

## ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 104**  
**6 August 2014**

**Mr. F**  
**v.**  
**Asian Development Bank**

**Lakshmi Swaminathan, President**  
**Gillian Triggs**  
**Samuel Estreicher**

1. The Applicant is a Senior Economist Level 5 (“IS5”) of the Asian Development Bank (“ADB”, the “Bank”, or the “Respondent”). He claims that the Respondent did not follow proper procedures or act in good faith when it laterally transferred him from the South Asia Department (“SARD”) to the Office of Regional Economic Integration (“OREI”), and downgraded PN10106 from a Level 6 (“IS6”) position in OREI to Level 5 on 28 November 2012. He seeks rescission of these two decisions, an order that he be reinstated for the originally advertised Level 6 position in OREI, and compensation for loss of salary and pension rights and for personal suffering.

2. The Applicant’s claim reflects both confusion and disappointment about the circumstances of his transfer to OREI from SARD. In essence, the Applicant believed he would be both transferred and promoted to OREI at Level 6, while the Respondent considered the appointment to OREI as a lateral transfer at Level 5 only. As the Applicant observed on 14 November 2012, “*we were working in parallel on two different levels.*” In short, the parties have been at cross-purposes.

### **I. THE FACTS**

3. The Applicant joined ADB on 26 December 1995 as an Evaluation Specialist at Level 4. In July 1998 he was promoted to Level 5 as a Senior Project Economist and he has been at the same level ever since, despite having applied unsuccessfully for several Level 6 positions.

4. After 15 years’ employment by the ADB as a Senior Project Economist at Level 5, the Applicant stated he was unhappy, describing his job as an “*uncomfortable situation.*” While receiving satisfactory evaluations each year from 2007-2012, he said he needed the challenge of work at a higher level.

5. The Applicant requested a meeting with the Respondent’s Lead Human Resources Specialist (“LHR Specialist”), Budget, Personnel and Management Systems Department (“BPMSD”), to discuss “*possibilities outside SARD.*” At a meeting held on 24 August

2012, the Applicant discussed his “*desire to leave SARD*” (for personal reasons, he did not want to work with the newly appointed DG, SARD), and how he “*could move to an IS6 position inside the Bank.*” The Applicant explained that he was “*anxious to transfer to a new department as soon as possible.*” He claims that he left the meeting believing that his plight “*did not fall entirely on deaf ears*”, although the Applicant accepts that the Respondent made no promises.

6. On 28 August 2012, the Applicant followed up his meeting with the LHR Specialist with an email asking “*who would be a person to talk to about issues of transfer ... ?*” The same day, on 28 August 2012, the Applicant applied for vacancy “ADB-HR-12-0570” in OREI as Principal Economist (Regional Cooperation) Level 6. The position was advertised as “a three-year non-renewable fixed-term” appointment. The Applicant described the vacancy in his submission to the Tribunal as “*internal,*” while the Respondent notes in its Answer that this description was factually incorrect as it had been advertised both internally and externally.

7. On 7 September 2012, a week or so after submitting his application, the Applicant met the Senior Director, OREI to discuss the advertised vacancy. Over the next two months after he had applied for the OREI vacancy, there were several email exchanges between the Applicant and the LHR Specialist. On 18 September 2012 the Applicant stressed that “*this existing uncomfortable situation...begs for resolution... and I do think a more pro-active BPMSD role in getting to a positive result would be great.*” On 2 October 2012 the LHR Specialist, stated “*we are currently exploring OREI, which seems like the only option open at the moment.*” He advised the Applicant that “*these things take some time .... We are in touch with the relevant departments even if we don’t report back on a daily basis and will contact you as soon as there [is] news.*”

8. On 23 October 2012, the Applicant again discussed his job application, this time with the Director, Regional Cooperation and Operations Coordination Division (“SARC”). The Applicant alleges that at no time during both his 7 September and 23 October meetings to discuss his job application was it suggested that a lateral transfer was to be made to OREI. Rather, the Applicant believed the discussions were premised on his application for the advertised vacancy at Level 6.

9. A later email, on 29 October from BPMSD to the Applicant, reported some progress. It stated: “*Head OREI has just signed the joint memo [see para. 10 below]. We have asked SARD to submit the original memo/JDs now to DG BPMSD so we can start processing the transfers....*” Despite the reference to “*transfers*” in the email, the Applicant states he continued to believe the discussion referred to the Level 6 position for which he had applied.

