

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

Decision No. 123

(21 October 2020)

Mr. Rexel Abrigo

v.

Asian Development Bank

Shin-ichi Ago, President

Anne Trebilcock, Vice President

Chris de Cooker

1. The Applicant, a National Staff at level 2, challenges the decision of the Asian Development Bank (“the Respondent”, “the ADB” or “the Bank”) to terminate his employment on 10 October 2019 and seeks reinstatement or compensation.

I. THE FACTS

2. The Applicant joined the Bank on 6 October 2008 as an Associate Information Coordinator (Environment), Administrative Staff at level 7, in the Facilities and Asset Management-Information Resources and Services Unit (OAFa-IR). In 2011 he was promoted to National Staff at level 1 as an Associate Environment Officer with the Office of the Director General of the South Asia Department. On 4 February 2016 he was promoted to National Staff at level 2 (NS2), Climate Change Officer and transferred to the Climate Change and Disaster Risk Management Division (SDCD) of the Sustainable Development and Climate Change Department (SDCC).

Meetings during 2017 to discuss Applicant’s performance issues

3. Soon after joining SDCD in February 2016 the Applicant’s supervisor resigned, leaving the Applicant without a direct supervisor until October 2017. During his 2016 Performance Review (“PR”) meeting, the Director, SDCD, who was the overall Department Head, told the Applicant that his performance was “inconsistent” and this had become more noticeable since the

third quarter of 2016. But since his performance was yet to be monitored, the Director, SDCD agreed to rate the Applicant as “satisfactory” for 2016.

4. During 2017, despite feedback and guidance, the Director, SDCD noticed no improvement in the Applicant’s performance and held meetings with the Applicant on 27 April 2017 and 31 August 2017 to discuss those aspects that, in his opinion, were not commensurate with the expectations of an NS2. The challenges in Applicant’s performance were categorized as: 1) inconsistency in delivering quality output in a timely manner; 2) inappropriate communication and lack of awareness of organizational protocols; and 3) a poor work ethic featured by absenteeism.

5. The new direct supervisor who joined the Department in October 2017 also noted performance issues which resulted in further meetings with the Applicant, the Director, SDCD, the Applicant’s direct supervisor, and a Human Resources (“HR”) specialist on 28 November 2017 and 1 December 2017. At the 1 December 2017 meeting, the Applicant was told he would be placed on a Performance Improvement Plan (“PIP”). At a meeting on 15 December 2017, between the Applicant and the HR Specialist, the Applicant was told that, although he had been told on 1 December that a PIP would be launched, the Applicant would have a separate PR meeting with the Director, SDCD and ultimately be given a rating. If he was rated unsatisfactory by the Director, SDCD in his next PR meeting he would be placed immediately on a PIP, and if his performance did not improve actions might be taken to terminate his appointment.

6. On 15 January 2018, the Applicant, the Director, SDCD, the Applicant’s direct supervisor, and an HR Specialist met to discuss the Applicant’s performance for 2017. The Note-to-File (“NTF”) of the meeting notes the Applicant’s performance issues since 2016, the regular meetings held during 2017 to discuss those issues, and the fact that the Applicant had showed “acceptance and willingness to be put under performance improvement plan to help him become better, regardless of the 2017 performance rating.”

2017 Performance Rating

7. On 22 February 2018, the Director, SDCD rated the Applicant’s 2017 overall performance

as “unsatisfactory”. ADB-wide competencies were assessed as “developing” for four out of the six core competencies: application of technical knowledge and skills; client orientation; working together; innovation and change; and “not proficient” for two of the six core competencies: achieving results; communication and knowledge sharing. The Director, SDCD’s written comments on the “unsatisfactory” rating were:

“In 2017, [the Applicant] was provided with periodic feedback on his underperformance. Notably, the meetings on 27 April and 31 August 2017 provided him a clear warning that there had been noticeable issues in his performance. Each time he recognized the issues and made serious attempts to change, which I appreciate. The senior consultants in the team, with significant ADB experience were there to provide the intellectual lead on the subject and to guide him through 2017, and he also availed himself of their advice on both technical and performance issues. Hence the absence of his immediate supervisor should not have resulted in [the Applicant] having significantly more workload, as opposed to what he claims. Despite this he was not able to show a consistent improvement and was eventually made aware that a formal performance improvement plan will be put in place to ensure a turn around and that all facilitation will be provided to enable him to make the transformation.”

8. The Director, SDCD's overall written comments on the PR form were that:

“[Applicant] started this year with an explicit goal to enhance his performance. He was provided advice at various junctures to step up and made his best efforts to do so. However, inconsistency in his performance has confirmed the observation that there is a mismatch between his skill set and the requirements of this position. This led to a communication to him in August that he will have to work with a formal performance improvement plan. Further, colleagues in the team had to step in at different points to ensure delivery of some critical outputs, impacting his position in the team and the team dynamics.”

