

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

Decision No. 106

(23 September 2015)

Ms. G

v.

Asian Development Bank

Lakshmi Swaminathan, President
Gillian Triggs, Vice-President
Shin-ichi Ago

1. The Applicant is an Associate Project Officer at the level of National Staff 1 in the Energy Division, Southeast Asia Regional Department (SEEN) of the Asian Development Bank (“ADB”, the “Bank”, or the “Respondent”) and was assigned to do project administration during her performance reporting period. She has worked for the Bank since 2 November 1981 and her type of employment is regular. In her Application she seeks:

1. the re-opening and rectification of her supervisor’s comments on her performance appraisal;
2. transfer to another division agreeable to both parties;
3. an amount equivalent to three times her annual salary as compensation for the emotional distress, serious anxiety, terror and mental anguish suffered; and
4. all other relief just and equitable under the premises.

I. FACTS

2. The step-by-step year-end Performance Review (PR) process set out in section III.B of the “Performance Management – Implementing Guidelines” in relation to national staff is as follows:

1. Staff describe their key accomplishments by completing Parts 1.A and 1.B based on their individual work plan.
2. The supervisor indicates up to three input supervisors that they will seek input from regarding staff’s performance relative to Parts 1 and 2. The supervisor then reviews and assesses the staff member’s key accomplishments and completes Parts 1.C and 1.D of the form.
3. Staff complete Part 1.E of the form providing their response, if any, to the supervisor’s assessments.

4. The supervisor provides the competency assessment against each of the six ADB wide competencies by completing Part 2 of the form. “The supervisor is expected to provide constructive feedback with specific examples for improvement areas...”.
 5. The supervisor must also consult, where appropriate, with others who can provide substantial feedback on performance of staff including input supervisors.
 6. The Heads of Departments/Offices meet Directors (the Raters of National Staff) to discuss overall ratings for other National Staff.
 7. Overall assessments are finalized at all levels and approved by Directors for National Staff (Part 3.1 of the form).
 8. The supervisor and the staff meet to discuss the overall assessment. Discussion will focus on key accomplishments under the work plan; significant variations in the work plan during the year; achievement of work plan outputs and competency assessment.
 9. The staff member completes Part 3.2 of the form, and submits the completed form online.
3. Prior to the start of the 2013 Annual PR process, in accordance with Administrative Order (“AO”) 2.03, para. 2.3, on 22 November 2013 the Budget, Personnel and Management Systems Department (“BPMSD”) sent a memo setting out implementation arrangements. It reinforced

“the importance of (i) face-to-face performance discussions occurring between supervisors and staff, (ii) supervisors providing more extensive and valuable feedback via these face-to-face discussions and their comments in Parts 1.C, 1. D... and Part 2 of the PR form....”.

The memo also specified, amongst other things, that staff and supervisors “should discuss Part 1 [...] and Part 2 [...] from 9 January to 7 February 2014.”, that the “Rater” (in the Applicant’s case, Director, SEEN) should complete Part 3.1 of the PR form (at which time it is automatically returned to the staff member), providing the overall assessment by 11 February 2014, and that the “Supervisor” should then meet with the staff member to discuss the assessment and communicate the overall performance rating. After this discussion, the staff member may complete Part 3.2 by providing his/her comments on the overall rating, but is not required to do so. The memo explained that “the PR Online system will remain open up to 21 February 2014 to allow staff time to submit their comments on their PR assessment (Part 3.2) after such discussion has taken place”. The “2013 PR Tips and Reminders” attached to the

memo added that “Any PR form not submitted by the closing date [later extended to 26 February 2014] will automatically be forwarded to BPPP [BPMSD Policy and Program Division] by the system.”

4. For Part 1 of the Applicant’s 2013 PR key accomplishments and results assessment, the Applicant had listed five key accomplishments which included reviewing bid documents, preparing a memo to the President to cancel a loan, and contributing to the processing, quality-at-entry requirements, and implementation of various projects. The Applicant’s PR form indicated that the Senior Energy Specialist was her input supervisor and accordingly her input had “been considered in the work accomplishment and competency assessment.” On 10 January 2014 the supervisor sought and received (either orally or by email) additional feedback from input supervisors other than the one indicated on the PR form.

