

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 90
(23 January 2009)**

**Eulogio Cahutay
v.
Asian Development Bank**

**Florentino P. Feliciano, President
Khaja Samdani
Claude Wantiez**

1. The Applicant contests the decision of the Asian Development Bank (“ADB” or the “Bank”) to dismiss him for misconduct and asks for reinstatement with restitution or compensatory damages in the amount of US\$100,000, moral damages in the amount of US\$20,000, exemplary damages in the amount of US\$20,000, and litigation costs in the amount of US\$2,000.

I. THE FACTS

Background

2. According to the Applicant, he joined ADB on 1 January 1993 as a Senior General Service Staff Driver. However, the Bank admits that the Applicant joined the Bank on 8 May 1986 as a contractual staff of the Office of Administrative Services (OAS). At the time of

his dismissal on 8 May 2007, the Applicant was a Level 2 Senior General Service Staff (Messenger) in the Logistics Management Unit (OAS-LM).

3. At around 11.30 a.m. of 9 March 2007, a staff member of the Bank (hereinafter referred to as “Ms. Y”), used the Metrobank Automated Teller Machine (ATM) located at the Bank's ground floor to make a balance inquiry. After determining her account balance, Ms. Y returned to her office. However, she inadvertently left her ATM card in the ATM machine without closing the transaction. Later the same day, Ms. Y learned that her account balance was less than when she first checked the same that morning. She contacted Metrobank and learned that a withdrawal amounting to ten thousand pesos (P10,000.00) had been made from her account that morning. This withdrawal was made less than two (2) minutes after she had made her balance inquiry. She also realized at that time that her ATM card was missing. She reported the matter to the OAS Security and Emergency Services Unit (OAFSA-SE). After reviewing the closed circuit video surveillance tapes of the area around the Metrobank ATMs, OAFSA-SE identified the Applicant as the person who used the ATM immediately after Ms. Y. Therein the Applicant appeared to be counting money while leaving the ATM. Metrobank later informed OAFSA-SE that there was no electronic record of any ATM transaction made by the Applicant on his own bank account on or about the time that Ms. Y left the ATM.

4. In the afternoon of 20 March 2007, the Principal Integrity Specialist and Associate Integrity Analyst of the Integrity Division, Office of the Auditor General (OAGI) interviewed the Applicant. Upon questioning, the Applicant said that he made two (2) cash withdrawals at around 11:00 a.m. from the Metrobank ATM. He said he used his own ATM card

to make withdrawals from the Metrobank ATM. He even suggested that OAGI call Metrobank to ask about the exact times of his withdrawals. Upon being shown the security video taken during Ms. Y's Metrobank ATM balance inquiry, the Applicant identified himself as the person shown in the video and explained that he had withdrawn money from the ATM. The Applicant also raised the impossibility of making withdrawals without Ms. Y's personal identification number (PIN) and said that he withdrew less than three thousand pesos (P3,000.00) from his own bank account. At the close of the interview, the Applicant, upon being asked whether he had withdrawn ten thousand pesos (P10,000.00) from another person's account on 9 March 2007, replied: "No, I only withdrew from my own account." When asked whether his answer had been truthful, he said that "It is the truth. I did withdraw. I have nothing else to say." Upon the request of OAGI investigators, he agreed to provide a written authority to check his Metrobank transactions on 9 March 2007.

5. However, early the next morning, the Applicant confessed to OAGI investigators that he had indeed made the unauthorized withdrawal and had kept the ten thousand pesos (P10,000.00) in his locker. He said that he did not spend the money because he "was expecting that someone was going to be looking for it" and gave the money over to OAGI for return to Ms. Y. The Applicant, however, continues to deny that he had taken Ms. Y's ATM card from the machine. The findings of the investigation of OAGI were summarized in a memorandum dated 21 March 2007 ("OAGI investigation report") addressed to the Director of Human Resources Division (BPHR) of the Budget, Personnel and Management Systems Department (BPMSD).