9. In his written response on the PR, the Applicant stated:

“I acknowledge that there are some delays in the delivery of some outputs, and in response to requests. I deeply apologize if some team members had to step in to help at some point. But I honestly believe that this is significantly due to the huge workload I had to accommodate in the absence of the Climate Change Adaptation Specialist in most of 2017. In hindsight, I agree in the assessment above that I should have communicated better that I was already drowning. Also, it would have been nice to have an assessment of my accomplishments that were satisfactory in 2017.”

10. On 5 March 2018, the Applicant wrote to the HR Business Partner to request conciliation with respect to his unsatisfactory performance rating and information on the relevant process. On the same day, the HR Business Partner advised the Applicant that he was eligible for conciliation and of the deadlines set out in Administrative Order (“AO”) 2.06 (“*Administrative Review and Appeal Procedures*”), para. 3 but the Applicant did not pursue this action.

Applicant is placed on a Performance Improvement Plan

11. On 6 April 2018, the Director, BPHP wrote a memorandum to the Applicant formally notifying the Applicant that he would be placed on a PIP for a three-month period and if his performance did not improve to at least satisfactory by 15 July 2018 then action might be taken to terminate his appointment in accordance with AO 2.05 (“*Termination Policy*”), para. 10. At the Applicant’s request, the commencement of the PIP was delayed by one month so that the period would cover 7 May to 6 August 2018. Applicant’s work plan from 7 May 2018 onwards was agreed by the Applicant on the same day by his email to the HR Business Partner.

12. Monthly meetings were held over the course of the PIP between the Applicant, his supervisor, and the HR business partner to monitor the Applicant’s progress. The first monthly meeting in June showed improvement in timeliness but noted that his quality and/or standard of delivery and communication skills were still lacking. During this period, on 11 May 2018, the Applicant received a “Hercules Team Award” for his contributions to the annual meeting event on Strengthening Climate and Disaster Resilience.

13. The second monthly meeting in July showed continued improvement in timeliness but also remaining issues around quality of output, communication protocols and work ethic.

14. The conclusions of the third and final monthly meeting on 14 August 2018 were similar. There was continued improvement in responsiveness but challenges remained in the Applicant's (i) level of engagement with his tasks; and (ii) quality of his output. On 30 August 2018, the Applicant submitted comments on the 14 August 2018 NTF of the last monthly meeting.

15. Pursuant to AO 2.05, para. 10.4, on 9 November 2018, the Director, SDCD sent a memorandum to the Director, BPHP through DG, SDCC informing the Director, BPHP that Applicant's performance during the PIP period was unsatisfactory and noted:

“the quality of [Applicant’s] work has remained an issue. In addition [Applicant] demonstrated difficulty in internal and external communication which placed the reputation of the team and the institution at risk. Furthermore, he continued struggling with effectively managing his time which resulted in his failure to meet some deadlines.”

16. On 3 December 2018, the Director, BPHP informed the Applicant by memorandum and in accordance with AO 2.05, para. 10.4 of the recommendation to terminate his appointment for unsatisfactory performance. The memorandum noted that the Applicant's performance issues “were observed as early as 2016” and he was “duly alerted through regular performance meetings and provided with the necessary guidance” and “given sufficient time to address [his] unsatisfactory performance.” The Applicant was advised that this recommendation would be presented for consideration by a Panel constituted under AO 2.05, para. 10.6. This Panel would provide its recommendation for approval to the DG, BPMSD. The Applicant was requested to provide written comments on the recommendation for the Panel to review.

17. On 18 December 2018, the Applicant submitted his 22-page written response to the termination recommendation, contesting the recommendation to terminate his appointment for unsatisfactory performance and requesting that his 2017 and PIP unsatisfactory ratings be replaced with satisfactory ratings.

18. In his response, the Applicant referred to taking up the NS level 2 climate change officer position on the understanding he would be mentored and supervised by two officers who subsequently resigned within a few months. He alleges that after they left, guidance did not materialize and there were difficulties forming a professional relationship with his then supervisor. He noted that for most of 2017 he did not have an IS (International Staff) supervisor, and “neither was there any direct supervision and direction from the Director, SDCD throughout 2017”. The Applicant also outlined difficult personal and health circumstances during 2017 (which he had disclosed to the Director, SDCD) that “contributed to my inability to perform.” Nevertheless, the Applicant maintained that the issues raised did not merit an unsatisfactory rating. The Applicant noted a considerable workload in 2017 and instances of positive feedback received from the consultant (who later became the Applicant’s supervisor) during 2017.

19. The Director, BPHP and the HR Business Partner discussed the Applicant’s written comments with him on 15 January 2019. The Applicant submitted further written comments as additional proof of his compliance with his work plan on 16 January 2019.

