

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 91
(23 January 2009)**

**Bruce Murray
v.
Asian Development Bank**

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

1. The Applicant contests the decision made by the President of the Asian Development Bank (“ADB” or the “Bank”) around 6 July 2007 which overruled the recommendation of the Development Effectiveness Committee (DEC) for the two-year renewal of the Applicant’s appointment as the Director General (DG) in the Operations Evaluation Department (OED) and in effect terminated the Applicant’s fixed-term appointment with ADB.

I. THE FACTS

Background

2. The Applicant joined ADB as an evaluation specialist in 1980. In the summer of 2004, he applied successfully for the Level 10 position, DG, OED. The DEC recommended the nomination of the Applicant to the position with the support of five out of six members (the Alternate Executive Director of the United States was the sole opposition to the nomination), and

the President accepted the DEC's recommendation. Upon the joint recommendation by the DEC and the President, the Board of Directors appointed the Applicant as DG, OED.

3. The appointment of the Applicant was based on the Board's 2003 policy paper on "Enhancing the Independence and Effectiveness of the Operations Evaluation Department," paragraph 18 of which stated: "The director general who will head OED will be appointed by the Board, upon the joint recommendation by the DEC and the President The appointment of the director general may be for an initial term of 3 years, which may be *renewed* for a maximum of 2 years. During this period, the director general can only be removed by the Board on the grounds of inefficiency or misconduct. Upon completion of the term, the director general is ineligible for any other staff position in ADB. Except as otherwise provided in the employment contract with ADB, the director general will be subject to, and covered by, all other rules and regulations applicable to ADB staff" (italics added). In accordance with this paragraph, the open vacancy advertisement for the position had stated, under "Terms and Conditions of Appointment," that "[t]he appointment of the director general may be for an initial term of three (3) years, which may be *renewed* for a maximum of two (2) years" (italics added).

4. The Board recommendation on the appointment of the Applicant, dated 27 September 2004, stated that "The DEC and the President jointly recommend that the Board appoints [the Applicant] as director general of OED effective upon the assumption of office, for a term of 3 years with an option to *extend* by two years" (para. 10, italics added). The Applicant assumed the position on 25 October 2004.

5. As he was already a staff member and could be transferred, ADB opted not to provide the Applicant with a contract specifying the terms and conditions of the appointment.

6. During the Applicant's tenure as DG, OED, he underwent three (3) annual performance appraisals in 2004, 2005, and 2006. There was nothing to indicate performance problems in the review of either 2004 or 2005.

7. For the 2006 performance review, the Bank decided to establish what it called a "benchmark" of 40% for "Generally Satisfactory" (GS) ratings for professional staff. The Applicant became aware of this for the first time on 23 December 2006. Despite the Applicant's misgivings about the 2006 Performance Development Plan (PDP) Review system, he implemented it. According to the Applicant, because of the special characteristics of OED, the 40% "quota" was applied as a "quota" at the departmental level for OED. At the suggestion of one Director, the three Directors of the Department – DG, OED, Director OED1, and Director OED2 – decided that they themselves would be rated as "GS" so that three staff of the Department would be rated higher than "GS".

8. The Applicant explains that he prepared the first draft of his 2006 PDP after which his supervisor, the DEC Chair, made minor modifications. Six of fourteen behavioral assessments were rated as "GS" and eight as better than "GS". The DEC Chair and the Applicant signed the PDP, and the President gave the Applicant an overall "GS" rating. The DEC Chair wrote on the Applicant's performance in the PDP: "Generally OED was a well managed department in 2006 that

produced good quality reports in an efficient and effective manner. However, as noted above there are areas for improvement.”

9. The Applicant’s three-year term was due to end on 24 October 2007. On 26 April 2007, two months after the Applicant’s 2006 PDP was completed, all members of the DEC agreed that the DEC should recommend the “reappointment” of the Applicant as DG, OED for a further two years. The President suggested that the matter would be best left to the successor DEC which would be constituted on 1 July 2007. On 28 May 2007, the DEC Chair met a second time with the President to discuss the matter, and the President informed the DEC Chair that he would not be able to agree to recommend renewal of the Applicant’s appointment. Near the end of June 2007, the President and the DEC Chair discussed the matter a third time, but the President adhered to his earlier view.