6. In view of the findings in the OAGI investigation report, the Director General (DG) of BPMSD issued a charge memorandum dated 27 March 2007 which the Applicant received on 28 March 2007. Therein, the DG, BPMSD summarized the findings of the OAGI investigators and informed the Applicant that the charges against him were very serious and might warrant imposition of the disciplinary measure of dismissal from the Bank because of the blatant nature of the misconduct. The Applicant was also suspended without pay effective 28 March 2007.

7. In an undated reply to the charge memorandum, the Applicant expressed remorse for his fault, and also indicated that he asked for, and was given, pardon by Ms. Y. He claimed that he had been tempted to commit what he knew was wrong because of his financial problems. He also asked for the Bank's consideration regarding his situation taking into account the fact that this was his first offense in his twenty (20) years of service and the fact that he had been commended twice, initially by former ADB President Kimimasa Tarumizu and subsequently by ADB Vice-President S. Stanley Katz, for his dedicated service to the Bank.

8. On 23 April 2007, in accordance with paragraph 9.1 (d) of Administrative Order (A.O.) No. 2.04, the Director, BPHR, acting on behalf of DG, BPMSD, met with the Applicant to discuss his reply. The Director, BPHR explained that the BPMSD's review of his case would be guided by Section 6 of A.O. 2.04 and indicated that any disciplinary measure that could be imposed would take into account the seriousness of his misconduct and his personal circumstances.

9. On 30 April 2007, the President approved the recommendation of DG, BPMSD that the Applicant be dismissed from the Bank's service. The DG concluded that, "By making an unauthorized withdrawal of P10,000 from [Ms. Y]'s account, [the Applicant] stole from a fellow staff member. When faced with the evidence of misconduct, [the Applicant] deliberately lied to the OAGI investigators. Taking into account the circumstances, he probably also lied when he said that he did not take [Ms. Y]'s ATM card. In view of the circumstances it is in the interest of ADB that the Applicant be terminated immediately." The President's decision dated 30 April 2007 was received by the Applicant on 8 May 2007.

10. On 7 June 2007, dissatisfied with the President's 30 April 2007 decision, the Applicant filed an Appeal with the Appeals Committee (Committee) against the said decision. In his Appeal, the Applicant contended that "the disciplinary measure of dismissal that was meted out in his case was way below any standard of proportionality and fairness."

11. On 6 November 2007, the Committee submitted its Report and Recommendation to the President according to which the Committee recommended that the President reject all of the Applicant's claims.

12. On 9 January 2008, the Bank issued a memorandum to the Applicant advising him of the President's decision on his Appeal. Hence this Application.

Relief Prayed For

13. The Applicant seeks redress, appropriate compensation, corrective measures and other measures deemed appropriate for the corrections of the violations of his right to due process and for the unjustified summary termination of his employment.

14. The Applicant also seeks the following relief:

a. To overturn the decision of the President approving the recommendation to terminate [the Applicant's] services and to reinstate the Applicant in his position without loss in seniority, restitution of all wages, allowances, privileges, reimbursements and other entitlements from the date of termination; or

b. Alternatively, to be awarded:

- i. Compensatory damage in the amount of US\$100,000.00
- ii. Moral damages in the amount of US\$20,000.00
- iii. Exemplary damages in the amount of US\$20,000.00
- iv. Litigation costs in the amount of US\$2,000.00

15. The Applicant likewise seeks the following preliminary measures:

a. that a full panel be constituted to hear and decide this Application;

b. that the statements of the Applicant when he was deposed without affording him the right to counsel or accompaniment be expunged from the records.

16. The Bank prays that all claims of the Applicant should be dismissed as there is no basis for the said claims.

II. FINDINGS

Preliminary Measures

Full Panel

17. The Applicant requests that a full panel be constituted to hear this Application. He maintains that his case should “be heard and ventilated as widely as possible to preclude any doubt in his mind that his case will be decided with the object of discovering the truth and ensuring that truth and justice shall prevail.” In the circumstances of the case, the Tribunal denies the request.