20. On 8 February 2019, pursuant to AO 2.05, para. 10.6, a Panel was convened to consider the termination recommendation. The Panel was composed of the DG, SDCC; the Director, SDCD; Applicant’s supervisor; the Director, Energy Division (SEEN) in his capacity as an independent director; and the Human Resources Specialist (BPHP) as Secretary of the Panel. The Panel considered all relevant documents including the Applicant’s comments of 18 December 2018 and 16 January 2019. The Panel review minutes noted “taking into account [the Applicant’s] comments and the discussion between the Panel members during the meeting, the Panel confirmed that the recommendation to terminate [Applicant’s] appointment for unsatisfactory performance is warranted and agreed to submit such recommendation to Director General (“DG”), BPMSD for his approval.” The Director, BPHP submitted this recommendation via a memorandum to the DG, BPMSD for his approval on 18 March 2019. The DG, BPMSD approved this recommendation to terminate the applicant’s employment, effective upon receipt of notice, with payment in lieu of 30 days’ notice.

21. By memorandum dated 19 March 2019, the Director, BPHP informed the Applicant that

the DG, BPMSD had decided to terminate his appointment with immediate effect, for unsatisfactory performance.

22. On 29 April 2019, the Applicant requested compulsory conciliation but it concluded unsuccessfully on 28 May 2019. On 10 June 2019, the Applicant requested administrative review of the decision to terminate his employment for unsatisfactory performance. On 24 June 2019, the DG, BPMSD gave his administrative decision, which was that the rendered performance assessment was premised on a “reasonable and observable basis”, all procedural requirements were complied with, and there was no basis for the assertion that the procedure was flawed or unfair.

23. On 2 July 2019, the Applicant appealed the decision to terminate his employment for unsatisfactory performance to the Appeals Committee pursuant to AO 2.06. The Applicant’s appeal included the assertion that “the constitution of the Review Panel was a one-sided exercise with a foregone conclusion in favour of the Department (SDCC); was an abuse of process and lacked fairness. The Panel included the staff’s supervisor and head of department (DG, SDCC) who initiated the proceedings against the staff. At the same time, the staff remained unrepresented to provide his/her viewpoint to the queries of the independent director.”

24. On 8 October 2019, the Appeals Committee submitted its report and recommendation to the President, in which it found that the Respondent had correctly applied the relevant ADB Administrative Orders, with no evidence of action by the Respondent that could be considered as an abuse of discretion, abuse of process, or of failure to follow proper procedure. In relation to the Panel, the Appeals Committee concluded there was “no indication of an abuse of process in the composition of the Review Panel, with the Panel composition being set out in AO 2.05. There was also no abuse of process apparent in the discussion of the Review Panel, wherein Appellant claimed due attention may not be paid to the Appellant’s written comments. The Minutes of the Review Panel of 8 February 2019 referred to consideration of Appellant comments in their deliberations.”

25. The President adopted the Appeals Committee’s recommendation on 10 October 2019. The President’s decision was communicated to the Applicant on 11 October 2019.

26. On 10 January 2020, the Applicant brought this application before the Tribunal contesting the decision to terminate his employment for unsatisfactory performance.

27. The Applicant seeks the rescission and the reversal of the following decisions:

- a) The unsatisfactory rating for 2017 which caused him to be placed under the PIP;
- b) The PIP unsatisfactory performance assessment issued by the Director, SDCCD;
- c) The Director, BPHP's notice of recommendation of termination of employment;
- d) The DG, BPMSD's approval of the termination recommendation;
- e) The DG, BPMSD's administrative decision that the termination decision did not represent an abuse of discretion or violation of due process; and
- f) The Appeals Committee report and recommendation, and the President's decision to adopt the recommendation.

28. The Applicant seeks the following relief:

- a) Reinstatement to his previous position and post;
- b) Alternatively, if reinstatement is no longer possible, the equivalent of 36 months' pay;
- c) Full back wages computed as of the time his service was terminated up to the date of the Decision by this Tribunal;
- d) Monetary compensation in the form of damages corresponding to his remaining years of service until retirement;
- e) Payment of attorney's fees; and
- f) Reinstatement and maintenance of lost benefits.

29. The Respondent maintains that the Application is without merit and should be dismissed, and that the Applicant is not entitled to any relief requested or to any legal fees or costs.

II. SUMMARY OF THE PARTIES' CONTENTIONS

Applicant's overall positions

30. The Applicant challenges the 10 October 2019 decision of the Bank to terminate his employment for unsatisfactory performance on the grounds that:

- a) there was a violation of due process rights:
 - i. there was no discussion of his comments on the recommendation (in breach of AO 2.05, para. 10.4);
 - ii. the Panel [established under A.O. 2.05, para.10.6] proceedings were not conducted in accordance with relevant rules;
 - iii. the administrative review process was not independent;
- b) the decision was an abuse of discretion as his performance was not of a level that warranted termination of employment; and
- c) the decision, based on the performance review for 2017 and the subsequent PIP, was tainted by improper motive and a conflict of interest.