10. The “*joint memo*” to which the LHR Specialist referred in his email of 29 October 2012 was from the DG, SARD and the Head, OREI to the DG, BPMSD (“Joint Memo of 22 October 2012”) requesting the Applicant’s transfer as Level 5 from SARD to OREI and the transfer of a Level 6 staff member from OREI to SARD as follows: “*We*

*jointly request the lateral transfer of...[the Applicant] from Senior Economist (Regional Cooperation), IS5, SARC to Senior Economist, IS5, OREI-00(PN10106).... We request the downgrading of the position to IS5 which can be accommodated by OREI's level complement.... Both [i.e.,the Applicant and another member of staff] have agreed to the proposed transfers.”* The Respondent argues the downgrading of the position was required to accommodate the transfer as AO 2.03 paras. 11 and 12 and Appendices 3 and 4 impose a 25% ceiling on Level 6 international staff positions within OREI. Subsequently, on 26 November 2012, having become aware on 21 November 2012 of the Joint Memo of 22 October, the Applicant complained to the LHR Specialist that this memo contained the *“false claim that I consented to my transfer to the downgraded position.”*

11. On 7 November 2012, the Applicant was advised by email that the Vice-President (Finance and Administration) had approved *“the transfer of [the Applicant] to Senior Economist, IS5, OREI-00.”* Thus, within ten weeks or so of his first 24 August meeting with the LHR Specialist, ADB had created a lateral transfer for the Applicant, as it believed he had requested.

12. The Applicant responded to the Senior Director, OREI on 12 November 2012 expressing his *“surprise”* at the lateral transfer and hoping that *“you can rectify the events and enable me to join your team at the advertised grade 6.”* Replying the same day, the Senior Director made it clear by email that: *“I had noted when we spoke that we will NOT have a level 6. In fact, we have several lent positions we are trying to regularize, and our level complement will not allow a 6. Moreover, there was no advertisement. If you are referring to the Level 6 we advertised, it was for a special 3-year term, which has already been filled. Hence, unfortunately, OREI will not be able to support a Level 6 request. I had earlier conveyed to BPMSD that we will be able to effect the transfer only on a lateral basis, i.e. without a promotion.”* Thus, by 12 November 2012 the Applicant would have become aware that he had not been successful in his application for the Level 6 position and that all he could be offered was a lateral transfer to OREI.

13. On 13 November 2012, the Applicant objected to his transfer at Level 5 by writing to the Senior Director, BPHR alleging that he had an earlier *“short and informal”* discussion with Director, SARC in late October to the effect that the Applicant would take the advertised fixed-term position at OREI at Level 6 and that there had been no discussion about a transfer at Level 5. He alleges that the Director SARC had said *“all was on track, and [the Applicant] should not worry”* and *“there would be a swap, where one IS 6 from OREI would join SARC and [the Applicant] would take the advertised position at OREI”*. The Applicant subsequently emailed the Director SARC on 14 November saying: *“I did not mean to say that you informally said level 6 OREI would be ‘swapped’ with LEVEL 6, SARC. That is what I ASSUMED under the circumstances.... I sincerely apologize for the wording that offended. I very truly appreciate your efforts to find me a position that is fitting for my skills and background.”*

14. The Senior Director BPHR replied on 14 November 2012: *“I think the misunderstanding is due to the fact that you had applied for a L6 position in OREI (together with a number of other positions) but at the same time, following our conversations, we had activated ourselves to find you a new job outside SARD and OREI turned out to be the best possibility. The position you applied for, however, had nothing to do with what you had been discussing with [Senior Director, OREI] and myself. The L6 position is a fixed term one and has been filled from the outside. ... But nobody ever spoke about a L6. You just assumed it was a L6 because you had applied for one. ....”*

15. The Applicant responded on 14 November by email: *“I didn’t know BPMSD had made the effort at a different level, until I got to know the outcome. Moreover, of course I didn’t know that the level 6 would be externally filled. .... Of course when I talked last with [Senior Director, OREI], I was thinking in relation to my level 6 application, as I was not aware otherwise. ...”*

16. On 19 November 2012 the Applicant received formal notification that he had not been successfully selected for the advertised fixed-term Level 6 position.

17. On 21 November 2012 the Applicant received a copy of the Joint Memo of 22 October 2012 (see para. 10 above) stating: *“PN10106 is currently classified at IS6. We request the downgrading of the position to IS5 which can be accommodated by OREI’s level complement. ....[The Applicant] has been in SARD for over 10 years, and he is inclined to do more knowledge work. Both [the Applicant and another staff member] have agreed to the proposed transfers. ....”*

18. On 26 November 2012, the Applicant wrote to the LHR Specialist noting that the Joint Memo of 22 October 2012 placed on his personnel file *“contains the false claim that I consented to my transfer to the downgraded position at OREI-00, as of 22 October 12. Factually, I was not made aware of this at the time....”*

19. On 28 November 2012 the Applicant received a memo from the LHR Specialist noting: *“we have clarified this matter [of his not being made aware of his transfer] between us in our email exchanges on 14 November 2012.”* On 10 December 2012, the Applicant was given a copy of a personnel action approval form, dated 2 November 2012, which noted that *“[the Applicant] has been consulted and has confirmed his interest to join OREI.”*

### **Conciliation, administrative review, and appeal**

20. The matter was submitted to compulsory conciliation, administrative review and to the Appeals Committee, all of which took place without resolution. The Report of the Appeals Committee dated 21 August 2013 recommended the President reject all of the Applicant’s claims as without merit. The Committee concluded that the Respondent had followed proper procedures and found that:

*“... the Appellant incorrectly assumed the Respondent was supporting his application for the L6 vacancy, when in fact the Respondent was working to identify a suitable position outside SARD as requested by the Appellant. ....Noting the ‘uncomfortable situation’ cited by the Appellant and the repeated email requests to the respondent for assistance in moving out of SARD from 20 August to 29 October 2012, the Committee believes the Respondent facilitated the transfer of the Appellant in accordance with AO 2.03 para. 3.”* The Committee concluded that *“ADB’s relevant policies and procedures have been correctly applied”* and that *“there was no evidence of action by the Respondent which can be clearly considered as an abuse of discretion, arbitrariness, discrimination, improper motivation, or as a violation of fair and reasonable procedures.”*

21. On 27 August 2013 the President accepted the recommendation of the Appeals Committee and denied the appeal.

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

22. The Applicant then filed his application with the Administrative Tribunal on 15 November 2013 contesting the decision to:

- (1) Transfer him laterally on 28 November 2012 from SARD to the Senior Economist, Level 5 position, OREI-00 (PN 10106) in OREI without any consultation; and
- (2) Reclassify PN10106 from a Level 6 position in OREI to Level 5 on 28 November 2012.

### **Remedies**

23. The Applicant seeks

- (1) Rescission of the two decisions he contests and for his current position to be re-designated a Level 6 position retroactive to his date of transfer from SARD to OREI;
- (2) \$20,000 for the difference in pensionable salary between the Level 5 and Level 6 positions since 28 November 2012;
- (3) An amount to be determined equivalent to the associated actuarial gains that would have resulted from additional ADB pension contributions reflecting additional compensation awarded by this Tribunal;
- (4) \$15,000 as compensation for prejudice, moral injury and personal suffering due to the actions of the Respondent;

- (5) Reasonable costs incurred (the Applicant to provide proof of costs at the request of the Tribunal); and
- (6) Direction that the Respondent modify AO 2.03 para. 3.1 (lateral transfers) to include clear procedures for lateral transfers made under this section.

24. In his Reply to the Bank's Answer, the Applicant notes that the Respondent failed to address the legal arguments and, instead, attempted to portray him as a disgruntled staff member seeking to be promoted at all costs before he retired. He asserts that the language used by the Respondent to describe him and his motivations are "*disrespectful and speculative*". The Applicant claims that in paragraph 41 of its Answer, the Respondent improperly questions Applicant's "*mental capacity*". The Applicant complains of the Respondent's attempt to portray him as being "*entitled*" to promotion as "*inappropriate and insulting.*"

25. The Respondent submits that the Application is without merit and should be dismissed and, for these reasons, the Applicant should not be afforded compensation.

26. In relation to preliminary matters, the Applicant requests:

- (1) A number of documents that were subsequently supplied by the Respondent in the Annexes to its Answer.
- (2) Confidentiality.
- (3) That the case be heard *en banc* on the ground that the ADBAT has not previously considered a case challenging lateral transfers.

## II. CLARIFICATION OF ISSUES

27. The facts as summarized raise a number of legal issues for determination by the Tribunal:

1. Did the Respondent comply with its Administrative Orders or abuse its discretionary powers when, as alleged by the Applicant, the Bank:

1.1 transferred the Applicant laterally at Level 5 from SARD to OREI without the Applicant's explicit consent, as required by para 5 of Administrative Order ("AO") 2.03 (Performance Management, Assignments, Lateral Transfers, Promotion, Position Classification and Staff Level Complement System) for pre-identified candidates?

1.2 failed to inform the Applicant in advance that his transfer to OREI

would be by lateral transfer at Level 5, contrary to the obligation of the Bank under para. 2.1 of AO 2.02 (Personnel Policy Statement and Duties, Rights and Responsibilities of Staff Members) to be guided by “fair, impartial and transparent personnel policies and practices in the management of all its staff”?

1.3 downgraded the PN10106 position from Level 6 to Level 5, in breach of AO 2.03 Appendix 3?

1.4 Failed to provide the Applicant with certain papers in accordance with para. 2.2 of AO 2.08 (Access to Personnel Files)?

1.5 Failed to inform the Applicant of other Level 6 positions that were alleged to be available in the Bank?

2. Is the Applicant’s allegation valid that his legal claims have been treated disrespectfully by the Respondent in its pleadings?

### **III. THE PARTIES’ CONTENTIONS**

28. The respective arguments of the Applicant and Respondent are now outlined by reference to each of the key legal issues set out above.

**Did the Respondent follow proper procedures or abuse its discretionary power when it laterally transferred the Applicant?**

#### **Alleged violation of AO 2.03**

29. The Applicant asserts that the Respondent failed to comply with AO 2.03. This AO has two different provisions that relate to lateral transfers:

- (1) Where a transfer is in the interests of ADB or the staff member’s development needs, no consent by a staff member is required. [AO 2.03 para. 3.1]
- (2) Consent of the staff member is required where there is a pre-identified candidate for an anticipated vacancy through lateral transfer or promotion, under the Pre-Identified Candidate Selection (or “PICS”) process. [AO 2.03 para. 5]

30. The Applicant argues that in his case consent was required as he was a pre-identified applicant for a vacancy anticipated by the Joint Memo of 22 October 2012. The Applicant also claims that reference to his consent by the Respondent in both the Joint Memo of 22 October 2012 and the 2 November 2012 form implies that the Respondent

considered the Applicant had been pre-identified for a lateral transfer within the meaning of AO 2.03 para. 5.3. Despite the requirement for consent in such cases, the Applicant claims the Respondent did not obtain his explicit consent to the lateral transfer.