5. The Applicant’s supervisor, Unit Head, Project Administration, Energy Division, SEEN, completed the Applicant’s assessment on 22 January 2014. Against Part 1, where the Applicant had indicated her accomplishments, her supervisor had noted “I confirm [the Applicant’s] work accomplishment for the year. SEEN looks forward to her efforts and teamwork for the division’s outcomes in 2014.” For Part 2, Competency Assessment, the Applicant was assessed “Developing” in four areas and “Proficient” in two areas as follows:

Application of technical knowledge and skills	Developing	Although [the Applicant] has basic knowledge and skills, she definitely needs to pay more attention to completeness and accuracy of information presented or inputted into the system.
Client orientation	Developing	[The Applicant] delivers her services routinely and responds to the clients although on several occasions reminders are needed.
Achieving results and problem solving	Developing	[The Applicant] will generally follow the relevant defined procedure and ADB process to minimize risks in project and TA administration.

Working together	Proficient	[The Applicant] has shown that she can consistently work well with colleagues and other staff of varying and diverse backgrounds.
Communication and Knowledge sharing	Proficient	[The Applicant] will search for relevant procedures to accelerate the work but may at times miss out on key details and therefore is encouraged to be more positive when receiving feedback as that is important for better directing her efforts.
Innovation and Change	Developing	[The Applicant] is willing to adapt to changes in project administration and will from time to time discuss with her colleagues and supervisor(s).

6. The overall comments made by her supervisor on 22 January 2014, following his consultations with the input supervisors, were:

“[The Applicant] has assisted several project officers from a varied background for loans and TA administration. Going forward, [the Applicant] is expected to take on similar challenges and it is recommended that she gives greater effort in reviewing the quality of her deliverables and other project outputs.”

7. On 22 January 2014 the Applicant’s supervisor completed Part 2 of the PR form. On the same day, the Applicant emailed her comments to her supervisor in relation to those three of the four areas where she had been assessed as “developing” (application of technical knowledge and skills; client orientation, and achieving results and problem solving). The Applicant requested revisions of her assessment, “fair recognition of [her] performance” and re-assessment in those areas as “proficient” rather than “developing”. The Applicant alleges in her application that at this time her supervisor told her that the assessment had been finalized, was “non-negotiable” and had been sent to Director, SEEN. On 23 January 2014, her supervisor responded to the Applicant’s email, copying Director, SEEN, by stating “As per our discussions, let us also discuss this week of 3 Feb with Director, SEEN for his views and comments on your PR.”

8. On 6 February, the Applicant emailed her supervisor, copying the Director, SEEN,

stating that “Further to our discussion, your assessment of my performance is not fair not to mention erroneous.” She went on to provide comments that disputed her supervisor’s comments. It is noted that in an email sent by the Applicant on 21 February 2014 to her supervisor, Director, SEEN and copied to the Director General, Southeast Asia Regional Department (SERD), the Applicant asserted that

“On 6 February 2014, you informed me that after your discussion with [Director, SEEN], the PR will not be changed, my rating will be “Satisfactory” and that if I want further discussion I should send an email to [Director, SEEN].”

9. While the supervisor did not contest this allegation when responding to that 21 February 2014 email, there is no other evidence to corroborate the Applicant’s assertion. On this point, the Tribunal also notes that by 27 February 2015 when the Applicant submitted her application, she had changed the date on which she alleged the discussion took place to 22 January 2014 as being when her supervisor told her that the assessment had been finalized, was “non-negotiable” and had been sent to Director, SEEN. On 10 February her supervisor, copying the Director, SEEN, responded to this email by stating “Thank you for your comments and feedback which are noted.” On 13 February 2014, the Director, SEEN agreed with the supervisor’s comments and rated the Applicant’s overall performance as “Satisfactory” in Part 3.1 of the PR.

10. On 21 February 2014, the Applicant’s supervisor sent an email to all staff under his supervision, including the Applicant, inviting them to contact him for individual PR discussions, along with a reminder about the 26 February deadline for the online form. The same day, the Applicant included Director General, SERD on her email exchanges with her supervisor and Director, SEEN to summarize in her words what had been discussed (see assertions made above at para. 8) and to note “I cannot accept the assessment because it is showing abuse of discretion, discriminatory and unfair treatment.” Accordingly, the Applicant chose not to engage in the online submission of her comments on the PR form and instead emailed her views.

11. On 1 March 2014, following the cut-off date, the Applicant’s performance review was automatically submitted electronically to BPPP. This action also automatically generated a statement in Part 3.2 which said, “The basis for the overall rating has been discussed and explained to me by [my supervisor], who completed Parts 1C, 1D and 2

of the form.” The Applicant’s PR form still included the name of only one input supervisor.