Respondent's overall positions

31. The Respondent asserts the Applicant's request to rescind his 2017 PR is inadmissible under Article II (3) of the Statute, as the Applicant did not exhaust internal remedies and did not initiate the procedures to challenge his 2017 PR at the relevant time.

32. Without prejudice to its objections to the receivability of the challenge to the 2017 PR, the Respondent submits that the Applicant has failed to discharge his burden of proving that the decision to terminate Applicant's employment was flawed.

33. According to the Respondent, it made every effort to provide the Applicant the opportunity to improve his performance. He was provided with feedback on the deficiencies in his performance over the course of the 2017 PR and his comments were taken into account in reaching the decision,

but the Applicant was unable to raise his performance to the level expected of his position.

34. The Respondent refutes the Applicant's allegations that the decision to terminate his appointment was improperly motivated, or tainted with abuse of discretion or any other substantive or procedural flaws.

III. FINDINGS

Preliminary issue: Was the challenge to the Applicant's 2017 Performance Review admissible?

Respondent's position:

35. The Respondent requests that the Applicant's efforts to seek rescission of his 2017 PR be ruled inadmissible under Article II (3) of the Statute, as the Applicant neither exhausted all remedies available within the Bank, nor initiated any procedures to challenge his 2017 PR at the relevant time.

36. The Respondent asserts that the Applicant's 2017 PR was completed on 22 February 2018, but at no stage did the Applicant file a request for compulsory conciliation with Director, BPHP as foreseen under AO 2.06, para. 3.3. Moreover, it contends that when challenging the outcome of the PIP and the consequent decision to terminate his employment, the Applicant did not challenge the 2017 PR.

Applicant's position

37. In his Reply, the Applicant asserts that the Tribunal is not precluded from reviewing the rating of the 2017 PR because it was the logical starting point of his termination. The Applicant contends that the rating of the 2017 review should not be taken in isolation from the PIP.

38. The Applicant also provides reasons for challenging the 2017 PR: the assessment of his core competencies was inconsistent with that for the previous year during which the Applicant had

scored at least “proficient” in the same core competencies; the Bank knew about the skills mismatch between the Applicant and the requirements of the Applicant’s position, yet did nothing to remedy it; the Applicant was trying to salvage his relationship with the Bank by not undergoing conciliation procedures for the 2017 PR; and the Applicant took the PIP as a reasonable alternative to the conciliation procedure without anticipating that the “PIP would turn out to be such a lopsided exercise”.

Finding on admissibility of the Applicant’s challenge to his 2017 PR

39. Article II (3) of the Tribunal’s Statute limits the Tribunal’s authority to hear disputes only where, except upon exceptional circumstances, “the applicant has exhausted all other remedies available within the Bank.” This Tribunal has consistently decided that the exhaustion of internal remedies is a prerequisite for the substantive examination of the merits. (See *Isip*, Decision No. 9 (1996), para. 53; *Rive*, Decision No. 44 (1999), para. 12; *Ibrahim*, Decision No. 86 (2008), paras. 42-46.)

40. The Applicant has not presented evidence that would give rise to a finding of exceptional circumstances which might excuse his failure to exhaust internal remedies regarding the 2017 Performance Review. The Tribunal finds therefore that the Applicant’s request to rescind the rating for his 2017 PR is not admissible, since he did not exhaust all remedies available within the Bank and did not initiate the procedures to challenge his 2017 PR at the relevant time.

41. Therefore, the Tribunal’s findings will be confined to examining the challenges concerning the assessment of the Applicant’s performance as unsatisfactory after the PIP had been initiated.

Issue One: Were all proper processes followed in arriving at the recommendation to terminate the Applicant's employment?

(i) Applicant's opportunity to provide comments on the decision to terminate his appointment.

Applicant's position

42. The Applicant maintains that the Respondent breached proper procedure as "he was not allowed to discuss his reply" to the recommendation to terminate his employment in breach of AO 2.05, para.10.4 (which states that "[t]he staff member will be afforded 10 working days to submit his/her comments [on the termination recommendation]; such comments will be discussed with him/her."). The Applicant contends that he was not consulted by the Director, BPHP on his comments on the findings of his supervisor and his Director. Instead, the Applicant says the only meeting he had with Director, BPHP was to discuss their recommendations to the Panel and how the process would go. The Applicant maintains that he was never consulted on the comments he submitted despite his insistence to add to the NTF for that meeting, and contends he was told that he did not have to provide comments on the NTF.

