

**ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL**

**Decision No. 95  
(8 September 2011)**

**Ms. D  
v.  
Asian Development Bank**

**Yuji Iwasawa, Vice President  
Claude Wantiez  
Lakshmi Swaminathan**

1. The Applicant seeks to quash the decision of the Director-General, Budget, Personnel and Management Systems Department's ("BPMSD") dated 11 February 2010 not to confirm her appointment as a National Officer in the Asian Development Bank's Resident Mission in the People's Republic of China ("PRCM"), and reinstatement of her position with consequential financial benefits.

**I. THE FACTS**

**Background**

2. The Applicant joined the Asian Development Bank ("ADB" or the "Bank") on 17 November 2008 as an Economics Officer, National Officer Level 9, in the Programs and Regional Cooperation Unit, PRCM, for a fixed term appointment of three years including a probationary period of twelve months.

3. The Job Profile of the Applicant was to “undertake the preparation and organization of forums and networking activities for the sharing of knowledge and development experiences between the People’s Republic of China (PRC) and other Developing Member Countries (DMCs) and among PRC’s development research partners and stakeholders from different provinces; to support the Country Director (CD) in carrying out a wide range of activities related to knowledge-sharing and networking, in supporting of policy dialogue, country programming, and disseminating the results of ADB-supported Technical Assistance (TA) and lending activities.”

4. The Applicant’s performance for her initial six months (17 November 2008 to 16 May 2009) was reviewed by her Supervisor who was the Principal Country Economist and Head, Programs and Regional Cooperation Unit, PRCM. While the Applicant had received from her Supervisor ratings of “Very Often Demonstrated” for “Client Orientation”, and “Often Demonstrated” for “Achieving Results” and “Working Together”, she was rated as “Occasionally Demonstrated” for “Application of Technical Knowledge and Skills” and “Learning and Knowledge Sharing”. She was advised to “strengthen her knowledge and analytical skills related to ADB operations” and to “strengthen her knowledge of ADB’s country operations and the regional cooperation program” as well as her “economics and analytical skills” to become a productive member of PRCM’s programs.

5. The CD, PRCM agreed with the assessment of the Applicant’s Supervisor in the PDP Review. In her comments given on 20 May 2009, the Applicant stated that she appreciated

her Supervisor's recognition of her key accomplishments and "recognize(d) the need to further strengthen (her) knowledge of ADB's operation and analytical skills".

6. On 15 June 2009, the Applicant and her Supervisor agreed to a six month work plan at the end of which the one year probationary period performance review occurred. She received a rating of "Often Demonstrated" for "Client Orientation" and "Working Together", but was rated as "Occasionally Demonstrated" for "Application of Technical Knowledge and Skills", "Learning and Knowledge Sharing", and "Achieving Results", the last having reduced from a rating of "Often Demonstrated" in the six-month review to "Occasionally Demonstrated" in her year-long review. Her Supervisor validated Applicant's key accomplishments but noted:

"due to her weak economics, technical and analytical skills, she experienced frequent difficulty performing her duties, and required close supervision and monitoring. The quality of her initial drafts of comments and notes was poor and required extensive revision. [The Applicant] lacked initiative in seeking guidance from supervisors and support from colleagues for tasks requiring team work. While [the Applicant] has conscientiously provided support for missions and workshops, her technical and analytical skills and written output are not up to the standard expected from a national officer."

7. On the basis of the foregoing, the CD, PRCM recommended, in consultation with her Supervisor, the non-confirmation of her appointment. On 16 November 2009, the CD, PRCM met the Applicant, her Supervisor and the Senior Budget Personnel Officer, PRCM, to discuss the non-confirmation decision. On 17 November, the CD, PRCM wrote a Note-to-File summarizing the Applicant's performance and prior discussions, the Applicant's rejection of the recommendation of non-confirmation, her request for reconsideration of the recommendation of non-confirmation, and his willingness to review additional submissions. It concluded with a request that the Applicant provide comments and additional written samples of her work.

