

**ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL**

**Decision No. 94  
(2 March 2011)**

**Mr. Y  
v.  
Asian Development Bank**

**Arnold M. Zack, President  
Claude Wantiez  
Lakshmi Swaminathan**

1. The Applicant seeks a reversal of the decision not to confirm his probationary appointment and confirmation of his appointment with the remedies listed below.

**I. THE FACTS**

**Background**

2. The Applicant joined the Asian Development Bank (“ADB” or the “Bank”) as a Level 5 Senior Financial Control Specialist in the Accounting Division (“CTAC”) of the Office of Controller (“CTL”) on 29 October 2008 on a standard three year fixed-term appointment with a one-year probationary period.

3. At the 2008 Christmas party, the Applicant allegedly invited his female administrative assistant and a female contractual employee to pass by his office and once there,

during a conversation, the Applicant opened his shirt to mid-chest level. The incident was reported by the administrative assistant to a fellow employee but there was no formal complaint.

4. In March 2009, another female employee (“Ms. A”), an associate working under the Applicant’s supervision, reported to the Assistant Controller that the Applicant had made comments to her about her physical appearance, expressing a desire to send her flowers as had her husband and offering to read a poem he had written about her. She allegedly told him she was no longer comfortable receiving such remarks and that the Applicant did not seem to care about her discomfort. He also apparently sought to discourage her from transferring to another position and told her she should withdraw her request for transfer. The Assistant Controller warned the Applicant to refrain from making such remarks which could be construed as harassment. The Applicant allegedly promised to do so, explaining to the employee that he was not aware of her discomfort and that she should not construe his behavior as malicious because he did not touch or come very near her. The Applicant did apparently stop talking to her about personal matters.

5. On 14 May 2009 the Controller submitted the Applicant’s completed “Performance & Development Plan Review After Six Months (For New Staff in Probationary Period)” to the Director, Human Resources Division (“BPHR”), which contained only positive comments. The Controller noted that the Applicant “has settled down quickly and started contribution. I appreciate and expect further contributions.” There was no reference to the earlier complaint of his subordinate (Ms. A) as the Applicant had assured the Assistant Controller that the behavior would stop and because the Assistant Controller was unaware of any recurrence of the inappropriate behavior.

6. On 3 August 2009 another staff member (“Ms. C”) apparently reported to Ms. A that she was avoiding going into the Applicant’s office because the Applicant had allegedly said to Ms. C “I missed you,” when she had come back late from lunch and had asked her several times whether she would get angry if he said something private to her. Ms. C had responded that if the Applicant did not have something good to say then it was better not to say anything. The Applicant had also allegedly asked Ms. C about her boyfriend and what they did on the weekend. Ms. A told her that on the next such exchange, Ms. C should tell him she felt offended and to stop making such comments.

7. On 12 August 2009 the Applicant asked another staff member (“Ms. B”) about her wedding plans, telling her that his wife was very generous and that she had told him he could have a girlfriend. The Applicant then asked her whether she had sex with her boyfriend. The staff member who claimed she was shocked, immediately said “no” and the Applicant changed the subject. Ms. B reported the incident later that day to the Assistant Controller who told her to tell the Applicant how she felt about having been asked such an inappropriate question. When she did so, the Applicant apparently said “OK, sorry”.

8. On 19 August 2009 Ms. A and Ms. B reported the foregoing incidents to BPHR focal point for harassment issues and the next day, 20 August 2009, the Assistant Controller spoke to the Applicant about the complaints. On 23 August 2009 he wrote to the Applicant, reviewing the 12 August complaint and his earlier discussions with the Applicant in early 2009 explaining that pursuant to Administrative Order (“A.O.”) No. 2.11 he was required to report the matter to the Controller.

9. The next day, 24 August 2009, the Applicant spoke to the two complainants, crying, saying to Ms. B he would not do it again and telling her that he had just asked the Assistant Controller to upgrade her position and asked her to clarify her report to BPHR, telling them that it was just a misunderstanding for which he had already apologized.

10. On 10 September 2009 the Assistant Controller wrote a Note-to-File with a copy to the Applicant noting that the Applicant had come to his office on receipt of the 24 August e-mail claiming that what he had done was not “that grave” and that there had not been physical contact with the two staff members who had complained about his inappropriate behavior. The note reviewed the incidents and discomfort of the two staff members and concluded as follows:

I remain concerned about your behavior and its impact on the workplace, and its effect on staff member morale and productivity. I will take this into account during your PDP review at the end of your probationary period. I advise you not to contact [Ms. A] and [Ms. B] with the intention to influence or persuade them about their concerns on your inappropriate behavior.