Respondent's position

43. The Respondent submits that it followed all proper procedures in arriving at the decision to terminate the Applicant's employment for unsatisfactory performance. It complied with all the relevant rules and procedures, and convened a Panel in accordance with AO 2.05, para. 10.6.

44. The Respondent further submits that the Applicant's allegations that he was not provided an opportunity to discuss his comments in breach of AO 2.05, para. 10.4 are inconsistent with the facts. The record demonstrates that the Applicant provided extensive written comments to the Director, BPHP on 18 December 2018. On 15 January 2019, a meeting was held between the Applicant, the Director, BPHP, and the HR Business Partner for the purpose of discussing the Applicant's comments before they were transmitted to the Panel. At this meeting, the Applicant reiterated matters that he had raised in his written comments. In addition, as a result of this meeting,

the Applicant was provided with an opportunity to supplement his written comments on the recommendation to terminate his employment, which he did on 16 January 2019. This was also put before the Panel and was taken into account in its decision.

(ii) The allegation that the Panel proceedings were not conducted in accordance with the relevant rules.

Applicant's position

45. The Applicant submits that the Panel proceedings lacked fairness because:

- a) he was unrepresented in the Panel proceedings;
- b) this was allegedly contrary to AO 2.05, para. 10.4 which provides that submitted comments “will be discussed with him/her”. The Panel confined itself to the raw comments made by the Applicant: he could have better relayed his position and addressed the Bank’s concerns before the Panel convened and should have been given a further opportunity to communicate his defenses orally and augment his written communications; and
- c) the Panel composition included his supervisor and Director, who had each initiated the proceedings against him. Therefore, only one other member of the Panel was needed to recommend that his employment be terminated. Meanwhile, the employee would need to convince three members to vote against their two colleagues on the Panel.

46. In his Reply, the Applicant further asserts:

- a) *Drilon*, Decision No. 110, (2017), X ADBAT Reports, 149, did not discuss the composition of the Panel and thus could not be relied upon by the Respondent. The Applicant refutes the Bank’s claim that the composition of the Panel is beyond question even with the presence of the same people in the Panel who issued the recommendation to terminate.

- b) There is no substantial distinction between the 2016 ESP and termination for unsatisfactory performance, since in both cases involuntary separation is on the line and fairness is crucial.

Respondent's position

47. The Respondent notes that the Applicant is not alleging that ADB failed to comply with the relevant rules but rather that the rules *per se* are unfair. The Respondent relies on previous Tribunal decisions concerning termination, none of which were vitiated on the basis that the panel procedure was defective in its design. (*Drilon, supra*).

48. The Respondent refers to *Drilon, supra*, in which the Tribunal noted that it is the supervisor who is best placed to assess a staff member's performance (*Drilon, supra*, paras. 31 and 64). The Respondent submits that due to the significance of the termination of employment decision, the rules provide for a process of checks and balances, including a panel that comprises several staff members in addition to the immediate supervisor, including an independent Director – in this case the Director of SEEN. Furthermore, the Respondent notes that the purpose of the panel is not to provide an adjudicative hearing. Instead, the panel provides a check before a recommendation is made to the DG, BPMSD for termination of employment. The panel itself makes no final decision.

49. The Respondent also submits that the process for establishing a panel to review a recommendation for termination is a “well-established procedure” and differs from *Cruz*, Decision No. 115 (2018), X ADBAT Reports, 235, where a panel was uniquely constituted to provide a process for the 2016 Early Separation Program (“ESP”).

(iii) The independence of the administrative review process

Applicant's position

50. Finally, the Applicant maintains that the administrative review process did not serve as an independent review of the underlying decision. The DG, BPMSD would effectively “rubber-stamp”

his original decision to terminate the employment. “Granted that this was indeed the procedure provided for in AO 2.06, the process is violative of due process.”

51. The Applicant relies on *Cruz, supra*, to show that “the membership of the Review Panel for its second meeting should not have included all of the same members and in particular, should not have included the officer who made the initial recommendation to include the Applicant in the ESP.”

52. Using this argument, the Applicant contends that in his case the first review conducted by the Panel composed of a majority of the same people who initiated the termination proceedings and the subsequent reviews by the DG, BPMSD violated due process.

Respondent’s position

53. The Respondent submits that the administrative review process set out in AO 2.06 is the first stage in the dispute resolution process and not part of the underlying decision. Having the administrative review process undertaken by the DG, BPMSD finalizes the administrative decision and provides an opportunity for management to correct course, if circumstances warrant, before a dispute proceeds. The Respondent maintains that there are further opportunities for the staff member to pursue a grievance (such as through the Appeals Committee and to the Tribunal) should the staff member be discontent with the outcome of the administrative review. The Respondent therefore submits that any flaws the Tribunal found with the second review of the Review Panel in *Cruz* are not analogous.