Expunging Statements of the Applicant

18. The Applicant requests that statements made by him when he deposed “without affording him the right to counsel or accompaniment” be expunged from the record. In response the Respondent argues the rules of investigation allow a staff member to be accompanied by another staff member during interviews conducted as part of an investigation but specifically exclude accompaniment by legal counsel.

19. In light of the Applicant's admission of wrongdoing in his Application and Reply, he has effectively waived any claim for procedural irregularity involving his deposition. Accordingly, the Tribunal denies the Applicant's request to expunge from the record his statements made during the preliminary investigation.

Relevant Administrative Orders

20. A.O. 2.02 provides as follows:

....

2.13 ADB shall require staff members to conduct themselves at all times in a manner befitting their status as employees of an international organization. They are expected to maintain a high degree of integrity and concern for ADB's interests and to avoid situations and activities which may reflect adversely on the institution, compromise its operations, or lead to conflicts of interest. The President may impose disciplinary measures on staff members whose conduct is unsatisfactory.

....

4.11 Staff members who fail to comply with their obligations under this Section 4 shall be subject to disciplinary procedures and sanctions for unsatisfactory conduct and misconduct set out in [A.O.] No. 2.04, including the possibility of termination or summary dismissal if warranted by the gravity of the misconduct in question.

....

5. GENERAL

It is not possible to set out all-inclusive or exhaustive code of conduct for the guidance of staff members. However, staff members are expected to use their own good judgment to conform with the intent and spirit of this AO in all matters not specifically stated herein. Should staff members have any doubt as regards their proper course of action in any matter related to this AO, it will be in their own interest to seek the advice of their Head of Department/Office or the [DG], BPMSD.

21. A.O. 2.04 provides as follows:

....

Section 2 (Examples of Misconduct):

2.1 Disciplinary measures may be imposed whenever there is a finding of misconduct or attempted misconduct. Except as otherwise specified, misconduct does not need to be intentional. Misconduct includes, but is not limited to, the failure to observe the Staff Regulations, AOs, Administrative Circulars and all other duties of employment. Misconduct further includes, but is not limited to, the following acts and omissions:

....

(f) Acts that violate applicable criminal law (e.g. theft, felonious acts, use or possession of illegal drugs); the making of knowingly false statements or willful misrepresentation or fraud pertaining to official matters, whether oral or written

....

Section 4 (Disciplinary Measures):

4.1. Disciplinary measures imposed by ADB on a staff member shall be determined on a case-by-case basis, taking into account the criteria set forth in this Section. They may take the forms indicated below.

4.2. Depending on the circumstances of the case, one or more of the following disciplinary measures may be taken by ADB when misconduct is determined to have occurred, provide the disciplinary procedure against the staff member is initiated within one year from the date the misconduct is discovered and brought to the attention of BPMSD or the Integrity Division of the Office of the Auditor General (OAGI):

....

(h) Dismissal for misconduct ...

The Applicant's Contentions

22. The Applicant maintains that his act was a singular and momentary error in judgment and that he never planned to take money from anybody. His act was not premeditated but was rather an instantaneous act without thought or contemplation and was brought about by pervading financial difficulty. His acts were not committed out of greed or outright dishonesty but were a result of this insuperable force.

23. Applicant points out that “while it was found that there was sufficient basis to find him guilty of misconduct, this is only in the generic sense of the word misconduct—not as it is defined in Section 2.1 of A.O. No. 2.04.” Since “no actual determination of a criminal act was ever pursued and adjudicated,” the Applicant stresses that “the moving factor was that of error in judgment rather than a clear premeditated criminal intent.”

24. Applicant further points out that the fact of his having admitted to the unauthorized taking of the money must be taken as having a mitigating effect on the charge against him.

The Bank's Contentions

25. The Bank argues that the Applicant, in making an unauthorized withdrawal of P10,000.00 from Ms. Y's account, engaged in serious misconduct which in itself warranted dismissal. It pointed out that under Section 2.1 (f) of A.O. 2.04, “theft” is explicitly included as

one of the examples of misconduct for which the Bank may impose a disciplinary measure on a staff member. The Bank further points out that the Applicant lied during the investigation when he was interrogated by the OAGI investigators about unauthorized withdrawal of P10,000.00 from the account of another staff member notwithstanding the fact that he had been informed at the beginning of the interview that under the Bank's Integrity Principles and Guidelines, he had an obligation to answer all questions truthfully. This act of “making knowingly false statements,” according to the Bank, is one of the examples of misconduct under Section 2.1 (f) of A.O. 2.04.

