

**ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL**

**Decision No. 92  
(19 August 2009)**

**R. Keith Leonard  
v.  
Asian Development Bank**

**Arnold Zack, Vice-President  
Khaja Samdani  
Claude Wantiez**

1. The Applicant alleges abuse of discretion by the Asian Development Bank (“ADB” or the “Bank”) and its failure to follow proper processes in the conduct of his 2007 Annual Performance and Development Plan (“PDP”) Review.

2. He seeks relief in the amount of US\$125,643 for failure to promote him to Level 8, the expunging of his year-end assessment dated 18 January 2008 and requests that a new year-end assessment be carried out.

**I. THE FACTS**

**Background**

3. On 12 January 2001, the Applicant joined ADB as an Evaluation Specialist in the Operation Evaluation Department (“OED”).

4. After different promotions in 2003, 2004 and 2005, he became one of the two Level 7 Directors in the Operation Evaluation Division 1 (“OED1”) on 24 June 2005. The

current dispute concerns his 2007 evaluation before he was transferred in 2008 to the Level 7 position of Regional Director at the Pacific Subregional Office in Suva, Fiji.

5. As was the case for all staff members, the Applicant was subject to PDP internal regulations. According to this regulation:

a) The staff member fills out the “Key accomplishments under the Work Plan” and “Significant variations for the Work Plan” sections (Parts 1.A and 1.B of the PDP form);

b) The supervisor fills out Parts 1.C and 1.D and 2 of the PDP sections, where he or she confirms or comments on the reported accomplishments and provides ratings for the ADB-wide competencies;

c) The rater, in principle the Head of Office, fills out Part 3 of the form, “Overall Assessment and Comments”, where he or she assigns the performance appraisal rating and may make comments.

6. But, taking into consideration the unique characteristics of OED, which does not depend on a Vice President but reports directly to the Board of Directors, the line report was different:

a) The supervisor of the Director General (“DG”) was the Chair, Development Effectiveness Committee (“DEC”) and his rater, the President as President of the Board of Directors;

- b) The supervisor of the two Directors, OED was the DG.
  
- c) For the raters of said two Directors, the process had changed:
  - i. for the 2005 PDP, DG, OED and Chair, DEC each acted as rater;
  
  - ii. for the 2006 PDP, DG, OED acted as both supervisor and rater.

7. On 6 July 2007, the ADB advised the Applicant's supervisor, Mr. Bruce Murray, that his term of appointment as DG, OED would not be extended beyond 24 October 2007. Accordingly, Mr. Murray would not remain the supervisor of the Applicant until the end of the year 2007, the normal period for the performance review.

8. Section V. of the 2007 Performance Management – Implementing Guidelines (27 March 2007) provides that, the “previous” supervisor has to complete Parts 1.C, 1.D and 2 of the PDP for the period of his supervision, discuss these parts with the staff member, and forward a copy of the PDP form to the Human Resources Division (“BHPR”) and to the staff member. The original form is to be retained in the office “as input into the next assessment exercise”.

9. Mr. Murray followed this process. Before his departure, he provided the Applicant with his assessment covering performance from 1 January 2007 to 24 October 2007

and rated the Applicant as having “Always demonstrated” all eight competencies; he added the comment:

... [Applicant] would be a strong candidate for an exceptional rating.

... [Applicant] is more than ready to be promoted from L7 to L8 ... I have every confidence that he could perform well as a L9.

10. Mr. Murray held a formal meeting with the Applicant to discuss the performance; this “interim” assessment was placed on the Applicant's PDP file and a copy was sent to BPHR and the Applicant.

11. No copy was sent to the Chair, DEC, Mr. Ashok Lahiri.

12. After the departure of Mr. Murray, the Applicant acted as officer in charge of the department; he applied for the post of DG, OED but was not selected.

13. Not having filled the DG, OED position by the time the PDP for 2007 was to be completed, the Bank was required by PDP regulations to designate a supervisor and rater for the two Directors.

