. To the contrary, he acknowledged that “he

invariably carried on some communications during working-hours”. But, in his Reply, the Applicant argues that many of those phone calls “could have been made in furtherance of (his) work on the program for the ADB annual meeting seminar held in May 2005 that he was entrusted to plan”. The Tribunal is not persuaded by this new explanation. Indeed, between February and August 2005, the Applicant made or received more than 350 calls to and from his home where an AUWSF administrative assistant was working (see the email from Mr. Kidd to the Applicant dated 26 October 2005). On 31 August 2005 alone, he gave or received 43 calls to or from his home. The Tribunal cannot believe that those calls were related to the ADB’s seminar held in May 2005.

32. The Applicant directed an RSDD staff consultant to research requests related to AUWSF matters. This consultant spent 87 hours of her time and her services were paid for by ADB. In his Reply, the Applicant argues that he had been given permission to do that by an ADB official. In fact, in an email dated 20 September 2005, the Applicant asked Mr. Boom, his supervisor: “I also am grateful to you for letting me use Dulce for research on women’s education matters. With your permission, I may from time to time continue to turn to her for help”. Mr. Boom answered: “ok no problem”. To work “from time to time” should mean to work on occasion. However, this is not what occurred. The Applicant used the services of Dulce as follows: 38 hours between 20 and 29 April 2005; 20 hours between 4 and 16 May 2005; and 24 hours between 13 and 25 July 2005.

Misuse of ADB's diplomatic pouch

33. The pouch service is a diplomatic privilege granted by the member countries in the interest of ADB's official business. Paragraph 4.3 of A.O. 2.02 provides:

“(t)he privileges, immunities, exemptions and facilities enjoyed by staff members under the Agreement Establishing the Asian Development Bank and the Government of the Republic of the Philippines regarding the Headquarters of the Asian Development Bank and any other agreements entered into between ADB and Governments of member countries are granted in the interest of ADB and not for the personal benefit of the individual”.

Equally, Article 13, section 49 of the Headquarters Agreement between ADB and the Government provides that “(t)he privileges, immunities, exemptions and facilities accorded in this Agreement are granted in the interest of the Bank and not for the personal benefit of the individuals themselves”. The Applicant did not abide by this rule. Indeed, on two separate occasions he used the diplomatic pouch service for AUWSF – he sent AUWSF related materials to the Bangladesh Resident Mission (BRM) and to Mr. Braseh Panth, Senior Education Officer at BRM, who had expressed an interest in the AUW project. In his Application, the Applicant acknowledges “having imprudently used the pouch for private purposes”.

Engagement of the spouse of an ADB staff member

34. On 6 March 2003, Director General, BPSMD issued a “reminder on prohibition on spouses/family members as representative agent in transactions with and/or within ADB”:

“1. There have been reports that some spouses of staff members are acting as representatives or agents of firms in transactions involving ADB (i.e. consulting contracts) or in transactions with staff members conducted within ADB premises. In this regard, we wish to remind all staff of their duty to avoid any action that may reflect unfavorably upon their position as employees of ADB.

2. In particular, we draw your attention to the following provisions in Administrative Order (AO) No. 2.02 and Project Administration Instruction 2.01 which strictly mandate staff, their immediate family members, and even their close relatives (as defined in AO 2.01) to exercise tact and discretion and avoid situations involving conflict of interests”.

The Applicant, who had been hired 3 months before, must have been aware of this prohibition. Nevertheless, prior to 15 April 2005, he placed an advertisement in the ADB Spouse’s network soliciting the services of a grant writer to revise and edit a proposal to ADB’s Poverty Reduction Fund for funding on behalf of the AUWSF. Ms. Kondratiev, whose husband was an employee at ADB, responded to the advertisement and informed the Applicant that she was on “friendly terms” with Ms. Tanaka, Senior Poverty Reduction Specialist in RSDD. In this capacity, Ms. Tanaka would initially review and evaluate the proposal for funding. The possibility of a conflict of interest was thus evident. The Applicant was fully conscious of the conflict. Indeed, on 15 April 2005, Ms. Kondratiev wrote to the Applicant:

“Dear [Applicant],

Thank you for all the info. I will look it all over the weekend and get back to you. The good coincidence is that I am on friendly terms with Sonomi and she seems open and, I imagine, good to work with.

We might have to be discreet about my participation because I’m not sure if I am actually allowed to work on anything in any way ADB related (as an ADB dependant ! ...). But, if nothing is said, I think it will be fine”.

The response of the Applicant was:

“Dear Nadia – Great. It will be a secret”.

The relationship of Ms. Kondratiev as a friend of Ms. Tanaka was the kind of situation envisaged in the reminder dated 6 March 2003 to avoid even the appearance of improper influence arising out of friendship with other staff members. In hiring Ms. Kondratiev to solicit funds for AUWSF from her friend Ms. Tanaka, the Applicant failed to avoid a conflict of interest or, at least, the possibility of such conflict.