10. On 3 July 2007, the President met with the Chair of the newly constituted DEC. The DEC Chair noted in a 5 July 2007 memorandum sent to the Secretary that “As it is not possible to make a joint recommendation by the DEC and the President to the Board of Directors for extension of [the Applicant’s] current term ... situation requiring early action for selection of new DG, OED exists now.”

11. On 28 June 2007, four months before expiry of the Applicant’s appointment, the Secretary informed the Applicant that the President and the DEC had been unable to agree on a recommendation to extend his appointment, and that for this reason his appointment as DG, OED would lapse on 24 October 2007 at the end of his three-year term. A memorandum from the

Secretary dated 6 July 2007 confirmed this, stating the reason as follows: “Your performance as Director General, OED has not fully met the President’s expectations and, especially for such a key senior management position, he could not agree to an extension of your appointment.”

12. The Applicant responded to the Secretary’s memorandum on 3 August 2007, contesting the decision of the President and pointing out that the previous DEC had thoroughly deliberated upon the issue before unanimously agreeing to recommend his reappointment. In response, the Applicant received a memorandum from the Officer-in-Charge, Office of the Secretary on 9 August 2007, which merely acknowledged the receipt of his memorandum.

13. On 24 October 2007, the Applicant’s three-year term as DG, OED ended and his employment with ADB was terminated.

Administrative Review and Appeal

14. On 21 September 2007, the Applicant requested administrative review, but on 8 October 2007, OIC, Budget, Personnel, and Management Department (BPMSD) found no merit in the Applicant’s allegations and denied any relief sought.

15. On 19 October 2007, the Applicant filed an appeal with the Appeals Committee. In the Report submitted to the President on 11 February 2008, the Appeals Committee recommended rejection of all of the Applicant’s claims. The Committee found that paragraph 2 of the 2003 Board Paper, the Vacancy Posting, and the Board Paper approving the appellant’s appointment, formed the

basis for any determinations on terms and conditions of employment, and that the appellant's appointment was not covered by Administrative Order (A.O.) 2.01 "Recruitment and Appointment". The Committee found that the President had exercised his performance management feedback responsibility appropriately, and that four months' prior notice of expiry of the Applicant's appointment was fair and reasonable.

16. On 11 February 2008, the President, upon recommendation of the Appeals Committee, rejected all of the Applicant's claims as without merit.

Application to the Administrative Tribunal

17. On 7 May 2008, the Applicant submitted to the Administrative Tribunal an Application, contesting the decision of the President not to extend his appointment as DG, OED for a further two years.

18. The Applicant specifically asks the Tribunal to rule on:

- a) whether the President had the power to make a unilateral decision that overruled the recommendation of the DEC, effectively removing the Applicant as DG, OED;
- b) whether the Applicant's 2006 PDP should be set aside;
- c) whether the President was obligated to follow the procedures in section 13 of A.O. 2.01, or equivalent principles in the body of international

law;

d) whether the President was obligated to follow the procedures in A.O. 2.03 and related Implementing Guidelines to provide sufficient feedback in written form about serious performance problems;

e) whether ADB has the legal right to penalize the Applicant by not making the procedures related to the extension of his appointment as the DG, OED clear and transparent.

19. The Applicant seeks the following compensation:

a) the salary, including the pay increase that should have resulted from the 2007 PDP exercise;

b) all benefits that the Applicant would have received had he continued to work in ADB until he reached the age of 60;

c) the expunging from ADB's records of:

i. the Applicant's 2006 PDP;

ii. the memo from the Secretary 6 July 2007 and all other documents containing adverse comments of the President and any other parties about the Applicant's performance as DG, OED.

20. The Applicant also requests the following preliminary measures:

... The production of information and advice provided to the President by

any party, particularly the Director General of BPMSD, the Managing Director General, the Vice President of Finance and Administration and the Secretary, in written form, E-mail or a summary of verbal discussions on my performance that helped to inform the President's decision not to agree with recommendation of the Board's Development Effectiveness Committee (DEC) to extend my appointment by two years.

21. The Bank requests the Tribunal reject the Application in its entirety for lack of merit. The Bank argues that the Applicant provides no evidence that the President's decision not to recommend renewal of the Applicant's appointment was arbitrary, discriminatory, an abuse of process or discretion, or in contravention of ADB's procedures.