14. On 26 December 2007, after an exchange on the efficacy of an annual review by one who had only recently come to supervise the Applicant, DG, Budget, Personnel, and Management Systems Department (“BPMSD”) determined that the Chair, DEC would serve as both supervisor and rater for the Applicant's PDP.

15. As written by the Bank in its Answer (para. 10):

In the absence of a DG, OED, the Chair, DEC was the next best choice to do the Assessment as **Supervisor**, as the person next most familiar with the work of the Directors of OED and technically Applicant's Supervisor at any rate, as Applicant was the Officer-in-Charge of OED. The choice of Chair, DEC as **Rater** is consistent both with the independence of OED and with Bank practice of having two people involved in the overall performance evaluation ....

16. On 10 January 2008, the Applicant e-mailed to Mr. Lahiri:

... I am letting you know that I have submitted my PDP for your input in sections 1C and 1D .... We should have completed to the end of part 2 by January 14.

I hope you have been provided the assessment done by Bruce up to 24 October.

17. On 17 January 2008, Chair, DEC prepared the PDP of the Applicant covering the period 1 January to 31 December 2007.

18. Without having read (see below) the appraisals made previously by Mr. Murray - "Always demonstrated for the eight competencies" - Mr. Lahiri assessed the Applicant as "Always demonstrated" only for two out of eight competencies and "Very often demonstrated" for the other six.

19. On 18 January 2008, Mr. Lahiri rated the Applicant's performance as "Satisfactory". He added the comment that the Applicant was "a very sincere and hard

working professional who does his best to improve OED's relevance for the stakeholders, including internal departments".

20. In his sworn statement of 11 December 2008, Mr. Lahiri wrote:

... I based my assessment and rating of [the Applicant]'s performance on my knowledge of his work, gleaned from the information [the Applicant] provided on the PDP form regarding his key accomplishments during 2007, from my direct experience with him and from my understanding of the performance of OED generally ... I did not read the assessment of the previous supervisor, Mr. Bruce Murray before initially evaluating [the Applicant]'s performance because I was aware that Mr. Murray was highly complimentary of the performance of [the Applicant] ... and I had a sufficient basis of my own to make an assessment ....

21. On 25 January 2008, the Applicant e-mailed Director, BPHR:

I write to request clarification on a number [of] issues surrounding the assessment of my performance as determined by ED Lahiri in the PDP just released.

....

The overriding concern is that the performance assessment in the PDP just received bears little if any resemblance to that prepared by the then DG OED, Mr. Bruce Murray, covering the period 1 January 2007 to 24 October 2007 ....

....

Obviously, I have difficulty rationalizing these two sets of performance assessments made less than 2 months apart. This gives rise to several questions for which I would appreciate receiving an answer ....

22. On 28 January 2008 and 7 February 2008, two meetings were held, the first between the Applicant and Director, BPHR and, the second, between the Applicant and Mr. Lahiri.

23. In his statement of 11 December 2008 quoted above, Mr. Lahiri writes:

After my PDP discussion with Mr Leonard, I requested a copy of the complete assessment from BPHR. I considered it ... I decided that no change was necessary ... that I would have made the same assessment if I had reviewed this assessment before finalizing my own .... Mr. Murray's assessment was fully consistent with my assessment of Mr. Leonard as a very good performer; however, I felt that my choice of a slightly moderate overall rating was more appropriate ....

I considered that Mr. Murray's assessment was also consistent with and supported my overall rating of Mr. Leonard as Satisfactory. I took with a grain of salt Mr. Murray's suggestion that Mr. Leonard would be a strong candidate for an Exceptional rating, as I felt that Mr. Murray was perhaps being overly generous, Mr. Murray was highly complimentary about both of his Directors in his transfer PDPs. Given that Mr. Murray and both of his Directors in OED had volunteered to take Generally Satisfactory ratings for the 2006 PDP, (though they maintained they did not merit them) as a sort of protest against the forced distribution of ratings that year, I felt that Mr. Murray might have felt the need to "make it up" to Mr. Leonard in this year's PDP. I was also cognizant of the fact that Mr. Murray himself did not have to make hard choices as a Rater, but could freely express the opinion that a staff merited the Exceptional rating.