8. On 23 November 2009, the Applicant commented on her PDP. She did not accept the assessment or the recommendation not to confirm her appointment and claimed that her Supervisor had not discussed and explained to her the overall recommendation, that her Supervisor had influenced the CD, PRCM on the issue of her performance, that her accomplishments in the implementation of the relevant projects proved her technical ability and analytical skills, that her Supervisor's comments were "extremely harsh, unfair and non-objective", and that the evaluation "completely contradict(ed)" the assessment of all ADB Task Managers and government agencies with whom she had worked closely based on her Work Plans. Further discussion followed with the Applicant on 2 December 2009. In a Note-to-File of that meeting written by the CD, PRCM on 3 December 2009, he again summarized the discussions, the Applicant's comments and concluded that the completed PDP form, the Applicant's comments, and the Note-to-File would be submitted to BPMSD "based on the PDP guidelines and procedures." Subsequently, BPHR endorsed the non-confirmation decision of the CD, PRCM. Accordingly, her employment with ADB was terminated effective 16 February 2010.

9. On 14 December, 2009 the Applicant e-mailed Director, BPHR and for the first time alleged that her non-confirmation was made not based on her performance but because of her response to "unwanted sexual advances by the supervisor...which lead(s) to the distorted assessment and comments on the PDP review". The Applicant sent follow-up e-mails to Director, BPHR providing copies of her written outputs and e-mail communications with Task Managers regarding her work and requested an independent evaluation of her PDP. On 17

December 2009, the Applicant filed a complaint of sexual harassment against her Supervisor under Administrative Order ("A.O.") No. 2.11 alleging four incidents that took place between December 2008 and 7 June 2009. This complaint was investigated by DG, BPMSD who concluded that there was no evidence to support a *prima facie* case of sexual harassment.

### **Conciliation, Administrative Review and Appeal**

10. The Applicant exhausted the remedies of Conciliation, Administrative Review and Appeal. Thereafter, this Application to the Tribunal was filed on 11 January 2011.

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

11. The Applicant contests the decision of the Bank's non-confirmation of her appointment and seeks:

- a) to invalidate and expunge and/or revise the PDP assessments conducted by her Supervisor, and the CD, PRCM from her record, and to have an independent and fair assessment of her performance, including the views of Task Managers;
- b) rescission of the final decision not to confirm her appointment made by the DG BPMSD and reinstatement of her position in PRCM as a National Officer or in another post;

- c) financial compensation equivalent to the amount of salary and benefits due for the remaining period (21 months) of the 3-year fixed term contract;
- d) appropriate compensation for mental suffering, humiliation, damage to her reputation and severe damage to her prospects for future employment; and
- e) ADB to reform its performance evaluation policy for National Officers whose main responsibilities are to assist Task Managers at HQs. The PDP evaluation should be jointly conducted by the immediate Supervisor and the Task Managers.

### **Applicant's Pleas**

12. The Applicant contends that proper procedures were not followed in the PDP review process in arriving at the non-confirmation decision as her Supervisor never discussed the assessment with her before handing it to the CD, PRCM, that the decision was arbitrary and represented an abuse of discretion, and that it was an abuse of process based on "distorted comments" by her Supervisor due to her refusal to grant him sexual favors. She asserts that her Supervisor showed a pattern of aggressive, unprofessional, disrespectful and harassing behavior to female ADB colleagues with his comments on her PDP constituting a serious form of defamation against her and a continuation of his pattern of abusive verbal behavior. The

Applicant pleads that the impugned decision was predetermined based on her personal relationship with her Supervisor and not based on reasons related to her work performance.

13. The Applicant alleges that the CD, PRCM was influenced by the Supervisor's comments and only reviewed the comments on her performance from Task Managers, government and implementing agencies after the non-confirmation decision was taken and after signing the PDP Review form which he gave to her at the meeting held on 16 November 2009. She asserts that these comments recognizing her contribution to the projects were submitted to the CD, PRCM after he informed her of his decision. The Applicant also submits that the CD, PRCM's statement that he held independent discussions with several staff who had worked with her is false.

14. The Applicant states that what the CD, PRCM wrote in the Note-to-File dated 3 December 2009 was an attempt to defend the failure to comply with due process in assessing her performance before the decision was taken. According to her, the CD, PRCM did not want to reverse his earlier decision which was later endorsed by the Director, BPHR in his memo to Director-General, BPMSD.

15. The Applicant alleges that the investigation on her complaint of sexual harassment by her Supervisor was not properly considered by BPMSD before approving the non-confirmation recommendation and that the overall rating given by the Supervisor for the one-year PDP was an abuse of due process and improperly motivated. She assails the decision of the Bank in these proceedings as being biased, non-transparent and an unfair evaluation of

her performance. She requests an independent evaluation of her PDP and the rescission of non-confirmation of her appointment as a National Officer.