22. By an Order of 12 January 2009, the Tribunal denied the request of the Applicant for preliminary measures.

II. FINDINGS

23. The legal standard applicable to this case is clear that the Tribunal can neither substitute its discretion for that of the management of the Bank, nor review whether the substance of a policy decision of the Bank is sound. It can only say that the decision of the Bank has or has not been reached pursuant to ADB's rules and procedures and otherwise by proper processes, or that the decision either is or is not arbitrary, discriminatory, or improperly motivated. See *Lindsey*, Decision No. 1 [1992], I ADBAT Reports 5, para. 12.

Terms and Conditions of the Applicant's Employment

24. The Applicant argues that, as he had no contract specifying the terms and conditions of the appointment, he is, in principle, subject to all rules and regulations applicable to ADB staff, in particular A.O. 2.01, section 13 (Extension of Fixed-Term Appointment; Regularization) and the procedures for performance management as set out in A.O. 2.03 and the Implementing Guidelines.

25. Paragraph 18 of the 2003 policy paper stated that "Except as otherwise provided in the employment contract with ADB, [DG, OED] will be subject to, and covered by, all other rules and regulations applicable to ADB staff." Thus, in the absence of an employment contract with ADB, indeed all rules and regulations applicable to ADB staff applied to the Applicant in principle. However, the position of the Applicant as DG, OED was special, and the above principle had to be adapted in view of his special position.

26. ADB established the Post-Evaluation Office in 1978. To reflect the increasing importance of operational evaluation, the Office was renamed Operations Evaluation Office in 1999, and upgraded and renamed the Operations Evaluation Department (OED) in 2001. OED undertakes evaluation activities to help the ADB management understand whether resources are well spent and the planned outcomes are achieved, and to ensure accountability for use of the resources. In order that OED can carry out its task impartially and objectively, OED is made independent of ADB's operations departments and is headed by a director general with the same seniority as the heads of operations departments. Until 2003, the director general reported directly to the President. The DEC, a standing committee of the Board of Directors, reviews the work of OED. In 2003, the Board

proposed a set of changes in the organizational framework of OED to enhance its independence and effectiveness in a policy paper entitled “Enhancing the Independence and Effectiveness of the Operations Evaluation Department.” In paragraph 17 of the paper, the Board proposed that “To ensure the organizational independence of OED, it should report directly to the Board through the DEC.” In paragraph 18 entitled “Appointment of the Director General,” the Board proposed as follows: “The director general who will head OED will be appointed by the Board, upon the joint recommendation by the DEC and the President The appointment of the director general may be for an initial term of 3 years, which may be renewed for a maximum of 2 years. During this period, the director general can only be removed by the Board on the grounds of inefficiency or misconduct. Upon completion of the term, the director general is ineligible for any other staff position in ADB. Except as otherwise provided in the employment contract with ADB, the director general will be subject to, and covered by, all other rules and regulations applicable to ADB staff.”

27. The Applicant was appointed as DG, OED based on this policy paper, in particular, its paragraph 18, and consequently there existed important differences between the position of the Applicant and that of other staff members of ADB, such as: i) he was appointed by the Board based on a joint recommendation of the DEC and the President; ii) he was appointed for an initial term of three years, which might be renewed but only for a maximum of two years; iii) during the period of appointment, he could be removed only for inefficiency or misconduct; and, iv) upon completion of the term, he was ineligible for any other staff position in ADB.

28. The Tribunal considers that paragraph 18 of the policy paper formed the basis of the Applicant’s appointment, and that the terms and conditions enjoyed by ADB staff members applied

to the Applicant only to the extent that they were consistent with the policy paper and the special nature of the position of the Applicant. The Tribunal finds that, in view of the character of his position, the procedures on extension of fixed-term appointments applicable to other ADB staff, as spelled out in A.O. 2.01, section 13, do not apply to the Applicant, and that the procedures for performance management, as set out in A.O. 2.03 and the Implementing Guidelines, are applicable to the Applicant only *mutatis mutandis*.

29. The Applicant invokes *Lindsey*, Decision No.1 [1992], I ADBAT Reports 5 and *Toivanen*, Decision No. 51 [2000], V ADBAT Reports 69. These cases related to extension of fixed-term appointment of other staff members whose positions do not partake of the nature of the position of the Applicant. Because of differences between the position the Applicant and that of other staff members, the principles enunciated in those cases do not apply to the Applicant as such.