24. Before the Appeals Committee, Mr. Lahiri stated that from his experience it is normal practice for retiring supervisors in the Indian civil service to give overly generous performance assessment to staff as a reward for loyal service (paras. 25 and 49 of Bank's statement in the Appeals process).

### **Internal Proceedings**

25. On 15 February 2008, the Applicant submitted a request to DG, BPMSD for Administrative Review of the 18 January 2008 decision taken by Mr. Lahiri.

26. On 5 March 2008, DG, BPMSD denied the claim.
  
27. On 6 March 2008, the Applicant appealed the decision of DG, BPMSD before the Appeals Committee.
  
28. On 25 June 2008, the Appeals Committee recommended that the President reject the claim of the Applicant.
  
29. On 16 July 2008, the President agreed with the Appeals Committee's recommendation.

**Application to the Administrative Tribunal**

30. On 1 October 2008, the Applicant submitted an Application to the Administrative Tribunal. He claims that proper processes were not followed in the conduct of his 2007 PDP.
  
31. The Applicant seeks the following relief:
  - a) \$125,643 in compensation being the cost in net present value terms of not being promoted to Level 8 as strongly recommended by the previous supervisor.



- b) the year-end assessment conducted by the Chairman, DEC dated 18 January 2008 be expunged from the Applicant's records.
- c) a new year-end assessment be conducted supervised by BPHR.

## II. FINDINGS

### The Principles

32. According to established jurisprudence, the evaluation of the performance of employees is a matter of managerial discretion; the Tribunal may not substitute its discretion in such matters for that of the Bank. Thus, we cannot decide whether the Applicant deserved or not:

- a) the overall rating “Satisfactory” in the final 2007 PDP;
- b) the number of assessments as “Always demonstrated” within the interim as contrasted to final PDP.

33. But, according to the same jurisprudence, “Such discretion ... is not unlimited and the Tribunal must ensure that the exercise by the Bank of its discretion is not arbitrary ... or adopted without due process.” (See *Behuria* Decision No. 11 [1996], II ADBAT Reports, para. 3).

34. In *Azimi*, ADBAT Decision No. 88 [January 2009], para. 31:

... The rule that the Applicant must carry the burden of showing ... that the managerial act or decision being challenged was vitiated by arbitrariness or disregard of due process, is the common rule that is recognized in all judicial or quasi-judicial dispute settlement.

### **The Application**

35. The facts asserted by the Applicant show that the Bank did not conduct his PDP for 2007 either in accordance with the PDP implementing guidelines, or in a fair manner.

(A) The Bank did not follow its own rules. As stated above, the hypothesis where, in the course of a review period change is foreseen in the supervisor of a staff member the matter is addressed in Section 5 of the 2007 Performance Management – Implementing Guidelines (27 March 2007):

... [T]he previous supervisor must complete Parts 1.C and 1.D and Part 2 of the PDP form for the period of his/her supervision of the staff member's performance. The previous supervisor will discuss Parts 1 and 2 with the staff member during a formal transfer interview. The previous supervisor will forward a copy of the PDP form to BPHR and to the staff member and the original form will be retained in the department ... as input into the next assessment exercise.

The overall assessment will be completed by the new supervisor, after consultation with the previous supervisor whenever possible.

Changes occurring after 15 November should be referred to BPMSD.  
[Underline added]

The “previous supervisor”, Mr. Murray, abided by this regulation before his departure on 24 October 2007. He completed the parts 1.C, 1.D and 2 of the PDP form, forwarded a copy of this to BPHR and the Applicant, and conducted the formal transfer interview.