16. The Applicant also concludes that her one-year PDP review was flawed as the Bank conducted two reviews (one on 16 November 2009 and the second on 2 December 2009) and prepared two Notes-to-File when, according to the "Note" found on the one-year PDP review form, only one Note-to-File is authorized.

17. The Applicant refutes the Respondent's contention that, by filing a claim against the Supervisor in the Beijing Xicheng District Court alleging sexual harassment, she has violated A.O. 2.02, section 4 which precludes "resort to national courts or other tribunals outside ADB to resolve such claims". The Applicant asserts that A.O. 2.02 section 4 does not apply to terminated staff members and that her recourse to the Tribunal is not for a decision on the dismissal of her harassment complaint. As a Chinese citizen she is entitled to protection by the Chinese law, and the harasser is also a Chinese citizen who is bound by the Chinese legal system.

### **Respondent's Response**

18. The Respondent submits that it justifiably and properly reached the decision not to confirm the Applicant's probationary period and that she failed to demonstrate her suitability for further employment in the Bank. Following her six months of employment, the CD, PRCM monitored her performance jointly with her immediate Supervisor for the remainder of her



probationary period during which time the Applicant's technical, analytical and writing skills remained weak leading to the recommendation not to confirm her appointment.

19. After the CD, PRCM informed the Applicant about the recommendation of non-confirmation of her appointment, she filed a complaint of sexual harassment against her Supervisor for the first time on 17 December 2009. This complaint was investigated by DG, BPMSD who concluded that there was no evidence to support a *prima facie* case of sexual harassment. Director BPHR endorsed the recommendation, and the Respondent submits that in all aspects of the case, it followed proper procedures.

20. In the Note-to-File of 17 November 2009, the CD, PRCM mentioned that the Applicant's performance was good in some respects but emphasized that her skills and performance did not match the job. In the second Note-to-File dated 3 December 2009, the CD, PRCM stated, *inter alia*, that "the assessment was carried out based on a rigorous review of her written work which he had carried out himself, had discussions with her Supervisor, and after giving due consideration to comments received from various Task Managers she had assisted and letters that she had requested from various government agencies. The assessment was based on a broad review of her work, and to ensure its objectivity, CD, PRCM had himself carefully reviewed the materials concerned". He had explained that her Supervisor had participated in the 16 November 2009 discussion and that he and her Supervisor had discussed in detail the issues prior to that meeting. Her Supervisor also noted in the meeting that he had on several occasions discussed the Applicant's performance with her. The CD, PRCM stated, "In addition he had held independent discussions with several staff who had worked with [the Applicant]". In

relation to the Applicant's request for an independent evaluation, he reiterated that primary responsibility for assessing her performance lies with her Supervisor and the CD, PRCM who also makes the recommendation regarding confirmation or not of her contract and that ADB procedures do not provide for independent evaluation.

21. The Respondent submits that the Applicant has come to the Tribunal with "unclean hands" having already filed a claim against her Supervisor in the Beijing Xicheng District Court alleging sexual harassment in violation of the ADB staff code of conduct set out in A.O. 2.02, section 4.

22. The Respondent contends that proper procedures were followed in the evaluation of the Applicant's suitability for further employment at the end of her probationary period and that an appropriate decision was made that the Applicant's appointment should not be confirmed. The Applicant has failed to demonstrate that the assessment was tainted by improper motive on the part of her Supervisor. There was no evidence to support a *prima facie* case of sexual harassment as alleged by her, and the DG, BPMSD properly dismissed the complaint of harassment. The Respondent claims that it has not abused its discretion in exercising any of its powers under the relevant A.O.s and that the Applicant has thus failed to adduce any evidence that the assessment was "distorted" by the Supervisor's personal feelings towards her rather than based on performance considerations.

23. The Respondent also submits that the Applicant has not proved that the PDP review at the end of her probationary period or the non-confirmation decision was improper and

asserts that it has a wide discretion in determining whether a probationary staff is suitable for service.

## **II. FINDINGS**

### **Request for a Hearing**

24. The Applicant requests for a hearing in order to present the testimony of three members of staff (Task Managers) in ADB HQ with whom she had worked. The comments of the Task Managers are, however, already on record and had been fully taken into account by the Respondent's officers when making the non-confirmation decision. Their comments focus on her areas of strength and not on her technical and analytical skills, which are the core issue in dispute. The Applicant has challenged the assessment of her performance done by her Supervisor and CD, PRCM and yet they have not been called as witnesses. The Tribunal accordingly denies the request for a hearing of witnesses on matters that are at best secondary to the question of the technical skills for which she was not confirmed.

