

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

Decision No. 125

12 May 2023

Choudhry

v.

Asian Development Bank

Chris de Cooker, President

Raul C. Pangalangan, Vice President

Catherine Meier

John Murphy

1. The Applicant seeks relief against the decision of 29 March 2022 taken by the President of the Asian Development Bank (“ADB” or “the Bank”) to impose disciplinary sanctions upon him, including suspension from duty for four weeks without pay and demotion with a five per cent salary reduction. The Applicant seeks rescission of that decision, damages for injury suffered and mental anguish, and legal fees. One case which has features in common with the present Application was considered at the same session as the present one and examined separately on its own merits (see *Farhan v. ADB*, Decision No. 126).

I. THE FACTS

2. The Applicant, who has worked for the Bank since 31 March 2014, was most recently a Level 5 (on a scale of 1-7) regular ADB national staff, Senior Investment Officer, outposted to ADB’s Pakistan Resident Mission (PRM). Throughout the course of his career at ADB the Applicant had favorable performance ratings. After the Applicant was found by the Office of Anti-Corruption and Integrity (OAI) to have transmitted inappropriate media in the form of pornography during office hours, Director General Budget, People and Management Systems Department (“DG, BPMSD”) agreed to impose disciplinary measures that included a demotion and temporary suspension. This application appeals that decision.

Early 2019 investigation by OAI: Investigation of Applicant – Applicant Informed through a 5 November 2019 Notice

3. After the sharing of an inappropriate video clip was reported, the head of Respectful Workplace Unit (RWU) from within the OAI fielded a mission to PRM in the first week of November 2019 to investigate the allegation that ADB staff were sending pornographic, erotic or sexually-oriented media in the workplace. The investigation included search and seizure operations.

4. On 5 November 2019, the OAI informed the Applicant both by telephone and through a notice that he was the subject of an investigation concerning inappropriate personal conduct in the workplace. The Applicant was provided (attached to the Notice) with a copy of paragraph 15 of ADB's Integrity Principles and Guidelines (IPG) which outlined rights and obligations of staff in relation to an investigation. This included para. 15C which informs a staff member of their right to request to be accompanied by another staff member during interviews.

5. The Applicant was offered a 24-hour notice to be interviewed, but he waived this and was interviewed the following day, 6 November 2019. The same day, the Applicant signed a notice indicating he understood his obligation to cooperate with the investigation and voluntarily agreed to the investigation team accessing his ADB issued devices as well as his personal phone for the purpose of the investigation.

6. The OAI also interviewed other staff and other individuals and conducted forensic imaging and analysis of staff's devices.

7. The investigation findings established that the Applicant was a member of 6 Whatsapp groups: one on his ADB-issued phone, titled "Brothers": and 5 on his personal phone, titled "AAG", "Legends", "Pak-FI", "Enlightened Moderation", and "Working Balls", containing 7 pornographic images stored on his ADB-issued phone and 654 images of pornographic material stored on his personal mobile phone, respectively. Of that media, over a period from 2016 to 2019:

- (i) 2 of the 7 files on his ADB-issued phone were time stamped during office hours;
- (ii) 33 out of 254 files were time stamped as having been transmitted from his personal phone during office hours (out of which 4 were transmitted before 31 March 2017); and
- (iii) 101 of 400 files were time stamped as having been received on his personal phone during office hours.

11 May 2020 - OAI Investigation Findings

8. On 11 May 2020, the OAI shared its investigation findings through an initial Confidential Memorandum with the Applicant. The memo described the alleged misconduct, evidence found in support and outlined that the Applicant had 15 calendar days to submit a response. Specifically, the memorandum outlined that the Applicant had allegedly engaged in misconduct by transmitting pornographic material through WhatsApp during office hours both to mission or ADB staff and external parties on his ADB-issued mobile phone. The report found that, on a more probable than not basis, the Applicant failed to comply with the requirements of Administrative Order (AO) 2.02 (Code of Conduct), paragraphs 4.12(i) (which prohibits activities or behavior that reflects negatively on ADB irrespective of whether within or outside the workplace) and 4.12(iv) (which prohibits the display, transmission or circulation of pornographic or sexually-oriented materials while in ADB premises, while on ADB mission, or any ADB-related activity) and AO 4.05 (Information and Communication Technology), paragraphs 5.3(a)(i),(iii) (which prohibits personal use of ADB's ICT resources when it could be reasonably expected to compromise the interests or the reputation of ADB) and 5.4(f) (which prohibits using ICT resources in a manner contrary to the rights and obligations of ADB personnel), which constitutes misconduct as defined in AO 2.02, paragraph 2.10 (where such an activity, within or outside ADB, amongst other things, would risk discrediting or disgracing ADB or bring it into dispute).