31. The Respondent argues that AO 2.03 para. 3.1 applied to the Applicant's case, not AO 2.03 para. 5.3, and, accordingly, no consent was required. In short, the PICS process did not apply because there was no vacancy other than the fixed-term position for which the Applicant had unsuccessfully applied. The Respondent relied in its pleadings on its right to re-assign the applicant under AO 2.03 para. 3.1, in response to the Applicant's repeated requests to be moved out of SARD. The Respondent also relied on its performance assessment of 28 January 2012 that the Applicant's skills could be better used in other economic and trade sectors of the ADB.

32. The Respondent also points out that, in addition to its right to transfer under AO 2.03 para. 3.1, all staff "*are subject to the authority of the President and to assignment by him to any of the activities or offices of the Bank.*" Such discretionary decisions are, the Respondent observes, "subject to only limited review by the Tribunal" (See *Sengamalay*, WBAT Decision No 254 [2001] para 29).

33. Even if the Applicant is correct in claiming that AO 2.03 para. 5.3 applied to his transfer, the Respondent argues that the Applicant's consent was implicit in his request for "*possibilities outside SARD*" and in his several discussions with relevant staff about other opportunities within the ADB.

### **Alleged violation of AO 2.02**

34. The Applicant argues that the Respondent was in breach of AO 2.02 para. 2.1 providing that the Bank is to be "*guided by fair, impartial and transparent personnel policies and practices in the management of all its staff*". The alleged breach lay in the failure to inform the Applicant in advance that the new position in OREI was a lateral transfer.

35. The Applicant also asserts that the Respondent's statement in the Joint Memo of 22 October, and the 2 November form, regarding the transfer that he had been consulted about and had agreed to, was "*a deliberate misrepresentation of the facts.*" The Applicant notes that "*[a]t no point in this e-mail correspondence is there any mention of the transfer being a lateral transfer.*"

36. The Applicant claims that the Respondent tacitly admitted it failed to inform him of the lateral transfer when it acknowledged there had been a "*misunderstanding*" regarding the move to OREI.

37. The Applicant also claims that the Respondent violated AO 2.02 when it failed to inform him that there were five Level 6 positions and five Level 5 positions in OREI. As



the Respondent was aware of the Applicant's keen interest in a Level 6 position it was neither fair nor transparent to fail to advise him of these promotional opportunities.

38. The Respondent argues that it complied with AO 2.02 para. 2.1 by arranging several information meetings for the Applicant to assess his transfer options. These meetings, the Respondent argues, were held in good faith, with an open mind and without creating expectations. Moreover, the Respondent points out, it is for the Applicant to prove his assertions, not for the Respondent to disprove them

#### **Alleged violation of AO 2.03 Appendices 3 and 4**

39. The Applicant alleges that the Respondent failed to follow procedures required by AO 2.03 Appendix 3 when the Bank requested that the Level 6 position in OREI be "*downgraded*" to Level 5. The Applicant alleges that the Respondent failed to comply with Appendix 3 para. 2 because:

- (1) There was no indication in the memo whether the job descriptions were new or updates or whether the department or office concerned had approved them (as required under para. 2(a));
- (2) Updated descriptions were not submitted (as required under para. 2(b));
- (3) A current organization chart was not provided (as required under para. 2(c)); and
- (4) No memo was sent to the Director, BPHR (as required under para. 2(d)).

40. In his Reply, the Applicant introduces a new allegation that the Respondent breached AO 2.03 Appendix 4 because the "*swap*" between OREI and SARD was done "*more out of concern for the imbalances in each department between authorized positions and actual filled positions.*"

41. The Respondent denies any violation of AO 2.03 as it followed its selection procedures for the fixed-term vacancy the Applicant unsuccessfully applied for. In particular, the Bank argued it was not bound to apprise applicants of progress of the selection process, and that usual practice was to send regrets to candidates only once the successful candidate has accepted the offer and that the position was clearly for a limited term position.

42. With respect to the Applicant's allegation that the lateral transfer was made "*out of concern for imbalances*" in departments, the Respondent claims this is without basis and unproven. The Respondent argues, as the Applicant was not entitled to a promotion, the Position Classification Procedures, and Position Level Complement Allocation Levels

required reclassification of the PN-10106 to a Level 5 to accommodate the transfer.

**Alleged violation of AO 2.08 para. 2.2**

43. The Applicant claims that the Respondent failed to follow AO 2.08 para. 2.2 as the “working papers” provided in the Respondent’s Answer, Annexes 3, 4, 6, and 7 (being information about the reclassified position), should have been copied to him or included in his personnel file.