26. The Bank belittles Applicant's subsequent confession to the OAGI investigators since, according to the Bank, the Applicant was already aware that the Bank had all the videotape and electronic evidence that it needed to charge the Applicant with the unauthorized withdrawal. The Bank contends that, in this context, the Applicant's rather late confession does not lessen the gravity of his misconduct.

27. The Applicant having finally admitted his misconduct, the only question for consideration is the proportionality of the penalty. There is sufficient case law on the subject of proportionality. As the Tribunal noted in *Abat*, Decision No. 78 (7 March 2007), para. 43: “As the President has the discretion to determine a sanction in disciplinary proceedings, the test to be adopted by this Tribunal before it can interfere with the President's discretion [to determine a sanction in disciplinary proceedings] is whether that sanction is disproportionate to the staff member's offense. See *Zaidi*, Decision No. 17 [1996], II ADBAT Reports 89. Lack of proportionality of penalty has been considered as an error of law in *Ferrecchia*, ILOAT Judgment No. 203 (14 May 1973). It has been observed as follows:

The Tribunal quashes a decision if it is founded inter alia upon an error of law. Cases in which a disciplinary sanction imposed on a staff member appears out of all proportion to the objective and subjective circumstances in which the misbehaviour was committed should be assimilated to cases [of] error of law.

28. Arguments raised by the Applicant in his defense are drawn from the standards for assessing the seriousness of the unsatisfactory conduct as set out in A.O. 2.04, section 6.2 as follows:

(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;

(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.

29. In relation to these factors, the Applicant argues that there is no mention of any criminal charges having been pressed against him and claims this proves the fact that the complainant bears no grudge against him. He notes that he tried to undo the offense by returning the amount (P10,000) and claims, without proof thereof, that the complainant has forgiven him. But this does not reduce the gravity of his misconduct. The issue here is not forgiveness of his behavior by the victim, but that by stealing the money he violated his obligations as an employee of the Bank. As this Tribunal has held in *Bares*, Decision No. 5, [1995] I ADBAT Reports, para. 25: “The Bank's duty is only to exercise reasonable care in every aspect of its activity that impinges or may impinge upon the safety, health or security of its staff.” The Tribunal finds that the Bank has not exercised its discretion in an arbitrary manner and that the disciplinary measure of dismissal was not disproportionate in the circumstances.

30. Further, the Applicant argues that his duties were non-managerial and that the occurrence did not take place in the performance of his official duties. But, in the current circumstances, the Tribunal considers the misconduct unacceptable in the first instance, whatever the Applicant's level of duty.

31. So far as the length of service of the Applicant is concerned, it is admittedly 21 years. However, the Bank asserts that this does not prevent it from assessing theft as serious misconduct. Theft is prohibited regardless of an Applicant's longevity. Indeed, as the Tribunal notes in *Nagarajah Gnanathurai*, Decision No. 79 (17 August 2007), para. 30: “The fifteen (15) years of service by the Applicant to ADB led the President to believe that the Applicant should have known better.” The Tribunal notes the Bank's increasing efforts to combat corruption,

including fraud committed by ADB staff members, and that the Applicant should have known that any theft would warrant the “strongest action possible”. With regard to the Applicant's alleged commendable performance, his receipt of a commendation does not override the fact that he admitted to committing the theft.

32. The Applicant's actions constitute serious misconduct within the meaning of A.O. 2.04. The Applicant's theft from a fellow staff member was a deliberate act and not an accident. The Applicant also deliberately lied to OAGI investigators until shown that there was a record of his misconduct. A.O. 2.04, para. 6.3 provides that “[d]ismissal 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 ADB.”

DECISION

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