11. On 25 and 28 September 2009 the two women filed harassment complaints against the Applicant to Director General (“DG”), Budget, Personnel and Management Systems Department (“BPMSD”) reporting the incidents described above. Ms. A, in her 28 September 2009 complaint, acknowledged that she initially had no intention of filing a formal complaint because an informal resolution had been mediated and that the Applicant had ceased the offensive language.

She claimed she came forward thereafter only because she felt responsible to bolster the complaint efforts of two staff members (Ms. B and Ms. C) she had supervised.

12. On 29 September 2009 the two harassment complaints were sent to the Applicant who replied on 5 October 2009 that he had never before faced “a situation of defending his integrity” in his 25 years of “distinguished” employment and that “he had no undertone or intention of any sexual nature with any of his staff at any time” and “respect(ed) women a lot”. He also offered an apology for being misunderstood and claimed that “some of my actions may have been misconstrued as offensive mainly due to cultural differences at the workplace.”

13. In response to Ms. A’s complaint, the Applicant noted that on learning she had made a complaint he had “apologized ... and maintained a clear distance thereafter, as acknowledged by the complainant.” He “was not aware she was offended”, and that if he had been aware “I would have stopped those much earlier.” He stated that his comment about sending flowers was in relation to Ms. A having resumed work after being sick, and that “honestly, I never had any poem for her,” but wanted to boast that he could write poems in a short time. He appealed for her to stay in the section as he wanted to avoid “instability” in the section due to loss of experienced staff, but once he realized that she was inspired to go to the Office of the Auditor General, he “never stopped her and when she left...gave her an appreciative PDP.” In relation to the 2008 Christmas party incident he said they were the only two who had no escorts and he had been wearing a dress shirt buttoned up to his neck and so had just “eased myself a little bit since I was sweating (the air-conditioners were turned off).” In relation to Ms. C, he explained that the remarks were “towards staff coming late after lunch (made in public) in a casual manner with a little humor at

work to bring attention that they should not be late” and that the private comment was in relation to Ms. C’s personal hygiene.

14. In response to Ms. B’s complaint the Applicant admits that “she has quoted the conversation in full” but had “tweaked the order completely”. He says that “I was uncomfortable when she stood beside me and asked her to go and take the seat opposite my desk” and that she had stayed in his office until the whole conversation was completed and had not left “immediately” as quoted. He argues that he advised her to be careful and get married early “only as a protective fatherly figure.” He admitted that “asking those very personal questions were wrong.”

15. On 6 October 2009, in accordance with A.O. No. 2.11 “Prevention of Harassment”, DG, BPMSD appointed two investigators to investigate the harassment complaints. The Terms of Reference for the investigation were “to determine what evidence would be available to DG, BPMSD to support his action in response to the complaints of harassment initiated by [Ms. A] and [Ms. B]”, to provide a report that “should contain findings of facts”, and “an opinion as to whether there is a *prima facie* case of harassment” “without recommendation as to remedy or discipline”, noting that “the investigator may interview any other persons that may provide information considered relevant to the complaint” and “[t]he investigator may also include his or her assessments, with reasons, of the credibility of the evidence.”

16. Accordingly, the investigators conducted their investigation by interviewing the Complainants, the Applicant and the Assistant Controller. The Report noted that when the

investigators met with the Assistant Controller he had mentioned that no woman other than Ms. A and Ms. B complained to him. They did not interview Ms. C because she did not want to commence with formal proceedings and was concerned that her relatively insecure position as a non-staff member employed by a contractor might be jeopardized by involvement in the investigation.

17. On 29 October 2009 the investigators submitted their Report which noted that:

[Ms. A's] formal complaint brings to the attention of ADB early evidence of behavior that makes women colleagues feel uncomfortable [and that] this matter with [Ms. A] was prior to the [Ms. B] incident. It demonstrates that although [the Applicant] was counseled about his behavior and stopped personal comments to [Ms. A], he continued and subsequently escalated personal comments with other staff.