44. The Respondent denies that it has failed to follow AO 2.08 para. 2.2 and that the Applicant misinterprets the provision. The Applicant was not entitled during the decision making process to receive the documents in question as they were working papers that do not concern “individual staff” as required by the provision. The documents sought by the Applicant either concerned other staff or because they were preparatory materials, are not subject to the obligations under AO 2.08 para. 2.2.

**Alleged violation of AO 2.12**

45. The Applicant alleges that the Respondent violated AO 2.12 Appendix 1, para. 1.2(c) by failing in its duty to tell him that there was a second Level 6 position in OREI which would become vacant on the transfer of the incumbent. The Applicant observes that staff such as himself cannot be aware of all career opportunities within the ADB. He notes that the Respondent was informed on numerous occasions of his desire to advance to a Level 6 position and the Respondent “*did not act in good faith by deliberately choosing not to tell me that a second IS6 position in OREI was vacant and by not giving me the opportunity to apply for this position.*”

46. The Respondent argues that AO 2.12 para. 2.2 makes it clear that career management is the primary responsibility of individual staff members. As the Applicant had applied for the fixed-term vacancy, he was fully aware that it existed. Moreover, the Bank maintains that in fact there was no second Level 6 position in OREI. As to other career opportunities, they were ones that, in the Respondent’s view, were not actual “*career opportunities*” for which the Applicant was suitable.

**Did the Respondent breach its obligation of good faith by not informing the Applicant of the lateral transfer until after its decision and for failing to inform him of other Level 6 positions?**

47. The Applicant argues that the common law principle of good faith applies to his situation (see *Lindsey*, ADBAT Decision No. 1 (1992)), and then alleges that the Respondent failed to act in good faith towards him by not informing him of the lateral transfer until after it had already been approved and by failing to inform him of Level 6 positions in OREI and elsewhere. He also relies on *In re Fernandez-Cabrello*, ILOAT

Judgment 946 (7 July 2000), para. 7:

“...[the complainant] was told nothing of what was going on. That is another flaw in the decision, the Organization being in breach of the duty of consideration it owes its staff, of the principle of good faith and of the rule that the staff member has a right to be kept informed of any action that may affect his rights or legitimate interests.”

48. The Respondent argues that it did not and could not have told the Applicant about any vacancy, other than ADB-HR-12-0570, because there was none. Lateral transfers are not vacancies. Moreover, as is stipulated in AO 2.03 para. 3.1, “*in case of ... lateral transfer the position concerned is not advertised.*” The Respondent also notes that, in accordance with AO 2.03 para. 6.1, it posts all vacancy announcements on the internal and external ADB websites. On these grounds, the Respondent argues that it did its utmost during the Applicant’s lateral transfer to manage his expectations and keep him abreast of progress, consistent with the Respondent’s policies and procedures and fairness to all staff.

#### **IV. FINDINGS AND CONCLUSIONS**

##### **Preliminary issues**

49. The Applicant’s request for documentation has been met as it was supplied by the Respondent in the Annexes to its Answer. The request for confidentiality in respect of the Applicant’s name was uncontested by the Respondent and granted by the Tribunal.

50. The Applicant has further requested that a full panel be constituted to hear this Application. He maintains that the subject matter is unique and that there has never been a case heard by the Tribunal dealing with the issue of transfers. The Respondent, while taking no formal position, suggests that there is no special need in this case nor a particularly unique or important question to warrant the decision being heard *en banc*.

51. The burden is on the Applicant to demonstrate the need for *en banc* proceedings. The Tribunal notes that in *Agliam*, Decision No. 83 [2008], VIII ADBAT Reports 73, para. 24, contrary to the Applicant’s assertion, the Tribunal dealt with the issue of transfers and, as in that case, the Tribunal is of the opinion that “*there are no circumstances of sufficient novelty, complexity or difficulty to make it necessary or desirable that this case be considered by a panel consisting of all its Members.*” In the circumstances of the case, having regard to Article V para. 5 of the ADBAT Statute, the Tribunal rejects the Applicant’s request for a full panel.

## **The exercise of discretionary power in lateral transfers**

52. The Applicant argues that his lateral transfer in the absence of his consent was an abuse of the Respondent's discretionary power and lacked good faith. When considering whether consent is required prior to the lateral transfer of the Applicant it is useful to review the jurisprudence of this Tribunal, and that of other international tribunals, with respect to such transfers. In *Agliam (id., at 73, para. 33)*, this Tribunal found that the President of the ADB has wide discretion in deciding upon a transfer in the interests of the Bank. Indeed, this Tribunal has considered it a duty to transfer staff to reduce tensions and restore good working relations. The Tribunal noted in *Agliam* that “[t]he ILO Administrative Tribunal [In re Saunders (No. 4), ILOAT Judgment No. 1018, 26 June 1990] considered it even

*‘the duty of the head of any international organization to take whatever measures can reduce tensions among his staff, bring about good working relations and improve efficiency.’”*

53. Equally, it is clear in international administrative law that the discretion to transfer must not be abused, for example, by arbitrary processes or hidden disciplinary sanctions. Again, as this Tribunal noted in *Agliam*, “[w]hile the Tribunal will be wary of interfering with an exercise of the President's discretion, it is incumbent upon the Tribunal to do so if the discretion is abused. It is the burden of the Applicant to prove that the discretion was abused”, such as the use of a transfer as a hidden punitive measure.