The Dismissal

35. The issue before the Tribunal is to determine the appropriateness of the President’s decision to summarily dismiss the Applicant. In *Zaidi*, Decision No.17 [1996] II ADBAT Reports 92, para 10, the ADB Tribunal decided:

“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”. (*Zaidi*, para.10 quoting from *Carew*, WBAT Decision No. 142 (19 May 1995), para. 32)

The existence of the facts

36. As stated above, the facts alleged in the charges against the Applicant are established.

The facts legally amount to misconduct

37. Paragraph 6.2 of A.O. 2.04 entitled “Disciplinary measures and procedures” provides:

“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;

...

(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;

...

(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 to mitigate any adverse consequences resulting from his/her unsatisfactory conduct”

The breach of the standard of conduct

38. While he was clearly aware of the position of the Bank, what the Applicant did was not a single misstep but a series of prohibited actions: systematically working during the ADB’s working hours for AUWSF; directing a member of the ADB’s staff to work on AUWSF business; making numerous personal long distance calls for personal purposes; and, misusing the diplomatic pouch. Moreover, the Tribunal emphasizes the fact that the Applicant did not tell the truth. On 30 August 2005, he told the General Counsel that “he was neither

abusing ADB's resources nor working on AUWSF matters during his office hours in any substantial way", while, on the eve, he had sent or received 57 related AUWSF emails. It is another breach of the required standard of conduct. The Applicant cannot argue that his supervisors and colleagues allowed him to believe that what he was doing was proper. They only knew that the Applicant was involved in the AUWSF project as *pro bono*; they were not aware of the extent of his involvement, an extent he concealed.

The consequences and damage caused to the Bank

39. Through his systematic work on AUWSF matters during office hours well beyond the expectation of any casual or occasional use, the Applicant misappropriated the salary paid by his employer. He also misappropriated ADB funds by misusing its telephone lines for personal matters and by utilizing hours of work by ADB staff members for the benefit of his personal interests. He placed ADB's reputation at risk by using the diplomatic pouch in contravention of ADB's agreement with member country governments.

The position held by the Applicant

40. The Applicant is a lawyer and as such he should have been particularly sensitive to the issues of conflict of interest and misuse of ADB's resources.

The unsatisfactory act was deliberate

41. Repeatedly, the Applicant acknowledges in his Application lack of judgment. There is the question that his conduct was deliberate. The fact that he did not act with malice is not relevant. Malice is not required to make an unsatisfactory act deliberate.

Length of satisfactory service

42. In light of his short term of service, seniority is not a mitigating factor.

The staff member's admission of the unsatisfactory conduct prior to the date it was discovered

43. The Applicant never admitted his conduct before it was discovered. To the contrary, on 30 August 2005, he told the General Counsel that he was not abusing ADB's resources, while, on the eve, he had sent or received 57 related AUWSF emails. Taking into consideration each of the criteria quoted in para.6.2 of A.O. 2.04, the Tribunal recognises "the seriousness of the unsatisfactory conduct".

The sanction imposed is provided for in the law of the Bank

44. The Tribunal endorses para.6.3 A.O. which provides:

"6.3 The disciplinary measure of dismissal for misconduct is particularly appropriate when the unsatisfactory conduct is serious ... or has jeopardized, or would in the future be likely to jeopardize, the reputation of the Bank and its staff, ... Dismissal for misconduct is also appropriate when the breach of trust is so serious that continuation of the staff member's services is not in the interest of the Bank"

The proportionality

45. The Tribunal has to examine whether the sanction is “not significantly disproportionate” to the offence (*Zaidi*, Decision No. 17 [1996], II ADBAT Reports, para 10). In *J.G.B.* Judgment No. 2495 (2006), the ILOAT decided:

“The Tribunal cannot substitute its assessment for that of the Director General, unless it notes a clear disproportion between the gravity of the offence committed and the severity of the resulting penalty”.

In his Reply, the Applicant argues:

“In the present case the lack of proportionality is reflected most apparently in the attitudes of the Bank’s senior officials before and after the OAGI Report. Numerous Bank officials enthusiastically supported the Applicant’s efforts on behalf of the AUWSF, which were greatly appreciated at the time and helped to sustain interest in the project. The General Counsel maintained an active interest in the project and the Applicant consulted with him from time to time”.

The Tribunal has already addressed this argument of the Applicant. Even if the “Bank’s Senior officials” were aware of the involvement of the Applicant in a “charitable entity” which is a laudable deed, they had not been alerted to the extent to which he was working on behalf of his outside AUWSF interests while being paid to do ADB work. The General Counsel had the right to expect, in good faith, that the Applicant would respect the explicit and obvious instruction he was given shortly after he joined ADB as to *pro bono* involvement being limited to AUWSF membership. In conclusion, taking into consideration the evidence, the seriousness of the misconduct, and the position held by the Applicant, the Tribunal is of the opinion that there was certainly no “clear disproportion” between the offence and the penalty.

The requirements of due process

46. As stated above, these requirements were observed.

DECISION

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

Arnold M. Zack

/s/

Vice-President

Claude Wantiez

/s/

Member

Yuji Iwasawa

/s/

Member

Simeon V. Marcelo

/s/

Executive Secretary

At Manila, 17 August 2007.