Finding I. Processes leading to the final recommendation to terminate the Applicant’s employment

54. The Applicant challenges the procedures which led to the final recommendation to terminate the Applicant’s employment. In summary the steps taken were as follows:

- a) The Director BPHP notified the Applicant that he would be placed on a PIP for a

- three-month period which, if unsatisfactory, could lead to termination of employment (AO 2.05, para. 10). A work-plan was agreed by the Applicant.
- b) Monthly meetings to review progress on the PIP work-plan were held, resulting in improvements each month in timeliness but issues remained with the quality and standard of his output, communication skills and work ethic. The Applicant submitted comments to the NTF following the final meeting in August 2018.
 - c) On 9 November 2018, the Director SDCD informed the Director, BPHP that the Applicant's performance through the PIP was unsatisfactory (AO 2.05 para. 10.4).
 - d) On 3 December 2018, the Director, BPHP advised the Applicant of the recommendation to terminate his employment for unsatisfactory performance (AO 2.05 para. 10.4), and that a panel would be constituted to review the recommendation.
 - e) The Applicant provided a 22-page response for the Panel's consideration, in which he submitted that his 2017 and PIP unsatisfactory performance ratings should be replaced with satisfactory ratings.
 - f) This response was discussed with him by the Director, BPHP and the HR Business Partner on 15 January 2019, and the following day the Applicant submitted additional comments.
 - g) On 8 February 2019, the Panel convened (AO 2.05, para. 10.4), considered relevant documents including all comments provided by the Applicant, agreed that termination of the Applicant's employment was warranted, and on 18 March 2019, submitted its written recommendation through the Director, BPHP, to the DG, BPMSD for his approval.
 - h) The DG, BPMSD approved the recommendation to terminate the Applicant's employment effective upon receipt of the notice (AO 2.05, para. 10.6), with payment in lieu of 30 days' notice.
 - i) The Director, BPHP informed the Applicant on 19 March 2019 that his appointment was being terminated for unsatisfactory performance with immediate effect (AO 2.05, para. 10.6).

(i) Applicant's opportunity to provide comments on the decision to terminate his appointment.

55. The Tribunal finds that the Applicant's allegations that he was not provided an opportunity to discuss his comments in breach of AO 2.05, para. 10.4 are untenable. The Applicant provided extensive written comments to Director, BPHP on 18 December 2018. On 15 January 2019, in

compliance with AO 2.05, para. 10.4, a meeting was held between the Applicant, Director BPHP and the HR Business Partner for the purpose of discussing the Applicant's comments before they were transmitted to the Panel. As a result of this meeting, the Applicant was provided with an additional opportunity to supplement his written comments and he did so on 16 January 2019. The Minutes of the Panel meeting reflect that Panel members were provided with "all documents relevant to the case" and confirmed the recommendation to terminate the Applicant's appointment "taking into account [the Applicant's] comments."

(ii) The challenge to the fairness of the relevant rules

56. The Tribunal notes the Applicant's concern over the fairness of the review process under the AO 2.05, para.10.4. The Tribunal recalls previous rulings, in which the paragraph concerned did not give rise to an issue. In *Drilon, supra*, for example, the termination decision was arrived at using the same panel procedures provided in this paragraph, and was not vitiated on the basis that the panel procedure was defective in its design.

57. The Tribunal found in *Drilon (supra, paras. 31 and 64)* that the supervisor is best placed to assess a staff member's performance. However, due to the significance of the termination of employment decision, the rules provide for a double-checking mechanism and for a review by a Panel comprising several members in addition to the immediate supervisor, and including a Director from another department.

58. The Applicant has relied on *Cruz, supra*, to show that "the membership of a review panel for its second meeting should not have included all of the same members in the first panel and in particular, should not have included the officer who made the initial recommendation to include the Applicant in the Early Separation Program ("ESP"). The Tribunal noted in that decision that the review system under the ESP procedure was not in conformity with AO 2.02, para. 2.14, which provides "the ADB will observe due process in all areas of personnel administration, in particular in initiating and deciding on the involuntary or premature separation of staff from service"¹. In that

¹ AO 2.02 ("Personnel Policy Statement and Duties, Rights and Responsibilities of Staff Members"), 31 July 2015 was superseded by AO 2.02 ("Code of Conduct"), 31 March 2017. The text cited in *Cruz* no longer appears in this

case the review was conducted by exactly the same members who initiated the first recommendation.

59. In the present case however, the review procedure was different. Here the membership of the Panel (as provided by AO 2.05, para. 10.6) included three persons (of the five) who had not previously recommended termination of the Applicant's employment. Therefore, the exercise was not a "rubber-stamp".