## **Administrative Orders with respect to moves within the Bank**

54. AO 2.02 sets the overarching standard for management of all staff, stating the Bank shall be: “*guided by fair, impartial and transparent personnel policies and practices*” [2.1]. Under AO 2.03 all staff are “*subject to the authority of the President and to assignment by the President to any of the activities or offices of the ADB*” [1.1]

55. AO 2.03 provides two specific grounds upon which staff may be reassigned.

56. The first ground under para. 3, “Assignments and Lateral Transfers,” does not require staff consent.

*3.1: “Staff members may be reassigned at their grade level on a lateral basis to a new activity or office if the interests of ADB or the staff member's development needs so warrant. In case of such a lateral transfer, the position concerned is not advertised.”*

57. The second ground for reassignment under para. 5, described as the “Pre-Identified Candidate Selection (PICS) process”, requires consent from the pre-identified candidate prior to any move.

*5.1 BPMSD will consult regularly with Departments/Offices regarding vacancy management, staffing and skills-mix requirements. Consistent with this initiative, the user Department/Office may indicate to BPHR if there is a pre-identified candidate for an anticipated vacancy through a lateral transfer or promotion. If the pre-identified candidate is from another Department/Office, the agreement of the Head of that Department/Office is required.*

*5.2 The pre-identified candidate must fully meet the selection criteria.*

*5.3 BPHR will conduct a preliminary screening to determine if the pre-identified candidate is eligible for lateral transfer or promotion as the case may be. BPHR will then obtain the candidate’s consent to his/her pre-identification.*

*5.4 If the pre-identified candidate agrees to his/her pre-identification, an internal selection panel will be convened to review the justification for pre-identification and to review the qualifications of the pre-identified candidate. The internal selection panel will then recommend whether to approve the selection of the pre-identified candidate. If the internal selection panel does not recommend the selection of the pre-identified candidate, the vacancy will be advertised.*

### **Application of the Administrative Orders and legal principles**

58. With the relevant legal principles and Administrative Orders in mind, the Applicant’s claim that his consent was required under AO 2.03 para. 5.1, and was not obtained by the Respondent, can now be considered. The first question is whether the Respondent made the lateral transfer under AO 2.03 para. 3.1 or under AO 2.03 para. 5.1.

59. The Respondent argues that it has the power in the Applicant’s case to make a lateral transfer without the employee’s consent under AO 2.03 para. 3.1 in the “*interest of the ADB or the staff member’s development needs so warrant.*” The evidence is that the Applicant repeatedly requested he be moved out of SARD where his situation was “*uncomfortable,*” that he explored all available avenues in the ADB to find another position, and that the ADB’s performance assessment recommended that the Applicant’s skills could be better used in another department. In these circumstances, the decision by the Respondent to effect a lateral transfer could properly and reasonably be made without express consent by the Applicant under AO 2.03 para. 3.1.

60. The evidence also supports the Respondent's claim that the Applicant had, at least impliedly, consented to the move to OREI. It appears, nonetheless, that any implied consent was misplaced because the Respondent and Applicant were at cross-purposes. The Respondent believed it was responding to the Applicant's request to a lateral transfer, while the Applicant believed he was moving to OREI on a promotion into an advertised position for which he had applied. The parallel processes of promotion and lateral transfer appear to have become intertwined in the mind of the Applicant to mean a "promotional transfer". It is possible that, if the Applicant had known in advance that the move to OREI was to be a transfer at Level 5, he would not have consented to the transfer, impliedly or otherwise. It is equally possible, if not more likely, that he might have consented to the lateral transfer, as this met his request to be moved out of SARD.

61. Even if there had been no genuine consent to the lateral transfer, it remains within the discretion of the Respondent to make the transfer under AO 2.03 para. 3.1. Consent by the Applicant was not therefore a pre-condition to the transfer.

62. The Applicant rests his claimed right of prior consent to his transfer on the Bank's alternative power to assign staff under AO 2.03 para. 5.1. Under the so-called PICS process, an applicant is a "*pre-identified candidate for an anticipated vacancy through a lateral transfer or promotion.*" If the PICS process applied to the Applicant, his express consent should have been obtained.

63. The Applicant's claim that PICS process applied has no substance because there was no vacancy or anticipated vacancy in OREI, and the Applicant had not been pre-identified as a candidate under the required procedures including a preliminary screening. Moreover, he could not have expected a promotion into OREI without satisfying the usual processes to establish that he had the "merit and capacity to assume increased responsibilities" under AO 2.03 para. 4.1. In summary, the Applicant's lateral transfer was not initiated under the PICS process and his express consent was not required.