18. In relation to Ms. B's complaint, the Report had noted that the question of whether she had sex with her boyfriend "is extremely inappropriate in the workplace." When confronted by [Ms. B] the following day that she was offended by his question, the Report noted that he merely said "OK, sorry". Even when the Assistant Controller spoke with him, he indicated that he was just being overly compassionate. In fact, he suggested that what he did was "not grave" since there had been no physical contact. There is some evidence to believe that "[the Applicant] likes to have control over his staff on both personal and professional fronts."

19. The Report then cited A.O. 2.11 para. 4.1 on the prevention of harassment and concluded:

It is our view that [the Applicant's] behavior includes elements of sexual harassment as well as general harassment, as defined in A.O. 2.11. He has demonstrated unwelcome verbal behavior that has created an intimidating and offensive work environment. The two cases formally brought to ADB's attention plus the general knowledge of the investigators of one other staff member's concern about [the Applicant's] behavior raises questions as to whether [the Applicant's] attitude and mindset are compatible with an international development organization where there are many different nationalities, cultures, etc. There is no doubt in our mind that some of his behavior is incompatible with ADB work environment.

20. The Applicant's 5 November 2009 comments on the Report noted his regret that his "remarks and behavior with good intentions have been viewed as general and sexual harassment though they were never intended to be such. I offer my sincere apologies and will ensure there is no such recurrence." With regard to the inappropriate question he stated "I realize that such questions are extremely inappropriate in the workplace and sincerely apologize for the grave mistake. It is an aberration and will never repeat."

21. On 20 November 2009 DG, BPMSD concluded that the Applicant had demonstrated "unwelcome verbal behavior" that created an "offensive work environment and that Applicant's behavior raised questions as to whether [the Applicant's] attitude and mindset were compatible with an international and multicultural work environment." He noted that then following his first 12



months of service with ADB it “is required to determine whether he is suitable for service in ADB. In these circumstances, I will provide the Controller and the Assistant Controller, CTAC with a copy of the investigation Report in a separate confidential memorandum which will also be copied to you. I will request the Controller to take serious note of the findings of the investigation Report and consider this matter in assessing the suitability of the staff member for further employment in ADB.”

22. On 27 November 2009 the PDP 2009 Review for the end of the Applicant’s probationary period confirmed several key accomplishments and commented on others. The Assistant Controller commended the Applicant’s technical knowledge and his contribution to improvements in the way Treasury accounting was done. He also noted that the work on the accounting policy “did not progress fast enough” even after his role as officer-in-charge (OIC) had ended. The Assistant Controller noted that in view of the complaints filed, his responsibility as OIC had been discontinued on 15 September 2009. He noted that the findings of the Investigators’ Report had created an offensive work environment and that his behavior demonstrated a lack of “appropriate intellectual and moral qualities, personality, character and demeanor for employment” as required under A.O. No. 2.01 para. 11.1. Following this evaluation, the Controller recommended non-confirmation of the Applicant’s appointment, reiterating that his unwelcome verbal behavior had created an “offensive work environment” and indicated an attitude and mindset that were incompatible with work at the ADB.

23. On 4 December 2009 the Applicant commented on the PDP in part as follows:

... A reading of the competency assessment and Supervisors comments above generally demonstrates more than satisfactory performance. My contributions are now being heavily scaled down and only my transgression is highlighted based on the two incidents involving “unwelcome verbal behavior”, resulting in the Controller’s recommendation for non-confirmation of my appointment. I am being penalized extremely disproportionately and unfairly for the errors I committed during my probation period for which I have apologized profusely and emphatically reassured all that it would never be repeated. I have erred as a human and request forgiveness and consideration of my case favorably by extending my probation.

24. On 14 December 2009 the Controller and Assistant Controller met with the Applicant. In a 12 January 2010 memorandum to the President, the BPMSD endorsed the Controller’s recommendation of non-confirmation to the President and noted that the Applicant’s “inappropriate and unwelcome verbal behavior during the probationary period does not warrant his continued employment in ADB.” He also considered that the Controller’s recommendation had not heavily scaled down his work contributions and was “reasonably based on an overall consideration not only of [the Applicant’s] intellectual qualities, but also his ‘moral qualities, personality, character and demeanor for employment by ADB as an organization.’” DG, BPMSD concluded that the Applicant had “acted in such manner at a time when he should have been demonstrating to ADB that he had the appropriate attitude and mindset to work in a multicultural work environment, which includes responsibility for setting the ‘highest exemplary standards of behavior and conduct’ as a supervisor, to ensure that ADB’s workplace is free from harassment.” The President approved this recommendation on 19 January 2010. On 25 January 2010, the

Applicant was notified that his appointment would not be confirmed at the end of his probationary period and that he would be paid out in lieu of the required 30 day notice. He however requested and was given special leave of one month to cover his rental subsidy to attend to his personal affairs.

