

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 85
(25 January 2008)**

**A. Maurice de Alwis
v.
Asian Development Bank (No. 4)**

**Arnold M. Zack, Vice President
Khaja Samdani
Claude Wantiez**

I. THE FACTS

1. This is the fourth time the Applicant appears before the Tribunal on the issue of whether he was entitled to rental subsidies for the lease from the company YGC of a unit in a residential condominium in Manila Bay, Cleveland Tower, Paranaque City.

2. In the first case, the Applicant challenged the decisions taken by the Asian Development Bank (“ADB” or “Bank”) on 25 May 2001 to recover rental subsidies paid to him between 1998 and 2000 and to forfeit his right to such subsidy for an additional three years (between 2000 and 2003): in its judgment of 8 August 2003, the Tribunal decided to uphold those decisions (Decision No. 57).

3. In the second case, the Applicant applied for the revision of Decision No. 57, quoted above; in its judgment of 28 July 2004, the Tribunal denied this request (Decision No. 66).

4. In the third case, the Applicant filed a new Application: he sought from the Tribunal a clarification of certain “*ambiguities and inconsistencies*” in Decision No. 57. By judgment of 20 January 2005, the Tribunal found “*no ambiguity or inconsistency in the principal decision which would necessitate clarification or interpretation*” (Decision No. 70).

5. After the three years subsidy suspension – upheld by the Tribunal in its judgment of 8 August 2003 – the Applicant submitted a rental subsidy application in June 2003 for the same condominium; he sought a subsidy for a monthly rent of Php 165,000.

6. In reviewing this rental subsidy application, the compensation and benefits specialist of the Bank noted that the amount of Php 165,000 appeared excessive in light of the condominium’s location in Paranaque City. Consequently, in December 2003, the Bank hired three appraisal firms; asking each of them for “*a report on the fair market value of the condominium units on the 17th floor of Cleveland Tower ... Paranaque city.*”

7. On 19 December 2003, the Philippine Appraisal Inc. issued a report giving the

following fair rental valuation, as of December 18, 2003:

Unit A or D ...

....

Unfurnished: Php 70.000 per month

On 10 December 2003, the Royal Asia Corporation gave the following appraisal:

- *Bare units (Minimum):* *Php 50,000*
- *Fully furnished units:* *Php 70,000 to Php 100,000*

On 11 December 2003, Cuervo Appraisers Inc. wrote:

It is our opinion that the fair rental value of the property is reasonably represented as follows:

<i>Unfurnished:</i>	<i>300</i>	<i>56,250</i>
	<i>400</i>	<i>75,000</i>

In each of the reports it was asserted that the property had been “*personally inspected*” (letters of Cuervo Appraisers Inc. and of Royal Asia Corporation) or “*inspected*” (letter of Philippine Appraisal Inc.).

8. In its 22 December 2003 memo issued pursuant to the three (3) reports, the Bank rejected the rental subsidy request of the Applicant. On 2 March 2004, he asked for a review of this decision.

9. On 19 July 2004, the Applicant was informed that the Bank – through its Director General, Budget, Personnel and Management Systems Department, (BPMSD) – had initiated formal disciplinary proceedings against him for attempting to commit fraud against the Bank’s rental subsidy system.

10. By a memo dated 5 May 2005, the Applicant was informed that a Review Committee was appointed to investigate the charges of serious misconduct brought against him by the Director General, BPMSD, in his 19 July 2004 memo. The 5 May 2005 memo requested the Applicant submit “*full and clear ... documents showing receipt of payment and receipt of rent ... 2000-2003 ... should include cleared checks and bank statements showing*

transfer of funds to the owner, signed receipt from the owner” On 19 May 2005, the Applicant provided a few related documents, but not all that had been requested.

11. In its report of 21 July 2005, the Review Committee concluded that the request of the Applicant for a rental subsidy based upon a monthly rental of Php 165,000 was an attempted fraud. Moreover, the Committee expressed “... *considerable doubt as to the authenticity of the landlord and tenant relationship*” It recommended that the President of the Bank permanently disqualify the Applicant from any rental subsidy and that he be demoted two grade levels.