### **Was the lateral transfer of the Applicant an abuse of power by the Respondent?**

64. In the circumstances of differing perceptions about the lateral transfer to OREI, the question is whether the Respondent's exercise of its discretion was an abuse of power or a punitive measure against the Applicant. Based on the email evidence, it is the Tribunal's view that the Respondent attempted, in light of its policies and current vacancies, to accommodate the Applicant's need to move to another position. The Applicant was treated with courtesy and professional willingness by ADB officials in their attempts to respond to his repeated requests to move to other departments.

65. Any possible failure by the Respondent lies in the lack of clarity about the basis on which the transfer would be made. From the first meeting with the LHR Specialist on 24 August 2012 until 7 November 2012, when the Applicant was first advised of his

lateral transfer to OREI at Level 5, there was a genuine confusion of objectives between the Respondent and the Applicant.

66. While it is perhaps understandable that the Applicant was focused on the advertised fixed-term post at Level 6, rather than a lateral transfer to OREI, he has the burden of showing that the Respondent had abused its discretion or had imposed a hidden sanction.

67. There is no credible evidence to support his allegation of abuse by the Respondent in the sense of acting in bad faith or in the sense of deliberately misleading him. To the contrary, the Respondent responded promptly and in good faith to requests by the Applicant for a transfer. The parallel application for an advertised three-year position with OREI at Level 6 proved to be a distraction for the Applicant, who linked his expectations for promotion to an advertised position at OREI with the prospect of a lateral transfer to another department.

**Is the Respondent in breach of its obligation to be guided by fair, impartial and transparent personnel policies and practices by failing properly to advise the Applicant of his lateral transfer at Level 5?**

68. The evidence does not support the Applicant's allegations that the Respondent had failed to be "*fair, impartial and transparent*" in respect of his lateral transfer. Put simply in the words of the Applicant, "we were working in parallel on two different levels." If a mistake had been made, it could have been made by both parties; a mistake that, if made by the Respondent, was made in good faith.

69. The frequent emails and meetings between the Applicant and the Senior Director OREI and Director, SARC, and with the LHR Specialist, indicate an active attempt by the Respondent to meet the Applicant's repeated requests to be moved. Over the weeks leading to the advice on 7 November, that the Applicant was to be transferred at Level 5, the evidence supports the conclusion that the Respondent was both pursuing options for the Applicant and keeping him informed as much as possible. The emails of 2 October and 29 October kept the Applicant informed that OREI was the "*realistic option*" and that the Joint Memo of 22 October 2012 had been signed by the relevant managers requesting the transfers.

70. The Applicant's claim that he was not advised of the transfer at Level 5 before the advice on 7 November is not demonstrated by the facts. First, there was no basis on which the Applicant could have believed his transfer was to be a promotion as the Respondent's selection procedures, including panel interviews, had not been met. Lateral transfer does not imply a promotion and any promotion must be based "on merit and capacity to assume increased responsibilities" (AO 2.03 para. 4.1). As an experienced and long-serving employee, the Applicant should have been aware of AO 2.03 that provides lateral transfers are not advertised. Secondly, the email of 12 November 2012 from the Senior Director, OREI says he had orally advised the Applicant that there would be no

Level 6 position available in OREI and that the advertised three-year position had been filled by an external candidate (see para. 12 above). It is noted, however, that there is no written evidence of this oral advice and it remains unproven.

71. It is true that Respondent's references to "*transfers*," for example in the Joint Memo, did not address the level at which the Applicant's transfer would be made. While the Respondent could have been clearer in stating the level of the proposed transfer of the Applicant, the Applicant's burden of proving that the Respondent failed to be fair, impartial and transparent has not been met. In fact, the evidence indicates the Respondent had acted in good faith to assist the Applicant to move from a department where he was unhappy.

**Were procedures in AO 2.03 paras. 11 and 12 and Appendices 3 and 4 followed in the downgrading of the Level 6 position in OREI to Level 5?**

72. The Applicant claims that several requirements under the Position Classification Procedures and Position Allocation Complement Allocation Ratios were not complied with. The Respondent denies this saying that its procedures for downgrading the Level 6 position were duly followed. The Respondent observes that it was entitled to reclassify the two positions involved in the transfer (PN-55050 and PN-10106) and, moreover, that the downgrade was necessary to accommodate the transfer from SARD to OREI at Level 5 for both staff members involved in the "*switch*."

73. The relevant provisions of the Administrative Orders are as follows:

***Appendix 3 Position Classification Procedures***

2. *Requirements from Department/Office Concerned* – *The following documents will be submitted by the Head of Department/office when requesting classification of a position:*

- (a) new or updated job description approved by the Department/office head concerned;*
- (b) updated descriptions of all related positions in the area under review, approved by the department/office head*
- (c) current organization chart showing the location and reporting relationships of positions in question; and*
- (d) forwarding memo from (or through) the department/office head to director, BPHR.*

***Appendix 4 Position Level Complement Allocation Ratios***

[Appendix 4 contains a table that shows an allocation for both SARD and OREI of 25% for Level 6 International Staff positions, and 30% for Level



5 International Staff positions.]

*Position Level Complement Action (PLCA) Procedures for IS*

...