### **Application to the Administrative Tribunal**

25. Thereafter the matter was submitted to compulsory conciliation, to Administrative Review and to the Appeals Committee, all of which took place without resolution. The President approved the Appeals Committee's recommendation on 15 July 2010 and thereafter on 23 August 2010, the case was taken to this Tribunal.

26. The Applicant seeks the following relief:

- (i) That the baseless and unfounded allegations in the Investigators' Report severely maligning his character be expunged from all relevant records of ADB and a confirmation letter certifying his good moral character be issued by DG, BPMSD and the President.

In his Reply the Applicant elucidated this earlier plea to add as follows:

- (a) the Tribunal to review the investigation of the two formal complaints of harassment and order the 'IV. Conclusion' and especially the last paragraph of the Investigators' Report expunged based on abuse of due

process and abuse of discretion;

(b) expunge the baseless and unfounded conclusions of the Investigators' Report incorporated in his first year-end PDP and other related unfounded remarks by Assistant Controller;

(c) set aside the first year-end PDP; and

(d) (same as for original plea)

(ii) That the decision of non-confirmation of his appointment be rescinded and his appointment confirmed based on his performance and he be reinstated due to the fact that the severe aspersions and defamation of his character have rendered his future employment career impossible;

(iii) A reasonable compensation for the defamation of his character which has traumatized and shattered him emotionally and psychologically and for tarnishing his excellent reputation hitherto;

(iv) Compensation of US\$30,000 to cover the legal costs and losses on hurried disposal of his personal effects including his car and loss of deposits on rental contracts due to the very short time provided to wind up his establishment in Manila; and

- (v) Based on the nature of the case, highest level of confidentiality and non-disclosure of his name.

27. In his Reply, the Applicant further elucidated his earlier request:

- (i) If he is not reinstated in ADB, that he be provided compensation of his earnings and benefits and pension privileges for the remainder of ten years of his peak potential career amounting to US\$2.5 million based on US\$210,000 p.a. (excluding home country travel, paid in 2009) after adjusting for the inflation at 4% per annum as a reasonable compensation for severely maligning and defaming his character which has traumatized and shattered him emotionally and psychologically and for tarnishing his excellent reputation that has seriously caused him his future job potential completely at the peak of his career.

(ii) Additional compensation as detailed below:

- (a) IRs. 400,000 (US\$9,302) towards legal fees.
- (b) US\$4,500 for the loss on hurried disposal of his car.
- (c) US\$2,500 loss due to discarding many of his personal effects and hurried shipment.
- (d) Php. 20,000 (US\$487) for loss of deposit on rental contract due to uncertainty of stay in Manila.
- (e) Total US\$16,789 to cover the legal costs and losses on hurried disposal of his personal effects including his car and loss of deposits on rental contracts due to

very short notice of just 3 days Jan 25, 2010 that his last working day was Jan 28, 2010 provided to wind up his establishment in Manila.

28. The Respondent requests the Tribunal to reject the Application for lack of merit.

## II. FINDINGS

29. Under A.O. 2.01 the Bank has the authority to provide for a probationary period “to determine whether the probationer is suitable for service in ADB.” Further, the Bank has prescribed among the matters to be taken into account in making such determination, the following:

- “(a) the technical competence of the probationer;
- (b) whether the probationer can adapt to the work culture within ADB;
- (c) the ability of the probationer to work harmoniously and well with supervisors and other colleagues; and
- (d) whether the probationer has the appropriate intellectual and moral qualities personality, character and demeanor for employment by ADB as an organization.”

30. The Tribunal has recognized the Bank’s authority in such matters in *Haider*, Decision No. 43 [1999], para. 17 noting that:

The main objective of probation is to enable the organization to find out whether the probationer is suitable for employment. It is clear in this context that the Respondent has the discretion to decide whether or not to confirm a probationary appointment... .

31. The Tribunal has also endorsed and enforced requirements of due process in the implementation of that process. It made clear the scope of its authority in *Lindsey*, Decision No. 1 [1992], para. 12:

The Tribunal cannot say that the substance of a policy decision is sound or unsound. It can only say that the decision has or has not been reached by the proper processes, or that the decision is or is not arbitrary, discriminatory or improperly motivated, or that it is one that could nor could not reasonably have been taken on the basis of facts accurately gathered and properly weighed.