12. In its decision of 13 October 2005, the President approved in part the conclusions of the Committee. He agreed with the existence of the fraud but not with the penalty which he changed to dismissal. The Applicant appealed from this decision.

13. On 21 April 2006, the Appeals Committee confirmed the President’s decision of 13 October 2005. The findings of the Committee were as follows:

22. Disclosure of Financial Interest. The Committee noted that in his application for rental subsidy dated 30 June 2003, the Appellant did not explicitly disclose the fact that the condominium was owned by his close relatives, which is contrary to the provisions of para 4.2 of A.O. 3.07, which were already in effect at the time of Appellant’s application.

...

23. Fair Market Value of the Condominium. The Committee noted that ADB conducted three appraisals of the fair rental value of the condominium, all of which independently, and by using different valuation techniques, found that the fair rental value for the said condominium was substantially lower than the one claimed by the Appellant. The Committee also noted the observation of the Review Committee that even after

allowing for 40 % to the top end of the evaluations done by appraisers, the rental payment for the condominium still appear to be high

24. Rental Payments. ... The Committee has not found any concrete evidence that the funds were actually transferred to YGC. In the Committee's view, this does indeed create the doubt on the authenticity of the landlord and tenant relationship.

25. In the light of these facts, the Committee finds that although ADB does not have explicit guidelines for staff on how to negotiate the rental payments, it was not unreasonable for the respondent to contemplate the charge of misconduct

Application to the Administrative Tribunal and subsequent proceedings

14. On 11 August 2006, the Applicant applied to the Tribunal challenging the decisions of the Appeal's Committee and of the President. He requested that the Tribunal:

- a) Declare his dismissal null and void and order his immediate reinstatement and payment of full back-wages from date of dismissal up to actual reinstatement;
- b) Order the Bank to pay him the amount of rental subsidy he is entitled to receive for the period from 1 July 2003 up to the effective date of the amended A.O. of 2004; and
- c) Order the payment of \$1,000,000 for moral damages.

15. On 28 November 2006, the Applicant requested that the case be set for evidentiary hearing. The Bank did not oppose this motion. On 7 March 2007, the Tribunal granted the request for an evidentiary hearing and ordered the hearing to be held on 13 August

2007 “... in relation to the question of fair appraisal of the rental value of the property at Cleveland Towers, Unit 17D and payment of rental for the same property during the period 1 July 2003 to 30 June 2004”.

16. The following witnesses appeared at the hearing held on 13 August 2007:

For the Applicant

- Pearl de Alwis, representative of YGC Investment.
- J.P. Bondoc, Dean of the Center for Appraisal Studies who was hired to do an independent review of the valuation reports.
- Jose V. Abular Jr., an employee of the Applicant who was invited to the Applicant’s “farewell dinner” hosted by the government of Laos.
- Engineer Jose L. Ocampo, of Vitale Valuation Services (and employed by Cuervo Appraisers from 1991 to 1995) hired by the Applicant to conduct an independent appraisal.

Connie Montano, the building representative of Cleveland Towers, could not appear because of illness; however, the sworn statements she had provided in March and August 2004 were accepted into evidence.

For the Bank

- Mr. Roberto Cacal, Jr., Assistant Vice President of Royal Asia Appraisal Corporation; and Mr Antonio Fercia, licensed appraiser.
- Mr. Rene Sebastian, a licensed appraiser who was involved in the 19 December 2003 Philippine Appraisal Co, appraisal report.

- Mr. Abelardo Garcia, Jr., former Executive Vice President of Cuervo Appraisers, Inc.,
- Mr. Salvador Ocianas, licensed appraiser.

II. FINDINGS

I. The charges

17. As stated above, the Applicant was charged with three counts of misconduct. The Tribunal now examines each of these charges.

1. The fair rental value of the condominium

18. According to Administrative Order ("A.O.") No. 2.04, misconduct includes "... *abuse or misuse of the Bank's benefits and allowances ...*" According to A.O. 3.07, the staff member has "*to exercise prudence and economy in rental payments and to avoid paying excessive rent*". It is up to the Bank to establish – not only that (A) the rent for which the Applicant requested a subsidy was excessive but also (B) that this request for an inflated rental subsidy was made knowingly.