9. On 25 May 2020, the Applicant provided his written response. In his response the Applicant refuted that storing and receiving pornographic material during office hours was a violation of AO 2.02. The Applicant also alleged that the OAI should not have accessed his

personal phone, that if he had transmitted pornographic content during office hours he did so “unconsciously”, and that any storage on his ADB-issued mobile phone was not deliberate. He also asserted that the OAI had to prove that any transmission of pornographic material had an impact on ADB. Thereafter the Applicant declined to discuss his response with the OAI.

10. On 29 June 2020 the OAI’s Final Confidential Memorandum was sent from the OAI to DG, BPMSD. This memorandum included amendments in response to the Applicant’s written comments. The memorandum found the Applicant, on a more probable than not basis, engaged in misconduct.

6 July - Decision by DG, BPMSD

11. On 6 July 2021, Director, HR Business Partners Division (“BPHP”) wrote to DG, BPMSD recommending the imposition of the disciplinary measures of:

- (i) suspension from duty without salary for 4 weeks;
- (ii) demotion to National Staff (NS) Level 4; and
- (iii) 5% salary reduction with immediate effect.

12. On the same day, DG BPMSD agreed with Director BPHP’s recommendations, signing the memo on the disciplinary measures to be imposed.

13. On 8 July 2021, the Applicant was informed by Director BPHP of the disciplinary measure decision through a virtual meeting and through the delivery of a notice.

11 February 2022 Appeals Committee Report

14. The Applicant appealed the decision on 6 August 2021. This was rejected by the Appeals Committee on 11 February 2022

15. The Appeals Committee concluded that BPMSD’s 6 July 2021 decision did not involve abuse of discretion, arbitrariness, discrimination, improper motivation, or violation of fair and reasonable procedure. The Applicant’s conduct was within the scope of “misconduct” as defined in AO 2.02 and further contemplated by AO 2.04. The Respondent followed proper

procedures as described in AO 2.04 and ‘adequate clarifications and explanations were provided by the Respondent.’ There was no indication of an abuse of process or discretion and no evidence of discrimination against the Applicant.

16. More specifically the Committee found:

- (i) No obligation to notify prior to the interview on 6 November 2020;
- (ii) No evidence of intimidation in the interview;
- (iii) The Applicant willfully cooperated with the investigation;
- (iv) No inappropriate search of the workplace;
- (v) The Applicant’s access to evidence was not unduly restricted;
- (vi) The process was abnormally lengthy, but not unreasonable given the circumstances;
- (vii) Compliance with formal disciplinary measures (in non-dismissal cases the President being able to delegate their authority to impose disciplinary measures to the DG, BPMSD); and
- (viii) The disciplinary measures were proportionate to the misconduct.

17. The Appeals Committee concluded “the BPMSD decision was proper. The Respondent followed procedures as described in AO 2.04. Adequate clarification and explanations were provided by the Respondent in response to the assertions made by the Appellant.” The Committee found no failure of discretion, no abuse of process, that the relevant AOs (2.02, 2.04, and 2.06) were properly followed, and no discrimination. Accordingly, the Committee did not recommend granting the relief sought by the Applicant and recommended the 6 July 2021 decision of DG, BPMSD, be affirmed.

29 March 2022 – President Affirms the Appeals Committee Recommendation

18. On 15 February 2022, the Appeals Committee sent its report to the President who on 29 March 2022 affirmed the recommendations. The President directed:

- (i) Suspension from duty without salary for four (4) weeks;
- (ii) Prohibition from entering ADB premises while under suspension without the prior approval of Director BPHP; and

- (iii) Demotion to national staff level 4, with 5% salary reduction with immediate effect.

5 July 2022 – Application to the ADB Administrative Tribunal

19. On 5 July 2022 the Applicant filed the present application with the ADB Administrative Tribunal (ADBAT) contesting the decision of the President to impose disciplinary measures on him. The Applicant seeks the following relief:

- (i) Rescission of the disciplinary measures imposed in the 6 July memo approved by DG, BPMSD;
- (ii) Damages in the amount of USD 250,000 for injuries suffered due to the irreparable damage to the Applicant's reputation among ADB staff and in the Applicant's social circle in view of the nature of the allegations levelled against the Applicant;
- (iii) Damages in the amount of USD 250,000 for undue mental anguish the Applicant suffered and to the Applicant's family; particularly to his school going children who had, unfortunately been subjected to rationing of food due to financial woes; and
- (iv) Payment of costs incurred by the Applicant in the present case, which includes engagement of counsel in the amount of USD 10, 000.