Role of the President in the Reappointment

30. The Applicant argues that the President had a role in the initial appointment of DG, OED but no role in the decision whether to extend the term of DG, OED. The Bank argued that the term of DG, OED was up for “renewal” rather than “extension,” stressing the difference between the two.

31. The Tribunal finds the debate conducted between the parties over “renewal” versus “extension” not to be dispositive. The crux of the matter is whether the procedures set out for the initial appointment of DG, OED – appointment by the Board of Directors upon the joint

recommendation by the DEC and the President – are required for his “reappointment” for a further two years. Acceptability of DG, OED to both the DEC and the President is clearly a prerequisite of his appointment for the initial term of three years. Although the 2003 policy paper did not expressly require the recommendation of the DEC and the President for the reappointment, it is reasonable to conclude that the same requirement applies. The Tribunal considers that because of the importance of the position of DG, OED, the implicit assumption of the policy paper was that if the performance of DG, OED during the initial term meets the approval of the DEC, the President, and the Board, he may be “reappointed” for the position for a further two years. Because it is a repeated appointment, the same procedures as used for the initial appointment are called for. DG, OED is to be reappointed by the Board of Directors upon the joint recommendation by the DEC and the President. The term of DG, OED cannot be renewed for a further two years in the absence of a positive recommendation by the President. The initial appointment required the confidence and support of both the DEC and the President and those same circumstances are appropriately regarded as preconditions for reappointment. As the Applicant did not have the confidence and support of the President at the end of three years, he did not meet the requisite preconditions for the reappointment.

32. Paragraph 18 of the 2003 policy paper states that “During this period, the director general can only be removed by the Board on the grounds of inefficiency or misconduct.” The Applicant argues that the phrase “during this period” refers to the entire duration of the appointment of DG, OED, i.e., both the initial three years and an extension of two years. The Tribunal considers that the term “this period” refers to the period for which DG, OED has actually been appointed. Thus, when a person is appointed as DG, OED for a term of three years, *during the period of three years* he can only be removed on the grounds of inefficiency or misconduct, and when he is

reappointed for a successive two-year term, *during that period of two years* he can only be removed on the grounds of inefficiency or misconduct. The import of the paragraph cannot be that a renewal of the term of DG, OED may be withheld only on the grounds of inefficiency or misconduct. The Tribunal is unable to agree that the requirement of acceptability by both the DEC and the President is dispensed with for the reappointment.

33. The Tribunal finds that the President did not abuse his discretion when he did not agree to the DEC's recommendation to reappoint the Applicant as DG, OED for a further two years.

2006 PDP

34. The Applicant argues that his 2006 PDP should be set aside in relation to the decision not to extend his position as DG, OED, as the 2006 PDP was fatally flawed due to the imposition of a 40% "quota" for "GS" ratings.

35. The Tribunal follows its decision in *M. Zeki Kiy*, ADBAT Decision No. 89 (23 January 2009), in which it found that there were no mandatory fixed percentage quotas in the 2006 PDP and that it was not arbitrary to foresee a reasonable distribution depicted as a bell-shaped curve among the four categories with a relatively small number in each extreme box and the majority of employees being relatively equally divided between the two interior boxes. Accordingly, the Tribunal rejects the request of the Applicant to set aside his 2006 PDP in relation to the decision not to extend his position as DG, OED.

36. The Applicant alleges that OED management decided that all three Directors would be rated as “GS” so that three staff of the Department would be rated higher than “GS”. According to the Applicant, he prepared the first draft of his 2006 PDP, and his supervisor, the DEC Chair, signed it after making minor modifications.

37. By signing the PDP, the DEC Chair adopted the content of the Applicant’s PDP as his own. Six of fourteen behavioral assessments were rated as “GS” and eight as better than “GS”. Based on such appraisal, the President gave him an overall “GS” rating, and signed the 2006 PDP of the Applicant. Regardless of who had drafted it, the 2006 PDP of the Applicant, which was signed by both the DEC Chair and the President, indicated a number of areas where improvement was needed. The President was justified in relying on the 2006 PDP of the Applicant to decide not to recommend his reappointment.

Due Process

38. As stated above, because of differences between the position of the Applicant and that of other staff members, the procedures on extension of fixed-term appointment applicable to other staff members stipulated in A.O. 2.01, section 13 did not apply to the Applicant’s appointment. Nonetheless, the procedures on the reappointment of the Applicant must still comply with the requirements of due process, and be fair and reasonable.