12. On 3 March 2014, in response to the Applicant’s 21 February 2014 email, Director, SEEN sent the Applicant an email encouraging her to see “the Ombudsperson regarding your performance assessment by your immediate supervisor”.

13. On 6 March 2014, the Applicant asked her supervisor for the reply he had received from her project officers with regard to a request for their assessment of her. Her supervisor responded on 12 March that “as advised by Director, let us talk to Ombudsperson next week.” The Applicant chose not to discuss the matter with the Ombudsperson.

14. On 22 April 2014, the Applicant requested compulsory conciliation but this ended on 27 May 2014 without settlement.

15. On 28 May 2014, the Applicant emailed the BPMSD requesting copies of her input supervisors’ assessments. The same day, BPMSD replied that the information she was requesting was confidential. On 29 May the Applicant again requested the assessments of her two other supervisors and was again told that these could not be provided as they were confidential.

16. On 10 June 2014, the Applicant requested Administrative Review to “correct the procedures which [my supervisor] has violated and to rectify the PR assessment”. On 26 June 2014 DG, BPMSD denied the request and ruled that there was no merit in the allegations surrounding the conduct and completion of the Applicant’s 2013 PR.

17. On 4 July 2014 the Applicant appealed to the Appeals Committee. On 21 November 2014, the Appeals Committee overall found that the Respondent had followed the proper procedures in responding to the Appellant’s request for compulsory conciliation and administrative review and that relevant policies and procedures had been correctly applied. It also found no evidence of an abuse of discretion, arbitrariness, discrimination, improper motivation or violation of fair and reasonable procedures. It recommended the President reject all of the Appellant’s claims and relief sought as without merit.

18. The Committee nonetheless had reservations in reaching this conclusion, and observed that it was:

“... left wondering if the case would have reached the present stage of appeal if the Appellant’s PR supervisor had given a more detailed explanation for his assessment at PR time, provided greater opportunity to the Appellant to share her views on the draft assessment, and, over the course of the year, had delivered more frequent feedback on areas of concern.”

19. On 4 December 2014, the Bank denied her Appeal.

20. In the Application dated 27 February 2015 the Applicant appealed this decision to this Tribunal. She claims that:

1. The completion of her performance review violated the PR exercise as indicated in the performance management guidelines. She alleges there was no due process and transparency, and abuse of power and discretion were evident;
2. The failure to provide her with copies of her input supervisors’ assessment when requested was unjust and in breach of AO 2.08; and
3. Her supervisor abused his discretion in making an assessment of her performance that was not based on her actual performance and achievements. She argues that her supervisor’s comments were not consistent with her actual performance and there was no attempt to cite specific instances to support those statements.

21. The Applicant in the final sentence of her Application makes reference to allegations of harassment (dealt with separately under AO 2.11 “Prevention of Harassment”) she had filed against her supervisor. She relied upon this as evidence that her supervisor’s handling of her PR was “but one of his deliberate acts to undermine my capacity and terrorize my being”, or in other words, there was an abuse of discretion in the assessment of her PR. The Applicant’s supervisor has denied this complaint, which is still pending.

II. SUMMARY OF THE PARTIES’ CONTENTIONS

22. The Applicant questions her performance assessment rating and argues that the Respondent’s comments in her performance review were not consistent with her actual performance and downplay her capacity and accomplishments without supporting evidence. She asserts that the comments are not constructive, are not based on specific details and instead “zeroed in on my supposed shortcomings which are

baseless, untrue, and which [my supervisor] could not explain.” The Applicant asserts that the performance review was also motivated by improper purpose and completed in breach of due process. Finally, the Applicant argues that the Respondent has breached procedures by not allowing her access to the assessments of her input supervisors.

23. The Respondent argues that the Applicant’s PR followed proper procedures, and was not a decision that was arbitrary, discriminatory, improperly motivated, adopted without due process or involved an abuse of power or discretion. It also argues that the Applicant’s allegations are not supported by the evidence. In relation to her input supervisors’ assessments, the Respondent argues that individual staff members do not have a right to access the specific comments/feedback provided by input supervisors. It also argues that the material requested does not fall within AO 2.08. The Respondent also notes in its Answer that the Applicant’s submission of statements made during the Compulsory Conciliation proceedings (in relation to the harassment claim) are confidential and should not have been shared as remedies have not been exhausted.

24. The Applicant alleges that she was denied an opportunity to explain to her supervisor why she considered the comments to be “vague and unfavourable”. The Applicant alleges that she requested that her supervisor reconsider his assessment. She alleges that while he invited her to his office on 21 January 2014,

“he did not discuss the grounds for these comments but simply pointed out that the workflow is already with the Director, SEEN and added that a discussion with the Director, SEEN will not change the assessment.”