Mr. Lahiri, who had agreed to become the “new” supervisor, knew, or should have known of and was bound by the Performance Management – Implementing Guidelines which required consultation with the prior supervisor “whenever possible” before completing the overall assessment. This he failed to do despite the fact that:

- (i) He was aware of the issue: on 10 January 2008, the Applicant wrote to him: “I hope you have been provided the assessment done by Bruce up to 24 October”;
- (ii) It was possible for him to mail or phone and consult with Mr. Murray who, at that time, was still in Manila;
- (iii) He had the opportunity to correct his omission. Notwithstanding this fact, after having requested the copy of the interim assessment from BPHR, he maintained his appraisal (see statement of 11 December 2008).

(B) The Applicant was not treated equitably. Even if there was actually no other solution but to appoint the same person, Mr. Lahiri, as supervisor and rater, the unusual situation should have led the Bank to give the Applicant greater guarantees of objectivity given that his review occurred almost at the end of the month of October and inasmuch as the

last paragraph of Section 5 of the Performance Management – Implementing Guidelines quoted above, provides that “changes [of supervisors] occurring after 15 November should be referred to BPMSD”.

36. One of those guarantees should have been that Mr. Lahiri, after having received the e-mail sent on 10 January 2008 by the Applicant, call Mr. Murray to discuss with him the Applicant's PDP.

37. The Bank did not adequately take into consideration the reasonable objections made by the Applicant in his mail of 10 December 2007 to Director, BPHR:

... [T]he person conducting the rating should have sufficient basis of direct experience .... [T]he rater must be in position to exercise their own judgment on the feed back provided by others by comparing this to their own experience .... [N]either the Chair of DEC nor the President would have the required degree of direct contact with the performance of OED directors' to give a fair and evidence-based assessment .... [Emphasis added]

38. One of the reasons given by Mr. Lahiri in his sworn statement of 11 December 2008 for maintaining his assessment was his “knowledge of [the Applicant's] work” and his “direct experience with him”.

39. Based on the record, we are unable to share this point of view. Mr. Lahiri may have known the Applicant as he knew a lot of other staff members but before October 2007, he was not the supervisor of the Applicant and, therefore, he did not have the responsibilities of a supervisor, which are described in detail in the “Competency Evaluation Guide” (Annex 5 to the Answer).

40. In other words, it could not be expected from Mr. Lahiri that for the period January to October 2007 he had the detailed knowledge of the Applicant's performance as would be required of a supervisor.

41. Other reasons given by Mr. Lahiri for his actions are likewise not convincing: "I felt that Mr. Murray was perhaps ... overly generous", nor his reference to the practice "in Indian civil service ...".

42. In summary, we find that, the Bank acted improperly in the final assessment of the Applicant and that the Applicant is entitled to a measure of recompense.

### **The Damage**

43. We are unable to grant the first claim of the Applicant: US\$125,643, i.e., "the cost in net present value terms of not being promoted to level 8". There is no assurance that the Applicant would have been promoted to level 8 regardless of what happened in his 2007 PDP.

44. However, we consider that an award of compensation in a sum of US\$15,000 to be appropriate recompense for the failure of the Bank to provide an equitable procedure for his annual assessment and its impact on the Applicant.

45. Inasmuch as we cannot substitute our discretion about the evaluation of the performance of the Applicant for that of the Bank, we lack authority to change the overall rating of “Satisfactory” to “Exceptional”.

46. But, taking into consideration the inadequacies of the creation of the final 2007 PDP, we grant the second claim of the Applicant that the year-end assessment conducted by the Chairman, DEC of 18 January 2008 be expunged from the Applicant's records.

47. We do not grant the last claim of the Applicant: inasmuch as it does not seem practicable or useful to make a new assessment two years after the facts.

## **DECISION**

For these reasons, the Tribunal:

1. directs the Bank to pay the Applicant compensation for injury in the sum of US\$15,000;
2. directs the Bank to expunge the final PDP 2007 from its records and keep a copy of this Decision in the Applicant's records in the Bank; and
3. dismisses the Applicant's other claims.