32. Thus in the case before us we have the following issues:

- (a) Was there improper process in the investigation of the complaints against the Applicant?
- (b) Was there improper process in the evaluation of the Applicant's performance and recommendation made at the end of the probationary period?
- (c) Was the decision not to confirm made in a way that was arbitrary, discriminatory or improperly motivated?
- (d) Were the proper procedures followed in giving the Applicant notice of the non-confirmation of his appointment?

## **The Investigation**

### *Applicant's Position*

33. The Applicant asserts there was a clear lack of due diligence and abuse of due process and of discretion in the Bank's investigation and that the baseless and unfounded conclusions of the Investigators' Report incorporated in his Performance and Development Plan (PDP) Review, as well as other unfounded remarks by the Assistant Controller in the first year-end PDP should be expunged since they had never been timely raised during his entire probationary period and were beyond the scope of the terms of reference of the investigators. The Applicant further alleges that the investigators abused their powers, that there was no showing of sexual

harassment as defined in A.O. 2.11. para. 4.1, that the complaints were not valid and the incidents not harassment, and that the complaints should have been handled by informal resolution.

*Respondent's Position*

34. The Respondent asserts that it had proper cause to launch the investigation, that there was no abuse of power in its designation of investigators, that they fulfilled their Terms of Reference in making findings of fact and opinion as to whether there was a *prima facie* case of harassment, that they did interview the proper individuals, that the Applicant's views were taken into account, and that the Report properly found that the Applicant did harass female staff.

*Finding*

35. The investigation here in question was initiated only after formal complaints were made in September 2009 under A.O. 2.11 by two staff members against the Applicant, charges that met the definition of "Harassment" under A.O. 2.11 para. 4.1. The Applicant was advised of the complaints and after his response, defending his actions as having no sexual intention and as having been misunderstood, the Bank, on 6 October 2009, invoked its right pursuant to A.O. 2.11 para. 6.2, to investigate the complaints with the investigators having the responsibility for making "a finding of the facts of the case" involved, with the authorization to render "an opinion as to whether there is a *prima facie* case of harassment".

36. The Applicant's complaint that the investigators were from the Human Resources Division is unfounded. The evidence shows that at the time of their designation neither Investigator was assigned from the Human Resources Division, one coming from the Independent Evaluation



Department and the other from the South East Asia Department where she had worked for three years. Although her entry position on beginning work at the ADB had been dealing with harassment complaints in the Human Resources Division, there is no evidence that their investigation was in anyway influenced by any connection with the Human Resources Division.

37. The Applicant's charge that the Investigators' findings exceeded their Terms of Reference is likewise without merit. The conclusions of the Investigators do contain the requisite findings of fact as to what had transpired as well as their "opinion as to whether" those facts viewed in the context of the Bank's rules on Prevention of Harassment constituted "a *prima facie* case of harassment" as defined in A.O. 2.11 para. 4.

38. The Investigators acted within their authority and discretion in examining documents, reports of oral statements and interviews. That discretion extended to the question of whether or not to interview Ms. C, whose comments had been relayed in writing to Ms. A and, indeed, having been provided to the Applicant, had been commented on and responded to by him. Inasmuch as the Applicant had not disputed the report of his conversation with Ms. C, with merely a different explanation thereof, the failure to interview Ms. C did not in any material way introduce into the record factual matters at variance with those described by the Applicant himself.

39. The Report properly addressed the Applicant's denial of harassing female staff by rebutting the misconception that there can be no harassment without touching or without a prior admonition against objectionable behavior, noting that the women involved viewed his behavior as

harassment and pointing out that A.O. 2.11 had been extensively revised in 2006 to broaden the definition of harassment so that it includes prohibited conduct, even if not previously objected to.

40. The Report concluded that the Applicant's "behavior includes elements of sexual harassment as well as general harassment" and that he had "demonstrated unwelcome verbal behavior that had created an intimidating and offensive work environment". It is true that the Report went further to "raise the question" as to whether the Applicant's attitude and mindset were compatible with an organization of many nationalities and cultures and went on to note "There is no doubt in our mind that some of his behavior is incompatible with ADB work environment." We find those conclusions, as the Applicant claims, beyond the scope of their authority. The investigators were not asked to investigate or report on how the Bank was to respond thereto. Such matters are within the province of the Bank and were not within their authority to conjecture. They were explicitly told not to provide their recommendation as to remedy or discipline. Their comments in that regard constitute *dicta* and are binding neither on the Bank nor on this Tribunal. However, given the absence of any substantial conflict on the facts found during the investigation or contained in the Report, we do not find that the unsolicited comments in any way justify rejection of the Report.