She alleges a breach of the Performance Management Implementing Guidelines, para. 2 to the effect that:

“... Discussions about individual strengths, opportunities for improvement, and feedback are important components of the assessment process. ...”

25. The Applicant also alleges that because her request for clarifications was pending and no discussion had taken place, the submission of her PR as “completed” on 1 March 2014 was a “flagrant violation of the procedures for the assessment process and is also a violation of my right to due process,” since Part III, para. 12, of the Implementing Guidelines specifies that “the staff member completes Part 3.2 of the form, and submits the completed form online.”. The Applicant argues that she did not

fill in the form as she was still in the process of questioning its contents. The Applicant also notes that the form included the note that the overall rating “has been discussed and explained to me by [the supervisor]...” and argues that this looked, incorrectly, as if she had agreed with the decision.

26. The Applicant challenges the Respondent’s reliance on the automatically generated statement and points out that she had asked her supervisor to explain the basis of his assessment and yet this statement had not changed.

27. The Respondent argues that it assessed the Applicant’s performance in 2013 in accordance with the applicable rules and procedures, including AO 2.03, the Implementing Guidelines, and the memo issued by BPMSD dated 22 November 2013.

28. The Respondent submits that the Applicant’s performance review was rated based on her contributions to the SERD and the Bank in general and her competencies were assessed in accordance with the expected standards for her level as demonstrated by the completed PR form. According to the Respondent, the performance assessment was conducted through the online performance management systems in accordance with the Implementing Guidelines and the BPMSD 2013 PR Memo. The Respondent states that the name of the Applicant’s input supervisor was listed in her PR form consistently with para. 7 of Attachment 2 to the BPMSD 2013 PR Memo; that the supervisor completed Part 2 of the PR form in accordance with the requirements of Section B of Attachment 2 to the BPMSD 2013 PR Memo; and that Director, SEEN (the Rater) completed part 3.1 in accordance with the procedures.

29. The Respondent further argues that the main objective of Part 2 of the PR form is for the supervisor to assess whether the staff member’s competencies are, according to para. 5 of section IIIB of the Implementing Guidelines, in line with the “expected standards for the position held by the staff”. The Respondent notes that while supervisors are encouraged to provide comments in Part 2, this is not a requirement. It also notes that the supervisor’s comments in Part 2 addressed both deficiencies (where the Applicant was assessed as “developing”) along with positive features of the Applicant’s competencies such as where she was assessed as “proficient”. It also notes that the Applicant’s supervisor had provided specific examples of areas for

improvement such as “pay more attention to completeness and accuracy of information presented or inputted in the system.”

30. The Respondent further argues that the Applicant could have provided her comments by completing Part 1E and Part 3.2 of the PR form. Nevertheless, the Applicant provided comments on her assessment in her 22 January 2014 email to her supervisor. The Applicant also says she met with her supervisor to discuss her assessment the same day, and sent further comments to her supervisor, copied to the Director, SEEN on 6 February 2014.

31. The Respondent argues that the statement “the overall rating has been discussed and explained to me by [my supervisor]” in part 3.2 of the PR form is automatically generated in the PR form when it is created.

32. Finally, the Respondent notes that on 21 February 2014, the supervisor sent the Applicant an email proposing that she “discuss your PR individually with me”. The Respondent observed that the Applicant did not take her supervisor up on this opportunity, and instead had responded with an email saying “if the assessment will not be corrected then there is no need for discussion.”

III. CLARIFICATION OF THE ISSUES

33. The following legal questions arise for consideration:

1. Did the Respondent follow due process in terms of ADB Policy, Procedures and PR Guidelines in completing the Applicant’s 2013 performance evaluation?
2. Did denial of the Applicant’s request for copies of her assessment from the other input supervisors constitute a violation of AO 2.08 (access to personnel files), paras. 4 and 5 or was it unjust?
3. Was there any abuse of discretion, improper purpose or arbitrary act by the Respondent in completing the Applicant’s 2013 PR?