39. The President had discretion in deciding whether or not to agree with the Chair DEC to recommend the reappointment of the Applicant. The discretion was particularly broad

because of the high level and importance of the Applicant's position. The WBAT stated that "[s]ubjective decisions which may seem unacceptably nebulous with respect to lower-level employees may be unavoidable with respect to persons near the summit of a corporate hierarchy." See *Conthe*, WBAT Judgment No. 271, [30 September 2002], para. 97. While the President had broad discretion, his decision was still subject to the requirements of due process, in particular that it must not be arbitrary. There is no evidence to suggest that the decision of the President not to recommend the reappointment of the Applicant was arbitrary.

40. In view of the high level of the Applicant's position and the broad discretion of the President, it was reasonable that the procedures for his reappointment be different from the procedures on extension of fixed-term appointment of a normal staff member.

41. The Applicant was appointed to the position of DG, OED for a fixed term of three years. While admitting there was no legal obligation on the Bank to reappoint him for a further two years, the Applicant argues that there was "a conditional expectation" that, based on satisfactory performance, there could be an extension of up to two years. He relies on A.O. 2.01, section 13.1, which states that "a fixed-term appointment will *generally* be extended ... when the following criteria are met ADB is satisfied with his/her performance" (italics added). However, a general expectation is not a guarantee. Moreover, as explained above, because of differences between the position of the Applicant and that of other staff members, A.O. 2.01, section 13 did not apply to the Applicant. The Tribunal is not persuaded that there exists any "conditional expectation". The broad discretion of the President in the appointment of the Applicant extended to his reappointment as well; the Applicant's generally satisfactory performance did not give him a right to reappointment.

Feedback on Performance Problems

42. The Applicant argues that the President did not bring performance problems of the Applicant to his attention in a timely manner so that he could correct them, thereby failing to follow the procedures for performance management as set out in A.O. 2.03 and the Implementing Guidelines.

43. An important purpose of the 2003 policy paper was to strengthen the effectiveness of OED by making it independent and remove undue influence, if any, of the President. The Tribunal finds it reasonable that the President did not give feedback directly to the Applicant on his performance during his three-year appointment out of respect for the independence of the Applicant's position. However, the President still retained broad discretion in deciding whether or not to recommend the reappointment of the Applicant at the end of his initial term of three years, and his decision not to recommend was not arbitrary.

Notice of Non-Renewal

44. The Secretary informed the Applicant, four months before expiry of the Applicant's appointment, that the President was not willing to agree on a recommendation to extend his appointment. The Applicant argues that the President was required under A.O. 2.01, section 13.2, to give notice not later than seven months prior to the expiry date of his fixed-term appointment.

45. As explained above, because of his special position, A.O. 2.01, section 13 did not apply to the Applicant's appointment. The Applicant was appointed to the independent position of DG, OED for a fixed term of three years, which "may be renewed" for a maximum of two years. His generally satisfactory performance would not give him a right to renewal. Thus, the situation was substantially different from a fixed-term appointment of a normal staff member, which "will generally be extended" if ADB is satisfied with his/her performance (A.O. 2.01, section 13.1). The Applicant was expected to be prepared for expiry of his appointment at the end of the initial term, although it "may be renewed" or there was "an option to extend" for two years. Under the circumstances, the notice given to the Applicant four months before expiry of his appointment satisfied the requirements of due process.

Discrimination

46. The Applicant claims that he was discriminated against, as his renewal decision was not treated the same way as other staff members seeking an extension of their fixed-term contract.

47. The principle of non-discrimination requires that staff members in "the same position in fact and in law" be treated equally. See *In re Vollerling*, ILOAT Judgment No. 1194 [1992], para. 2. Equality of treatment is not required when the circumstances of the persons concerned are different. Paragraph 18 of the 2003 policy paper formed the basis of the Applicant's appointment. Because of differences between the position of the Applicant and that of normal staff members, the procedures on extension of fixed-term appointment applicable to normal staff members stipulated in A.O. 2.01, section 13 did not apply to the Applicant, and the difference in treatment was justified.

The Tribunal finds that the Bank did not arbitrarily discriminate against the Applicant compared to other staff members seeking an extension of their fixed-term contract.

DECISION

For these reasons, the Tribunal unanimously dismisses the Application.