41. The fact that Ms. A had participated in an informal resolution of her initial complaint against the Applicant, did not constitute a bar against her providing information of subsequent harassing behavior against other staff members, nor in the absence of a commitment not to further disclose that settlement did it preclude the facts involved therein being used as evidence of Applicant's behavior and attitude during the period involved in the investigation.

## **The Evaluation of the Applicant's Performance and Recommendation Made at the End of the Probationary Period**

### *Applicant's Position*

42. The Applicant asserts that his "substantial performance and excellent achievements were heavily downscaled" if not ignored in his PDP, by incorporating the conclusions from the Investigators' Report in order to lend support to the decision of non-confirmation. He cites the downgrading of his competency ratings, inclusion of adverse comments based on unsubstantiated allegations and opinions from the Investigators' Report, and the comments of his supervisor who had never even sent him a memo advising that he was wanting in any area of his work or ever issued any warnings. He accuses the Human Resources Division of having orchestrated the filing of formal complaints and fabricating charges long after the incidents and his departure from the Bank.

### *Respondent's Position*

43. The Respondent argues that proper procedures as set forth in A.O. 2.01. Section 11 were followed, that the PDP properly reflected the Applicant's technical skills and his behavioral shortcomings, that the remarks he made to female staff were not denied by the Applicant, and that they provided an accurate assessment of his performance to be weighed against controlling standards. The Respondent asserts that its evaluation properly included reference to the Investigators' Report as well as his technical skills as necessary components for the employer to be able to assess his suitability for continued employment. The Respondent denies that the harassment complaints were orchestrated to defame him or that it fabricated e-mail evidence.

*Finding*

44. A.O. 2.01 prescribes the several steps for determining the suitability of a probationary employee for service in ADB, including the first and second performance reviews, the recommendation of the Head of Department/Office concerned, and the opportunity for the staff member to comment thereon. A.O. 2.01, para. 11.1 sets forth some of the criteria to be considered in making the determination, including not only technical competence of the probationer but also “(b) whether the [Applicant] can adapt to the work culture within the ADB”, can “(c) ... work harmoniously and well with ... colleagues” and “(d) whether the probationer has the appropriate intellectual and moral qualities, personality, character and demeanor for employment by ADB”. There is no evidence of the downgrading of the Applicant’s technical competence ratings under (a) of para. 11.1. The portions of the evaluation that focused on (b), (c) and (d) concerning his behavior and relationship with female workers involved separate criteria that needed to be considered. The evaluation would have violated the Bank’s procedures if based solely on his technical competence. In addition, consideration of behavioral standards was required. As this Tribunal held in *Dalla*, Decision No. 73 [2005] para. 70, while citing the World Bank Decision *Matta*, WBAT Reports 1982, Decision No. 12, para. 47: “these are factors which related ‘not only to the technical competence of the employee but also to his or her character, personality and conduct generally, insofar as they bear on ability to work harmoniously and to good effect with supervisors and other staff members.’”

45. For the record, we have earlier in *Ibrahim*, Decision No. 86 [2008] objected to the Respondent incorporating into its submission reports and e-mails from staff members or supervisors solicited in the preparation of the case to produce evidence to which the Applicant never had timely

opportunity to respond before the non-continuation decision had been taken. Both parties had the opportunity to request an oral hearing in this matter with the opportunity for examination and cross-examination of witnesses when such additional presentations might have been offered. As neither party made a specific request for a hearing, those subsequently provided testimonials are accordingly excluded from our consideration, which rests upon information timely produced and subject to the due process standards of the Bank's procedures.

46. Given the charges that had been raised about the Applicant's behavior, the Investigation that was provided to ascertain the truth and seriousness of those charges and given the criteria listed in A.O. 2.01 para. 11.1, the Tribunal finds it was appropriate for the Bank to include the results of that investigation in its evaluation of the Applicant's potential for continued employment within the organization. The fact that his supervisor had not earlier subjected him to criticism for his performance or imposed any discipline for his behavior does not detract from the record as it developed and was presented in the PDP. His acceptance in his PDP of the basic facts underlying the charges, his request for forgiveness and his having "apologized profusely" therein constitute ample acknowledgement of his "errors" (see para. 23 above). We find that due process and the requirements of the applicable Administrative Orders were complied with in evaluating the Applicant's suitability for continued employment within the ADB.