### **Tribunal's Scope of Review**

25. While determining whether a probationary staff is suitable for service, it is a well-established principle that the Respondent has a wide discretion in the matter.

“the discretionary power of the managerial authority in probationary cases is generally broader than usual as a result of the very nature of probation.” (*Haider*, Decision No. 43 [1999], V ADBAT Reports, para. 18)

26. A staff member on probation is under close scrutiny on the basis of which his or her supervisors are to decide whether he or she should be retained in service. A probationer has no inherent right to be confirmed. However, the Bank must follow the A.O.s and safeguards provided to the probationer so that he or she is not unfairly denied confirmation. In *Schmidt-Soltau*, ADBAT Decision No. 93, (5 February 2010), paragraph 21, it was held that

“[t]he discretionary authority of the Bank should be exercised with due regard to the guarantees of due process to which probationers are entitled. ‘The very discretion granted to the Respondent in reaching its decision at the end of probation makes it all the more imperative that the procedural guarantees ensuring the staff member of fair treatment be respected.’ (*Salle*, WBAT, Decision No. 10 [1982], Reports, para. 50). Thus, the probationer should be given a fair chance to demonstrate his suitability with adequate guidance and supervision in order to qualify for employment and should receive guidance and be made aware of concerns regarding his performance as well as the opportunity to defend himself against these concerns.”

27. The key issues in the present case are: (1) whether due process had been followed by the Bank in deciding not to confirm Applicant’s appointment; and (2) whether the decision not to confirm her appointment was made in a way that was arbitrary, discriminatory or improperly motivated.

**Requirement of Due Procedure and Process in Evaluating the Applicant’s Performance at the End of Probationary Period**

28. A.O. 2.01 section 11 reads in part as follows:

11.1 The purpose of the probationary period is to determine whether the probationer is suitable for service in ADB. Such determination is generally made by ADB on the basis of the staff member's first 12 months of service. In determining whether a probationer is suitable, ADB has a broad discretion. Matters that may be taken into account include, but are not limited to, by way of example:

- (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 superiors and other colleagues; and
- (d) whether the probationer has the appropriate intellectual and oral qualities, personality, character and demeanor for employment by ADB as an organization.

...

11.3 The performance of a staff member is first reviewed after six months of the staff member's service. A second review is conducted before the end of the 13<sup>th</sup> month of the staff member's service. On the basis of such second review, the Head of Department/Office concerned shall make a recommendation to the Director General, BPMSD, in case of professional staff, and to the... Director, BPHR, in case of national officers/administrative staff, concerning confirmation of the staff member's appointment, extension of the staff member's probationary period or termination of the staff member's appointment. Such recommendation shall be copied to the staff member who shall be given the opportunity to submit comments concerning an extension of his/her probationary period or termination of appointment, which comments shall be discussed with him/her....."

29. We find that the requirements set out in paragraph 11 above have been properly followed by the Respondent, namely:

- a) the Applicant's Supervisor completed her six month PDP at the end of six months;
- b) after she had put in one year of service in ADB her Supervisor assessed the Applicant in parts 1 and 2 of her probationary year PDP;

- c) based on this assessment, the CD, PRCM recommended non-confirmation of her appointment in part 2 of the PDP on 16 November 2009;
- d) On the same day, as noted in the first Note-to-File, the CD, PRCM met with the Applicant, in the presence of the Applicant's Supervisor, and Senior Budget and Personnel Officer, PRCM, and discussed the basis for the recommendation and offered the Applicant an additional five working days to submit written comments on the evaluation and additional samples of her work;
- e) On 23 November 2009, the Applicant provided her comments on the recommendation and on 2 December 2009, the CD, PRCM, in the Supervisor's presence, discussed those comments with the Applicant; and
- f) The CD, PRCM sent the PDP with the recommendation through DG, EARD to Director, BPHR along with the relevant papers of the discussions and the Applicant's comments.