*4. If the candidate meets the requirements for PLCA, a selection panel will be convened to review the justification for the PLCA. ....*

74. An examination of the relevant documents set out in the Respondent's Answer indicates that the Respondent met the requirements of AO 2.03 paras 11 and 12 and Appendices 3 and 4. Annexes 3 and 4 of Respondent's Answer provide the job descriptions for PN55050 at the new Level 6 and PN 10106 at the new Level 5, which shows a higher degree of responsibility for the Level 6 position and broader skills required. Moreover, the Respondent was required to meet balance requirements, and has done so. In any event, a promotion of the Applicant to Level 6 would not be based merely on availability of staff level complements, but would also require satisfaction of his "merit and capacity to assume increased responsibilities" as stipulated in AO 2.03 para. 4.1.

**Failure to provide the Applicant with copies of Annexes 3 and 4 of the Answer in violation of AO 2.08 para 2.2**

75. Staff members have a right of access to documents that relate to their personal or individual files under AO 2.08 para. 2.2.

*"AO 2.08 (Access to personnel files)*

*2.2 "Working papers" means preparatory materials generated by supervisors or managers for their use in exercising their managerial responsibilities or prepared by [BPMSD] in the performance of its personnel management function. Recommendations concerning individual staff actions cease to be working papers following consideration of the recommendation by the President or other authorized officer and shall be copied to the staff member ... and be included into the personnel files."*

76. The Applicant has no right to receive "working papers" that are defined as preparatory materials generated for the exercise of managerial responsibilities, or those that deal with general staff matters. The documents claimed by the Applicant – Annexes 3 and 4 of the Answer – are not subject to the obligations under AO 2.08 para. 2.2 because they do not relate to an "individual staff action".

**Failure to advise the Applicant that other Level 6 positions had become available**

77. The Applicant claims that the Respondent is in breach of its duty to tell him about opportunities for promotion to a Level 6 position, particularly in respect of a second Level 6 position that became available within OREI. The following Administrative Orders recognize a function of the Bank in providing information to staff of career opportunities and state that “*career management is primarily the responsibility of the individual staff member;*”

*AO 2.12 (Career management), 24 October 2005*

*2.2: Career management is primarily the responsibility of the individual staff member. Other parties such as ADB and the director/supervisor are involved in the processes and are there to assist the staff member in developing their careers. The staff member has ultimate responsibility for the process. ....*

*Appendix 1 Roles of concerned parties in ADB’s career management:*

*1.2(c): “Bank management .... Provides information on career opportunities.”*

78. While all vacancies within the Bank are advertised both internally and externally, it is good practice for management to advise candidates of opportunities within the ADB. Indeed, the role of the LHR Specialist with the BPMSD was presumably to assist staff in their career development. The Respondent was aware of the efforts over a period of years by the Applicant to seek promotion to Level 6. The Applicant had failed in several attempts to gain promotion to Level 6. The Respondent states that the failure to be promoted indicates that the Applicant did not have the skills necessary for appointment at the higher level, a view supported by the regular assessment of the Applicant as “satisfactory” only.

79. The Respondent has explained why it did not advise the Applicant of vacancies. With respect to the alleged second Level 6 position with OREI, the Respondent states “*Simply put, Respondent did not and could not tell the Applicant about any other vacancy ... because there was none*”. In any event, any vacancy would have been announced in the normal course of events.

**Applicant’s allegation that his claims in the pleadings have been treated with a lack of respect**

80. The Applicant, in his Reply to the Respondent’s Answer, observes that the language used by the Respondent to describe him and his motivations are “*disrespectful and speculative*” and “*inappropriate and insulting*”. He points, for example, to para. 41

of the Answer where the Respondent casts doubt on the Applicant's mental capacity by suggesting that "*the Applicant truly lacks the capacity to understand AO 2.03.*"

81. The Applicant's allegations here arise entirely from the pleadings process. However, the Tribunal might usefully respond to the Applicant's concerns in the interests of an orderly and respectful Tribunal process.

82. The tone and language of the Respondent's Answer tend to support the Applicant's assertions. Some phrases and terms seem gratuitous, and do not assist the Tribunal in its deliberations. Examples include: "*he felt entitled to career progress;*" "*wished to reach a higher pay grade prior to his retirement;*" "*pushing to achieve his secondary goal of a salary increase;*" "*less than realistic expectations;*" and "*deliberately create confusion*".

83. To use pejorative terms to describe the Applicant at a personal level, does not assist the legal process or the Tribunal.

84. As regards the merits of the Applicant's legal claims, he has not met the burden of proving any violations of the obligations of the Respondent towards him; therefore he is not entitled to compensation or any other remedy.

## **DECISION**

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

“Mr. F”

Lakshmi Swaminathan

      /s/        
*President*

Gillian Triggs

      /s/        
*Member*

Samuel Estreicher

      /s/        
*Member*

Attest:

Cesar L. Villanueva

      /s/        
*Executive Secretary*

At Manila, 6 August 2014.