IV. FINDINGS

34. The Tribunal notes that a general review of the evaluation of Bank employees by their superiors is beyond its jurisdiction. As this Tribunal decided in *Claus*, ADBAT Decision No. 105, (13 February 2015), para. 75:

“It is settled law that the assessment of staff members’ Annual Performance is essentially made by the Bank and it is not for the Tribunal to substitute its assessment. The general position concerning the Tribunal’s ability to review the Bank’s assessment of staff members, is described in Mr. E, ADBAT Decision No. 103 (12 February 2014), para. 54:

“... The Respondent’s exercise of discretionary power is subject to review by the Tribunal, but only in circumstances of where the challenged management decision is arbitrary, discriminatory, improperly motivated, adopted without due process or involves an abuse of power or discretion (see Lindsey, Decision No. 1[1992] I ADBAT Reports 5, para. 12).

35. Evaluating the performance of the Applicant is a matter for her supervisor(s). The Tribunal may interfere in such evaluation only under the strict conditions set out under the *Lindsey* formula, namely if it appears that the evaluation has not been reached by the proper processes, is arbitrary, discriminatory or improperly motivated or could not reasonably have been taken on the basis of facts accurately gathered and properly weighed.

36. The Tribunal also notes that “the burden of proof rests on the person who makes allegations, namely, the Applicant in the present case” (see *Mr. E*, Decision No. 103 (12 February 2014)).

1. Did the Respondent follow due process in assessing the applicant’s performance?

37. The key issue here is whether the Applicant has discharged her burden of showing “*prima facie* that the managerial act or decision being challenged was vitiated by arbitrariness or disregard of due process” (*Azimi*, Decision No. 88 [2009] VIII ADBAT reports, para. 31). The Tribunal notes that complications arose when the Applicant’s supervisor, upon finishing his input on Part 2 of the PR, allegedly told the Applicant that it could not be changed. It is certainly in the supervisor’s power to assess the Ratee’s competencies referring to the competency profile appropriate for the staff member’s level (para.13 of the 2013 PR Tips and Reminders) and it may not be a “matter for negotiation”. However, it is also mentioned in the same passage of the Tips and Reminders that “Supervisors are encouraged to provide specific comments or examples to help the Ratee better understand his/her strength and areas for improvement”. The opportunity for the supervisor to provide such comments or examples was lost when the Applicant considered that further discussion, beyond that

which took place on 22 January 2014 in the supervisor's office, was futile and useless because his assessment had allegedly already been made and forwarded to the Director, SEEN. Neither the supervisor when he responded to the Applicant's 21 February 2014 email, nor the Respondent in its Answer, specifically refuted this allegation. However, neither has the Applicant substantiated her allegation. In these circumstances, the Tribunal considers on balance that the Applicant did not discharge her burden of showing *prima facie* that the statement as alleged was made and therefore has not shown sufficient evidence that the Respondent breached due process.

38. In addition to the failure to meet the standard of proof, the Tribunal further notes that the Applicant's argument is weakened by her choice not to meet with her supervisor once Part 3.1 was completed and her deliberate decision not to engage in the process by completing the on-line system. The Tribunal concludes that the Applicant's subsequent behavior in failing to engage with the process and not allowing further discussion through the PR was not reasonable in the circumstances. As this Tribunal held in *Yamagishi*, Decision No. 65 [2004] VI ADBAT Reports, para. 40, "*communicating with a staff member assumes that there is a staff member who is interested in listening.*" (cf. ILOAT Judgment No. 1301 (76th Session, 1994), Consideration 8).

39. The Tribunal notes however that the Respondent appears not to have been fully faithful to the spirit of its Implementing Guidelines and its memo issued by BPMSD on 22 November 2013 in terms of citing the importance of "(i) face-to-face performance discussions" and "(ii) supervisors providing more extensive and valuable feedback". The Appeals Committee report (noted above at para. 18) also mentioned reservations. In addition, the record shows that the Applicant was informed of the identity of only one of the three input supervisors consulted by the supervisor during the PR. While this was not a fatal flaw in these circumstances, it fell short of what was contemplated if not required by the Performance Management Implementation Guidelines.

40. Accordingly, the Tribunal suggests that the Bank do more to abide by both the spirit and the letter of its own Guidelines. The Tribunal also observes that the automatic operation of the online PR system might not be sufficiently flexible and

transparent, for example, to accommodate instances where a staff member has brought issues of process to the Bank's attention.

2. Did denial of the Applicant's request for copies of her assessment from the other input supervisors constitute a violation of AO 2.08 (access to personnel files), paras. 4 and 5 or was it unjust?