A. Was the rent excessive?

19. For the three appraisers, the fair rental value of the condominium unit was from Php 50,000 to 70,000 per month. Each of the appraisers worked separately from the others and none of them knew the reason of the Bank's request: nevertheless, they reached a similar

assessment of the rental value of the condominium unit. Each appraiser asserted having personally inspected the property and having met with Mrs. Connie Montano, building administrator of Cleveland Towers condominium.

20. It is true that this assertion conflicts with the Mrs. Montano's sworn statement of 3 March 2004 in which she wrote: "*I would like to make it clear that I was never interviewed by any representative of the said appraisal companies in ... December 2003...*" At the evidentiary hearings, where Mrs. Montano did not appear because of illness, the three appraisers maintained under oath having spoken with Mrs. Montano and moreover two in three appraisers – Mr. Sebastian of Philippine Appraisal and Mr. Fercia of Royal Asia Appraisal Corporation – produced documents allegedly provided by Mrs. Montano at that time, i.e. a brochure setting out asking prices for the purchase of available Cleveland Tower condominiums (Mr. Sebastian) and her business card (Mr. Fercia). Consequently, the Tribunal finds the testimony of the appraisers persuasive.

21. To determine this fair value, the three appraisers followed standard practice: market comparison approaches including listings and other market data of comparable properties registered in the vicinity. At the evidentiary hearings, Mrs. Bondoc and Albano - witnesses appointed by the Applicant – claimed that ADB's appraisers did not comply with the international valuation standards. But, the Philippine Real Estate Appraisers Association of which the three ADB's appraisers are members, became a member of the international valuation standards committee in 2005, two years after the reports. Thus, at the time of their appraisals – in December 2003 – these standards were not in force.

22. To support his request for a rental subsidy of Php 165,000 per month, the Applicant offered:

a) The “*appraisal*” of Mrs. Montano - Indeed, in her sworn statement of 3 March 2004, Mrs Montano wrote that she thought the fair rental value of the unit from 2000 to 2003 was between Php 150.000 and Php 180.000 per month. The Tribunal is not convinced by this valuation: Mrs Montano is not a professional appraiser and – above all – she is (or was at the relevant time) building administrator of the Cleveland Tower and in this capacity, had an interest to ensure the highest value of the units in “*her*” building.

b) The appraisal of Mr Ocampo - Mr Ocampo concluded – after inspecting the unit in June 2007 – that the fair rental value was Php 120.000 per month in 2002-2003. Even if this valuation might be credible, the Tribunal notes, on one hand, that it is refuted by three other appraisals and, on the other hand, that the amount valued by Mr Ocampo – Php 120,000 – is far below the Php 165,000 for which the Applicant claimed a subsidy.

In conclusion, the Tribunal finds the monthly rent of Php 165,000 did not correspond to the fair rental value of the condominium unit involved.

B. Was the request for an excessive rental subsidy made knowingly?

23. In July 2002, the Applicant hired Cuervo appraisers – Mr. Oscianas – to prepare an appraisal for unit 17D at Cleveland Towers. After having “*personally inspected the property, investigated local market conditions*” and considered “*sales, offerings and*

rentals of condominium units ...” Mr. Oscianas provided his detailed reports (12 pages) on 6 August 2002; it was sent to YGC c/o the Applicant. This report valued the fair rental value of the unit at Php 75,000 per month.

24. According to the testimony of the former Executive Vice President of Cuervo at the evidentiary hearing, the Applicant complained about the low value appraised by Mr. Oscianas; the Applicant rejected the report as unprofessional and did not pay the bill of the company. So, in 2002, one year before the application for a rental subsidy of Php 165.000 per month, the Applicant knew that his request could not correspond to the fair valuation. At that time, the Bank had begun disciplinary procedures against him, namely for breach of A.O. 2.04 which lists “*abuse or misuses of the bank’s benefits and allowances...*”. If the Applicant had been in good faith, he should have – at least – asked for a second appraisal. Instead, he concealed the Cuervo report which was shown by the Bank (and not by the Applicant) for the first time at the evidentiary hearing. Consequently, the Tribunal is convinced that the Applicant knew that the rent for which he claimed subsidy in June 2003 was far in excess of the condominium’s fair rental value.