30. The Tribunal finds no flaw in the procedure used by the Bank in holding two PDP meetings. As provided in the aforesaid A.O. 2.01, review of the staff member's performance is required by the PDP procedures to discuss the recommendation and the Applicant's comments on the same. We are not persuaded by the Applicant's claim that the

Bank is limited to one PDP review at the end of 12 months. Although the bottom of the PDP form provides for "a" Note-to-File, the provision of a second meeting and a second Note-to-File in this case did not violate the rules and in fact provided the Applicant a further opportunity to present her case. It is also clear from the records, including the Notes-to-File of the meetings held on 16 November and 2 December, 2009, that both the Supervisor and CD, PRCM discussed and explained in detail to the Applicant the basis for the assessment and the latter's recommendation. The Applicant, having specifically requested the CD, PRCM to reconsider the recommendation of non-confirmation, cannot now be heard to challenge the result of that recommendation as being contrary to ADB law.

31. With regard to the PDP Implementing Guidelines on which the Applicant relies, the Tribunal reaffirms that these "apply only to the performance evaluation of staff members with confirmed appointments and not to staff members on probation..." (see *Schmidt-Soltau*, Decision No. 93 (5 February 2010), para. 34).

32. Therefore, the Tribunal finds that there is no merit in the Applicant's claim that proper procedures leading to the decision had not been followed by the Bank.

### **Requirement for the decision not to be arbitrary or improperly motivated**

33. The Tribunal notes that the Applicant in her comments provided on 20 May, 2009 acknowledged that "Meanwhile, I, as a new staff, recognize the need to further strengthen my knowledge of ADB's operations and analytical skills. My thanks go to the Supervisor who

has helped develop my work plan and provided guidance on undertaking each work assignment". This acknowledgement of her shortcomings shows that the Applicant's subsequent allegations of improper motive, pre-determination, arbitrariness and abuse of discretion on the part of her Supervisor and others are baseless and without merit.

### **Allegation of Sexual Harassment**

34. The Tribunal finds no evidence that the conclusion in the investigation report on the allegation of sexual harassment has been done improperly or not in accordance with A.O. 2.11. The Applicant's contention that the Tribunal should hear evidence in relation to the harassment investigation is beyond the purview of the Tribunal and the provisions of A.O. 2.11. We find that the Applicant has failed to adduce any persuasive evidence that the assessment of her performance by her Supervisor was "distorted" or tainted by his personal feelings towards her and instead is based on her work performance considerations.

35. Moreover, the significant delay in bringing her 17 December 2009 formal complaint of sexual harassment raises questions as to their standing. The four incidents which allegedly took place between December 2008 and 7 June 2009 were not formally raised until December 2009. Her explanations for this extensive tardiness being that she had been busy with her work and had not read the A.O. on harassment till after she learnt that she had not been confirmed as a member of the staff in November 2009 are not convincing. The Tribunal concludes that the Applicant has failed to discharge her burden of proving that the alleged four incidents influenced the non-confirmation decision.



## **Independent Assessment of Performance**

36. With regard to the Applicant's request for an independent assessment of her performance, there is no provision for independent assessment under the relevant Administrative Order (A.O. 2.01), which already provides for a multi-layered review of the work of the probationer by a number of officers before a final decision on non-confirmation is taken at a senior level. As already mentioned above, the CD, PRCM took into account the various e-mails and written communications from the Task Managers and other agencies she had submitted, while assessing her work. Further, the comments of the Task Managers regarding her work related to those areas which portrayed her strengths, which are not in question here. It is the Bank, in exercise of its broad discretion under the relevant provisions given in A.O. 2.01, section 11, which is to take a decision at the end of the probationary period as to whether or not a staff member is suitable for further employment. That decision is based on the assessment by the Bank of a probationer's technical competence, ability to adapt to the work culture of ADB, ability to work well with superiors and other colleagues, and appropriate intellectual and moral qualities, personality, character and demeanor for employment.

37. The Tribunal finds no evidence that the non-confirmation decision was arbitrary, pre-motivated, unjustified or distorted, or that the Respondent's administrative orders with respect to performance evaluation and non-confirmation were violated. The Applicant has failed to discharge the burden of proof of her allegations against the Respondent (see *Azimi*, Decision No. 88 [2009] VIII ADBAT Reports, para. 31).

**DECISION**

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

Ms. "D"

Yuji Iwasawa

/s/  
Vice President

Claude Wantiez

/s/  
Member

Lakshmi Swaminathan

/s/  
Member

Attest:

Cesar L. Villanueva

/s/  
Executive Secretary

At Manila, 8 September 2011.