41. The Applicant argues that she was denied access to the assessment of her performance made by her input supervisors on her personnel file and that this was in breach of AO 2.08. She argues that the right to access her personnel files is clearly stated in AO 2.08 (1 March 2002), para. 4(a) which provides that:

“all papers/documents prepared or issued after 1 January 1992 which concern the staff member and are the basis of administrative decisions taken in respect of the staff member, except ... working papers and privileged documents, may be inspected by the staff concerned.....”

In her Reply, the Applicant also alleges that the decision not to share the assessment of her input supervisors with her is unjust.

43. The Respondent argues that the guidelines in the BPMSD 2013 PR memo specify that feedback from input supervisors should be incorporated but that they need “not attribute comments to individual supervisors.” The Respondent notes that ensuring this feedback is confidential allows the input supervisors to be more candid than if their feedback were disclosed directly to the Applicant. It notes also that this recognizes that ultimately the performance review of a staff member is the responsibility of the direct supervisor. It also notes that the feedback and comments obtained by the staff's supervisor from input supervisors for the purpose of a performance review are not included in the staff's personnel files kept by BPMSD and therefore their access does not fall within AO 2.08.

44. The Tribunal notes that according to AO 2.08, para. 4 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. As such, the documents claimed by the Applicant are not subject to the obligations under AO 2.08 para. 2.2 because they are working papers. It is also for that reason that these documents are not in the staff's personnel files kept by BPMSD.

45. Noting the Bank's refusal to comply with the Applicant's request on the grounds of confidentiality, the Tribunal recognizes the delicate balance between requirements of due process on the one hand and the confidentiality designed to safeguard reliable appraisals on the other. (cf. *ILOAT Judgment No. 2700*, (104th Session, 2008), Considerations 5 to 7.) As a general principle, it would be open and fair for a staff member to know the names of all those persons acting as input supervisors, and, in appropriate circumstances, have access to either the written assessments provided, or a process where discussion of the assessment can take place. In this case, the Bank has set up such a process of discussion, and yet the facts indicate that the Applicant chose not to engage in that process. Thereby, from the Applicant's own actions, she has foregone the opportunity to discuss the basis of her assessment. The Applicant has explained this failure to engage on the basis of an alleged statement that her assessment was "non-negotiable". However, as discussed before, the Applicant has not substantiated this allegation and failed to discharge her burden of proof.

46. Finally, with regard to the question whether this was an unjust process, the Tribunal considers that this was not unjust as reasonable standards of due process were met through the opportunities for discussions with the Bank. While the 2013 PR Tips and Reminders included for the online supervisor to indicate on the electronic form "up to three input supervisors who the online supervisor will contact for feedback about the staff's performance", the Tribunal notes that Guidelines or Tips are not mandatory and therefore their simple breach cannot be breach of due process. (Cf. *Ibrahim*, Decision No. 86 [2008] VIII ADBAT Reports, para. 51). However, the failure to provide the Applicant with the names of all her input supervisors on the Applicant's PR form and the fact that she did not become aware of the two further input supervisors until the end of the process were to her disadvantage, lacked transparency and not in the full spirit of the PR.

3. Did the Respondent abuse its discretion in the assessment of the performance of the Applicant?

47. The Applicant contends that the adverse performance review amounted to an abuse of discretion. The Respondent refutes this view.

48. The Tribunal finds consistently with its earlier findings at para. 36, that the Applicant has the burden of demonstrating that there was an abuse of discretion. The

observations of the Tribunal in *Behuria (No. 2)* stated as follows:

“The Applicant has, basically, asserted [her] disagreement with several of the Respondent’s assessment of his performance; but this cannot take the place of proof of discrimination or bias, which the Tribunal finds to be absent from the record.”(Behuria (No. 2), Decision No. 11 [1996], II ADBAT Reports, para. 11).

Accordingly, the Tribunal finds that disagreement with the assessment does not of itself demonstrate an abuse of discretion and there is no other evidence to indicate that there has been an abuse of discretion.

Relief

49. In conclusion, the Tribunal finds that the Applicant has failed to discharge her burden of proving that the Respondent breached due process, or acted arbitrarily or with improper motive. As there has been no breach by the Respondent of its obligations, all the relief claimed by the Applicant as set out in para. 1 of this decision is denied.

50. Nonetheless, the Tribunal believes that the Respondent could have taken more care to act in the spirit of its own PR Guidelines and Tips. In these circumstances, it is recommended that the Applicant be given an *ex gratia* payment.

DECISION

For the above reasons, the Tribunal unanimously decides to:

- (i) dismiss the Applicant’s claims; and
- (ii) orders the Bank to make an *ex gratia* payment of US\$ 5,000 to the Applicant.