2. The rental payments to YGC

What was the incentive for the Applicant to increase the fair rental value of the condominium unit?

25. In its Decision No.57 of August 2003, this Tribunal concluded that “*It is a precondition of granting rental subsidy that staff member has actually paid rent and that in cases where reasonable doubts emerges as the correctness of the statements made by a staff*

member, it is incumbent on the staff member to substantiate the basis of his claim". To substantiate his claim for a rental subsidy, the Applicant simply produced a check written to his sister as payee; however according to the assertion of the Applicant, the rental property is owned by YGC and not by his sister. Thus, the Bank had a reasonable doubt "*as to the correctness of the statements*" allegedly made by the Applicant to YGC.

26. So, it was – according to the quoted decision of the Tribunal – incumbent on the Applicant to prove that he actually paid rent to YGC. The easiest way for the Applicant to prove his payment of rent was to provide the bank records of YGC. The Tribunal does not agree that, as argued by the Applicant, it would be an "*unnecessary and unreasonable intrusion into the financial affairs of a third person*": YGC is not a "*real*" third person or even a proper landlord; it is an entity owned by his sister and nephew. And, in any case, the Applicant could not provide those receipts; at the evidentiary hearing, Pearl – his sister – and one of the two shareholders of YGC testified that YGC had no bank account and that she received the rent for the condominium into her personal bank account. Furthermore, the Applicant does not propose another means "*to substantiate the basis of his claim*": he had failed to take this elementary precaution after he had been found guilty by the Tribunal's decision of August 2003 for the same behaviour, namely his failure to keep the necessary documents to prove, if required, that he did in fact pay the agreed rent to the corporate owner of the property.

3. The failure to disclose financial interest

27. Under the version of A.O. 3.07 effective until June 2000, renting from a company owned by close relatives of a staff member was not formally prohibited. On 22 June 2000, A.O. 3.07 was revised to read as follows:

A staff member requesting rental subsidy for a residential property owned by one or more close relatives as defined in AO 2.01 or owned by a company in which the staff member has a substantial financial interest, has an obligation to disclose such information. As a general rule, in these cases the staff member will not be eligible for rental subsidy unless otherwise authorized by the Director, BPMSD

The Bank argues that the Applicant failed to disclose the fact either that he retained a substantial interest in YGC or that members of his immediate family, the sole shareholders of YGC, were the owners of this company.

28. Although the Bank agrees that this failure to disclose his financial interest was not the basis for the dismissal, the Tribunal believes that the Applicant had acknowledged the situation, which was thus known to the Bank. Indeed, on 15 July 2003, referring to the application for rental subsidy for the period 1 July 2003 to 30 June 2004, BPMSD wrote to the Applicant:

We note that the property in question was previously jointly owned by your close relatives, Pearl de Alwis and Choo Tsun Yoe., who are the only shareholders of YGC...

The Applicant answered on 17 July 2003:

Please note that here has been no change in ownership ...

He submitted, in attachment to this memo, a rental receipt signed and acknowledged by his sister, Pearl. So – in July 2003 – although the Bank was aware of the situation it did not know that the amount for which The Applicant applied was deliberately excessive.

29. In conclusion, the Tribunal finds that the two first charges are established and linked: the Applicant had an interest to inflate the rental value of the condominium because the more he claimed to have paid, the higher the subsidy owed by the Bank would be, subsidy for the benefit to the close members of his family, if not himself.

II The dismissal

30. Section 6.2 of A.O. 2.04 “*Disciplinary measures and procedures*” provides namely

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 ...

...

(f) whether the unsatisfactory conduct was a deliberate act;

...

The breach of the standard of conduct

31. The Applicant was previously sentenced for lack of prudence and economy in his rental subsidy application. Despite this “warning”, he continued trying to obtain a benefit to which he knew he was not entitled.

The position held by The Applicant

32. Prior to his dismissal, the Applicant held the position of Senior Financial Analyst; his behaviour has provoked a loss of confidence in his integrity and betrayed the trust of his colleagues.