60. As the Tribunal decided in *Lindsey, supra*, paras. 7 and 8, observance of due process obligations is critical in relation to a performance assessment that can possibly end in termination of employment. Thus, the process "must involve a fair and balanced scrutiny of the staff member's ... performance" (*ibid*, para. 7). As provided in AO 2.05, para. 2.1 "ADB will observe due process in initiating and deciding on the involuntary or premature termination of staff member's appointment."—The procedures used in the present instance met those standards of fairness.

61. The Applicant expressed concern that he was not present at the Panel deliberations. The Tribunal finds that AO 2.05, para. 10.6 does not require the Applicant to be present. The Applicant's extensive and detailed comments were made available and reviewed by the Panel. In order to comply with due process requirements this material was adequate for the Panel's purpose which was to "take into consideration all relevant circumstances including the Staff member's comments (Ref. paragraph 10.4 of this AO) and length of satisfactory service".

(iii) The nature of administrative review

62. The Tribunal notes that the administrative review process set out in AO 2.06 is the first stage in the dispute resolution system and is not part of the judicial process. The process undertaken by DG, BPMSD finalizes the administrative decision and provides an opportunity for management to correct course, if circumstances warrant, before a dispute proceeds. The administrative review, which takes place after a decision has been made to terminate the Applicant's employment, should

AO 2.02 but is reflected in AO 2.05 ("Termination Policy"), para. 2.1.

not be confused with the second stages of the process which involve an examination by the Appeals Committee followed by a review by the present Tribunal. Drawing a parallel with the Panel procedure under AO 2.05 is inaccurate. Therefore, the Applicant's allegation that the administrative review is unfair is not accepted.

63. The Tribunal finds that the procedures during the PIP process assessing the Applicant's performance, the Panel recommendation to terminate employment, and the termination of the Applicant's employment were correctly followed pursuant to AO 2.05.

Issue Two: Was the unsatisfactory rating of the Applicant's performance under the Performance Improvement Plan reached on a reasonable and observable basis?

Applicant's position:

64. The Applicant asserts that his performance was not of such a level that warranted termination of his employment. He basically challenges his 2017 PR in which his performance was assessed to be unsatisfactory and the PIP the result of which the ultimate conclusion was that his performance had not improved to a "generally satisfactory level".

65. By giving a number of reasons, the Applicant asserts, *inter alia*, that: he made appropriate comments in the project reviews in keeping with his responsibilities; his errors were not sufficiently egregious to warrant termination; his manner of communication was never inappropriate and he managed to perform reasonably under the PIP even with the increased workload; he was unjustly evaluated on the disputed basis that his workload was reduced; and he should not have been given an unsatisfactory performance rating for 2017 (which then generated the PIP). As evidence of his satisfactory performance, the Applicant also listed awards he had received, including one team award while he was working under his PIP.

66. The Applicant also alleges that the Director, SDCD had initially been supportive of the Applicant's attempts to move departments to a position that better matched his skills, before he was placed under the PIP. In his Reply, he further alleges that he had "already found departments

willing to take him on after being allowed by BPHP to inquire. However, when the Applicant asked to be transferred, the BPHP refused to grant his request and instead carried out the termination process.”

Respondent’s position:

67. The Respondent submits that it reasonably concluded that the Applicant’s performance under the PIP was not of the required level, and termination of employment was warranted. His performance did not improve to a generally satisfactory level in the context of the PIP and the Applicant’s mention of simple “clerical errors” “elide over the substantial and substantive deficiencies in his performance.” With regard to the awards received by the Applicant during his PIP, the Respondent says there is no direct line between awards and performance assessment. In the Respondent’s view, the record demonstrates that the Applicant’s supervisor continuously expressed concerns about the quality of the Applicant’s work product, and such concerns persisted over the course of the PIP. The NTFs documenting the monthly review meetings during the PIP provided an evidentiary record of those concerns.

68. The Respondent asserts that over the course of the three-month PIP, the Applicant’s supervisor identified the following concerns with the quality of the Applicant’s work:

- a) The readability, accuracy and thoroughness of Applicant’s work product;
- b) Applicant’s insistence that he had completed work, when he had not;
- c) Applicant’s missteps in communications with colleagues outside of the team;
- d) His ability to think analytically and to derive substantive value from his project review functions;
- e) Serious concerns relating to Applicant’s handling of a project in Sri Lanka.

69. The Respondent also disputes the Applicant’s suggestion that his workload had not been reduced over the course of his PIP. Nevertheless, this would not change the fact that the Applicant’s performance had not been raised to a generally satisfactory level over the course of the PIP as was required. The “purpose of the PIP is not to lower the bar to make it easier for a staff member to succeed, but to provide structured oversight to assist them to meet the performance

standards expected of their position.”

