

**ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL**

**Decision No. 102  
(31 July 2013)**

**Hua Du  
v.  
Asian Development Bank  
(No. 2)**

**Arnold M. Zack, President  
Yuji Iwasawa, Vice President  
Lakshmi Swaminathan  
Roy Lewis  
Gillian Triggs**

1. The Applicant requests revision of the Administrative Tribunal’s Decision No. 101 of 31 January 2013. In that Decision the Tribunal dismissed the Application of Hua Du challenging her dismissal for *“involvement and knowledge of the writing and sending of three emails... sent in a malicious attempt to damage the reputation of ADB and several staff (amounting to) misconduct under para 2.1(c) of AO 2.04, as these actions were detrimental to ADB and harmed ADB’s reputation. Furthermore, as a senior ADB staff member enjoying the trust and confidence of the President, your actions did not conform to the standard of conduct required in paras. 2.13, 4.3(i) of AO 2.02 and reflected adversely on ADB and compromised ADB’s operations.”*

2. The Applicant requests revision in accordance with Article XI of the Statute of the Tribunal (“the Statute”). In support of her Application she submits a letter dated 16 January 2013 written by Mr. A. Sharma, former Director for Governance and Finance South Asia Department and Senior Director for Regional Economic Integration and Cooperation and sent to Director General of BPMSD asserting that the letter is “a fact which by its nature might have had a decisive influence on the judgment of the Tribunal” as stipulated in Article XI of the ADBAT Statute, and noting that the document had been rejected by the Tribunal for missing the applicable deadline for submission.

3. The Applicant also argues that the Tribunal’s reliance on the “balance of probabilities” has resulted in a miscarriage of justice and is contrary to the well- established standard of proof in misconduct cases citing *Dambita*, WBAT Decision No. 243 (2001), paragraph 21 which held that

“the standard of evidence in disciplinary decisions leading, as here, to misconduct and disciplinary sanctions must be higher than a mere balance of probabilities.”

4. The Applicant contends that the 16 January 2013 letter from Mr. Sharma constitutes conclusive evidence of her innocence and that she would have been absolved if the Tribunal had had that letter before it explaining her non-involvement with the Kumar emails, when deciding the case. She asserts that she had fully cooperated with the investigators; that she had informed them of Sharma’s involvement immediately on learning of it; that her truthful statements were improperly discounted by the investigators as hearsay; and that she should have been praised for sharing all that he had with the investigators. She emphasizes that the documents “conclusively demonstrate from Mr. Sharma’s lips that the Kumar emails were his doing and that I was not involved.” Evidence of her involvement or her having had knowledge of the emails before they were sent from her computers was non-existent. She stresses that probabilities have no place in adjudicating accusations against a staff member who has honorably served the bank for seventeen and a half years. She asks the Tribunal to right this wrong and set aside its judgment and to reinstate her to allow her continued service to the Bank and asserts that there is no evidence that she did not reply fully and truthfully to the questions of the investigators, even though they sought to discount her reporting of facts as hearsay.

5. The Applicant concludes that there should be clear proof beyond suspicion before a finding of guilt; that there was no evidence against her in the Kumar email event; that the contents of Sharma’s letter together with his prior statements of her non-involvement do not support the Tribunal’s judgment; that her involvement was assumed condemning her by guilt by association is both unconscionable and contrary to ADB’s avowed commitments and contrary to due process. Accordingly, the Applicant requests the Tribunal to revise its judgment on the basis of evidence established and confirmed by the Sharma document and the lack of tangible and credible evidence in this case as to her guilt or involvement in the Kumar emails.

6. According to Article IX, paragraph 1 of the Statute, “All decisions of the Tribunal ... shall be final and binding.” Article XI, paragraph 1 of the Statute provides for one exception to this principle of finality of Tribunal judgments, whereby a request for the revision of a judgment is made permissible, provided that three conditions are met:

- a) “Discovery of a new fact
- b) Which at the time of the delivery of the judgment was unknown both to the Tribunal and the party
- c) Which by its nature might have had a decisive influence on the judgment.” (*Lim (No. 2)* Decision No. 81 [2007] VIII ADBAT Reports 55, para. 2).

7. We note that this Tribunal in *Lim (No. 2)* found that the rule provided for in Article XI “has to be construed very strictly.”

8. The letter here in question repeats much of the Applicant’s presentation during the investigation, as well as the facts asserted in the course of her submissions, affirming her claim of being unaware of the writing of the emails; not knowing of the use of her home computers for that purpose; and not knowing from where the emails were sent or who could be the possible senders. Those were facts already in our knowledge as were reports of Sharma assuming responsibility for the emails and asserting the Applicant’s lack of involvement, and the evidence of Sharma’s requested deletions of emails from the computer.

9. As held in *de Alwis (No. 2)* Decision No. 66 [2004], VI ADBAT Reports, p. 35, para. 17, “[w]hat the Applicant is asking the Tribunal to do is to review its decision with which [the Applicant] is not satisfied, on the basis of the same facts and arguments by alleging mistakes of law and mistakes in the appraisal of facts, which are not permissible grounds of review.” We find no new fact presented which was previously unknown both to “the Tribunal *and to th[e] party*” that would have had a decisive influence on our judgment as specifically required by the Statute.

10. The Applicant also raises an argument rather than a fact as to the appropriateness of the burden of proof used by this Tribunal, asserting that we should be bound by a standard higher than the balance of probabilities. While Article XI makes no provision for reconsideration based on standards of proof, we noted in paragraph 39 of Decision No. 101 that our controlling standard of proof is that set forth in Appendix 2 of A.O. 2.04 para 8.1: “*(t)he standard of proof for the investigation is a Preponderance of Evidence*”. That requirement is repeated in A.O. 2.04 para 9.2 and in Appendix 1 of A.O. 2.04 as “*Evidence which is more credible and convincing than that presented by the other party. In cases of misconduct, it is a standard of proof requiring that*

*the Evidence as a whole shows that it is more probable than not that the staff member committed the misconduct.”*

11. We are bound by and affirm that definition, which we find was properly applied in this case.

**DECISION**

12. For these reasons, the Tribunal unanimously decides to deny the Applicant’s request for revision of its Decision in *Hua Du*, Decision No. 101 (31 January 2013).

Arnold Zack  
*President*

I hereby certify that the Decision has been rendered pursuant to exhaustive deliberation conducted by the members of the Tribunal effected through email and telephone exchanges and confirmation.

\_\_\_\_\_/s/\_\_\_\_\_  
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Date: July 26, 2013

Yuji Iwasawa  
*VicePresident*

Lakshmi Swaminathan  
*Member*

\_\_\_\_\_/s/\_\_\_\_\_  
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Date: 28 July 2013

\_\_\_\_\_/s/\_\_\_\_\_  
\_\_\_\_\_

Date: 25th July 2013

Gillian Triggs  
*Member*

Roy Lewis  
*Member*

\_\_\_\_\_/s/\_\_\_\_\_  
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Date: 25th July 2013

\_\_\_\_\_/s/\_\_\_\_\_  
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Date: 25 July 2013

Attest:

I confirm that the decision has been rendered by the judges pursuant through exhaustive consultation among themselves through email and telephone exchanges and confirmation, and that the Decision was signed and all pages initialed by the members of the Tribunal based on the same final copy thereof.

Cesar L. Villanueva  
*Executive Secretary*

\_\_\_\_\_/s/\_\_\_\_\_  
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Date: 31 July 2013