The misconduct was deliberate

33. As stated above, the Tribunal is convinced that the misconduct of the Applicant was deliberate. Para 6.3 of A.O. 2.04 provides:

6.3 The disciplinary measure of dismissal for misconduct is particularly appropriate when the unsatisfactory conduct is serious ... 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 ADB.

In this case, the unsatisfactory conduct was serious; because of the breach of trust, it was not in the interest of the Bank to continue the services of the Applicant. Thus, the sanction of dismissal was provided for in the law of the Bank.

34. With regards to the proportionality of the measure, the Tribunal has to examine whether the sanction is not significantly disproportionate to the offence (See *Zaidi* Decision No. 17 [1996] II ADBAT Reports, para.10). In its judgment *Mr. J.G.B* 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 (emphasis supplied).

Taking into consideration the gathering of the evidence, the repeated character and the seriousness of the misconduct in the face of opportunity to correct his misbehaviour and protect his position, the Tribunal is of the opinion that there was certainly no “*clear disproportion*” between the offence and the penalty: so, it has no justification to substitute its assessment for that of the President.

III The requirements of due process

35. The Tribunal cannot agree with the arguments of the Applicant with respect to due process.

1. The refutation of the appraisal reports

36. The Applicant had the opportunity to refute the appraisals before the initiation of the preliminary inquiry: indeed, the three reports were provided to him on 22 December 2003 while the preliminary enquiry was initiated in July 2004.

2. The choice of a counsel

37. The Bank did not deny the right of the Applicant to counsel of his choice when he was invited to sign himself his own appeals statement. This request was, indeed the application of A.O. 2.06 para.7.2 which does not allow for counsel outside the Bank to file an appeal on the behalf of the staff member.

3. The time limit of the disciplinary action

38. According to A.O. 2.04 para.4.2, disciplinary proceedings must be initiated within one year from the date of the discovery of the misconduct. The excessive character of the rental request was discovered, at the earliest, on 11 December 2003, the date of the receipt of the first appraisal report. The preliminary inquiry began in February 2004; the Bank did not exceed the time period under which it could initiate the disciplinary action.

4. The “double jeopardy”

39. Assuming the rule of double jeopardy is applicable to disciplinary procedures (See UNAT, Judgment No. 1066 *Ragan* (2002) para.5), it implies that the same person cannot be punished twice for the same wrongdoing. But, that is not the case here: the present case involves the Applicant’s rental subsidy application for 2003 under the A.O. 3.07 in June 2000 and not the rental subsidy applications for 1998 and 1999 under the then applicable A.O. 3.07. He had already been disciplined for the earlier wrongdoing. The current discipline arises from

the subsequent wrongdoing and in particular his failure to heed the warning inherent in that earlier penalty.

5. The bias of the appeals and review committee against the Applicant

40. The Applicant was a level 5 staff member. The review committee was composed of a level 8, level 7 and level 5, i.e. in accordance with A.O. 2.04 para.9.3 (a) which provides : “(in) appointing ... a review committee the rank and official position of the ... members of the review committee “vis à vis” the staff member under inquiry shall be taken into consideration”. On the other hand, the Bank challenges the allegation of the Applicant that the review committee composition would have changed “in the midst of the deliberations” Even if the Applicant established this fact – and he does not – it would not detract from the responsibility of the Tribunal which is to review the propriety of the action of the President irrespective of the earlier deliberations or determinations of the Appeal and Review Committee.

6. The alleged harassment

41. The Applicant has to prove that he was harassed for exercising his right before the Tribunal. He has failed to do so. On the contrary, the Tribunal notes that the Applicant made ample use of his right to challenge the Bank before this body. It is, after all, his fourth appeal on variants of the same theme. Finally, the Applicant did not provide the Tribunal with any evidence to support his contention that his name was leaked as a staff member who would be dismissed by the end of the year. Namely, in relation with a farewell dinner in Laos, the

witness provided by the Applicant could not give any precision neither about the date of the dinner nor about the relationship between the alleged dinner and his improper action.

DECISION

For these reasons, the Tribunal unanimously dismisses the Application.