### **The Decision to Not Confirm the Applicant's Appointment**

#### *Applicant's Position*

47. The Applicant challenges the fact that his supervisors never found any serious behavioral issues, and had failed to follow the traditional concepts of disciplinary procedures found

in the A.O. 2.11 para. 6.2.2(e). The whole proceeding, according to the Applicant, was an orchestrated effort to remove the Applicant even after there had been no instances of repeats after any official warning.

*Respondent's Position*

48. The Respondent asserts there is nothing on the record that would support the Applicant's claim of an abuse of discretion in the decision not to confirm his employment or his claim that he was treated unfairly. Indeed, it continues, the undenied statements "alone provided a sufficient basis for the Respondent's conclusion that the applicant did not satisfy the appropriate intellectual and moral qualities, personality character and demeanor for employment by ADB as an organization." It argues that given the Applicant's probationary status, the Bank was not required to subject the Applicant to progressive discipline and was fully within its authority to not confirm his employment.

*Finding*

49. The record is clear that the Respondent adhered to the appropriate procedure in providing the Applicant an initial six month performance review, and a second performance review before the end of the 13<sup>th</sup> month, and in having the Head of Department/Office prepare a draft recommendation with the Applicant being provided the opportunity to comment thereon and discuss the draft with his superior. Thereafter, the recommendation with those comments was forwarded to DG, BPMSD and thence to the President. The Tribunal has examined the proceedings and finds no evidence of an orchestrated effort to remove the Applicant. Indeed, had the Applicant not engaged in repeated misbehavior following his initial incident, this matter would not be before us. It was the

Applicant's continued inappropriate behavior, rather than any orchestrated undertaking by the Bank that was the triggering event that led to his non-confirmation. There is nothing in the A.O.s which requires the Respondent to impose progressive discipline as a precondition to non-confirmation. The latter is specifically provided for under A.O. 2.01 Recruitment and Appointment of External Candidates. Indeed, the provision that the Bank may terminate a staff member's appointment "during the probationary period at any time during the staff member's first 12 months of service" makes it clear that that authority is not subordinated to any prerequisite for the imposition of disciplinary proceedings. The Tribunal therefore finds that the decision not to confirm the appointment of the Applicant was made in a manner that was not arbitrary, discriminatory or improperly motivated.

### **Procedures followed in providing the Applicant notice of the non-confirmation**

#### *Applicant's Position*

50. The Applicant argues that he was not provided reasonable notice and not timely informed about his non-confirmation, that the three-day period provided in his official notification on 25 January that his last day of duty would be 28 January was extremely detrimental to his future career, that the abrupt end of his employment has prevented him from getting employment, and that the Bank deprived him the opportunity to complete the "numerous forms for exit clearance." He argues that the payment of severance in lieu of notice did not compensate him for the very short time he had to disband everything in three days.

*Respondent's Position*

51. The Respondent notes that the Controller had recommended non-confirmation on 27 November 2009, and that the Applicant had commented thereon by 4 December 2009 showing he was fully aware that his appointment was unlikely to be confirmed. It asserts the Respondent's authority under A.O. 2.05 para. 2.5 to make a payment in lieu of notice and in addition points out that the Respondent, at the Applicant's request, even extended his rent subsidy for a month to permit him to clear his personal matters.

*Finding*

52. The Applicant was early informed of the prospects of his non-renewal, and by the time the Bank exercised its option of providing compensation in lieu of notice, he was well alerted to the end of his time with the ADB. Nonetheless, the Bank provided him, at his request, another month of rental subsidy to clear his affairs. The provision in A.O. 2.05 para. 2.5 for payment of compensation in lieu of notice did not restrict his time for closing his affairs, it merely freed him of any work responsibility to do so after the termination had come into effect. The Tribunal finds that proper procedures were followed in giving the Applicant adequate notice of his non-confirmation.

**DECISION**

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



Arnold Zack

          /s/            
*President*

Claude Wantiez

          /s/            
*Member*

Lakshmi Swaminathan

          /s/            
*Member*

Attest:

Cesar L. Villanueva

          /s/            
*Executive Secretary*

At Manila, 2 March 2011.