70. The Respondent submits that ultimately the Applicant simply disagreed with his supervisor’s assessment, which is not evidence that a performance review was invalid. The Respondent relies on *Drilon, supra*, para. 64: “the [a]pplicant’s opinion of her performance capabilities as more than satisfactory cannot be taken as a substitute for the assessment made by her supervisor and other reviewers who have arrived at a different conclusion as per the relevant rules.”

71. The Applicant suggested that the Respondent should have moved him to a different position. The Respondent contends that it is unreasonable to expect the Bank simply to transfer staff to another position and allow performance deficiencies to go unaddressed, and there is no legal basis that requires it to do so. The Respondent also submits that it is under no obligation to overlook performance difficulties or to seek to identify a job for the Applicant in which he is more likely to succeed.

72. However, the Respondent contends that it met its obligations under AO 2.05, para. 10.3, which were to provide the Applicant with a structured work plan to guide his work over the PIP three-month period, during which the Applicant would be supported to demonstrate improvements to his performance. The Applicant was also provided detailed feedback in monthly meetings and the opportunity to improve. Given that the Applicant was not able to improve his performance to a generally satisfactory level, termination was justified.

Finding II. The assessment of the Applicant’s performance during the Performance Improvement Plan

73. The Tribunal reiterates its basic competence with respect to the scope of review, which has been expressed from its inception, in many decisions. For example, *Lindsey*, Decision No.1, (1991), 1 ADBAT Reports 5, para.12 stated that the:

“Tribunal cannot say that the substance of a policy decision is sound or unsound. It can only say that the decision has or has not been reached by the proper processes, or that

the decision either is or is not arbitrary, discriminatory, or improperly motivated, or that it is one that could or could not reasonably have been taken on the basis of facts accurately gathered and properly weighed”.

74. The Tribunal notes that the great majority of the Applicant’s allegations relate to his disagreement with the management’s assessment, which is not evidence that the rating was invalid. The Tribunal recalls its decision in *Drilon, supra*, para. 64, in which it stated: “*the [a]pplicant’s opinion of her performance capabilities as more than satisfactory cannot be taken as a substitute for the assessment made by her supervisor and other reviewers who have arrived at a different conclusion as per the relevant rules.*”

75. The Tribunal has found no element of discrimination or abuse of discretionary power by the Respondent in handling the matters during the course of the Applicant’s PIP period. The assessment of the Applicant’s performance as unsatisfactory has been reached on a reasonable and observable basis.

76. With regard to the Applicant’s contention that the Bank failed to allow his transfer to another Department prior to the PIP, the Tribunal finds that the Applicant did not submit sufficient details to permit the Tribunal to assess the reasonableness of the Bank’s position.

Issue Three: Was the underlying decision tainted by bias or improper motive?

Applicant’s position

77. Due to a lack of an immediate supervisor at the time, the Director, SDCD acted as the Applicant’s supervisor for a period-and had initiated the unsatisfactory 2017 rating. The Applicant contends that the Director, SDCD was motivated by improper factors, as “Applicant was involved in a quarrel with a close friend of the Director, SDCD during an informal meeting headed by the Applicant as Bank staff.”

Respondent's position:

78. The Respondent disputes the allegation of improper motivation and notes that the Applicant provides no evidence or details (such as who the close friend was and what knowledge, if any, the Director, SDCD had of the alleged event), and also notes that the Applicant raises this argument for the first time at the Tribunal stage. "Applicant's allegations are unsubstantiated and gratuitous and should be dismissed for what they are. In any event, such allegations were not subject to review in administrative review of the appeals committee, and should be dismissed for failure to exhaust internal remedies as required under Article II (3) of the Statute of the Tribunal."

Finding III. Fresh allegation of improperly motivated decision

79. The Applicant's fresh allegation of improper motivation did not comply with the requirements of exhaustion of internal remedies under Article II, paragraph 3(a) of the Tribunal's Statute. A bare allegation cannot give rise to the exceptional circumstances that might warrant a waiver of this requirement. In fact, no such circumstances were presented to it. The Tribunal therefore concludes that it has no jurisdiction to entertain the claim of improper motivation.

IV. RELIEF

80. The Tribunal finds that the Application is unfounded. Therefore, the relief claimed by the Applicant in paragraph 28 of this decision is denied. Given this finding, the conditions under Article X, paragraph (2) of the Statute are not met and costs are also denied.

DECISION

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

Shin-ichi Ago

/s/

President

Anne Trebilcock

Chris de Cooker

/s/

Vice-President

/s/

Member

Attest:

Cesar L. Villanueva

/s/

Executive Secretary

At Manila*, 21 October 2020

* In view of the public health emergency occasioned by the COVID-19 pandemic rendering it unsafe to meet in person, the Tribunal conducted its deliberations in these proceedings remotely, by way of audio-video conferencing coordinated by the Office of the Executive Secretary in Manila.