20. The Respondent filed its Answer on 26 September 2022. The Applicant's Reply was submitted on 29 October 2022, and the Respondent's Rejoinder on 22 November 2022. The Respondent maintained that the Application was without merit and should be dismissed and that the Applicant was not entitled to any relief or costs.

II. SUMMARY OF THE PARTIES' CONTENTIONS

The Applicant's Principal Contentions

21. The BPMSD decision:

- (i) was disproportionate to the seriousness of the alleged misconduct; and

- (ii) was an abuse of process and discretion.

The Respondent's Principal Contentions

22. In its Answer, the Respondent requests, in accordance with Rule 7, paragraph 3, of the Tribunal's Rules of Procedure, confidentiality as it applies to the name of another relevant Pakistan Resident Mission staff member.

23. The Respondent underlines the seriousness of the Applicant's conduct, that due process was observed during the investigation and the disciplinary procedure, and that the disciplinary measures were proportionate to the misconduct.

24. It urges the Tribunal to dismiss the Applicant's claims as without merit, and to deny the requested relief, and legal fees and costs.

III. FINDINGS

Preliminary Matters

a. En banc

25. In light of the complexity of the issues in this case and the nature and seriousness of the charges, the Tribunal decides, in accordance with Article V (5) of the Statute of the ADB Administrative Tribunal read with Rule 5, paragraph 6, of the Tribunal's Rules of Procedure, that this Application warrants consideration by a panel consisting of all its members.

b. Confidentiality request

26. The Respondent requests, in accordance with Rule 7 paragraph 3 of the ADBAT Rules of Procedure, confidentiality as it applies to the name of another relevant resident mission staff.

27. Rule 7, paragraph 3, of the Tribunal's Rules of Procedure states that:

When filing its answer or, if required, its rejoinder, the Bank may request that the name of any witness or person cited remain anonymous. The Bank shall provide reasons for such a request.

28. The Bank justifies its request by explaining that the staff member concerned was also disciplined but that the disciplinary measure received by him was not the subject of the present Application and, moreover, was not in the public domain.

29. The Tribunal grants the Bank's request.

30. The Applicant makes no request for anonymity, which is available pursuant to Rule 6, paragraph 3, of the Tribunal's Rules of Procedure.

31. The Tribunal recalls that it may determine *sua sponte* that the Applicant's identity be kept confidential for the purposes of the judgment. It did so, for example, in *Ms. C*, Decision No. 58 (2003), a case involving allegations of fraud and disciplinary measures. The Tribunal did, however, not grant confidentiality in other cases such as *Abat*, Decision No. 78 (2007), and *Gnanathurai*, Decision No. 79 (2007).

32. The Tribunal sees no reason to grant anonymity *sua sponte* in the present case.

c. Oral hearing

33. Rule 11, paragraph 1, of the Tribunal's Rules of Procedure provides:

Oral proceedings, including the presentation and examination of witnesses or experts, may be held only if the Tribunal so decides, on its own motion or at the request of a party filed up to the date fixed for filing the rejoinder.

34. The Tribunal notes that neither party has requested an oral hearing. As the submissions by the parties provide a sufficient basis for consideration of the issues, the Tribunal considers that oral proceedings are not warranted.

The Merits

35. The Applicant challenges the 29 March 2022 decision of the President of the Bank confirming the disciplinary sanctions of suspension from duty for four weeks without pay plus demotion with a five per cent salary reduction.

The Tribunal's Scope of review in This Matter

36. The Tribunal has set out its scope of review with respect to disciplinary measures in

Mr. H, Decision No. 108 (2017), para. 47 in the following terms:

“In [disciplinary] cases the Tribunal examines (i) the existence of the facts, (ii) whether they legally amount to misconduct, (iii) whether the sanction imposed is provided for in the law of the Bank, (iv) whether the sanction is not significantly disproportionate to the offence, and (v) whether the requirements of due process were observed.” (*Hua Du*, Decision No. 101 [2013] IX ADBAT Reports 82, para. 31).

37. The Tribunal further held in *Ms. J*, Decision No. 116 (2018), para. 90:

Having considered the arguments put forward by the parties about the sanction imposed, the Tribunal reiterates its basic mandate that it cannot substitute its assessment for that of the head of the organization “*unless it notes a clear disproportion between the gravity of the offence committed and the severity of the resulting penalty*” (*Abat, supra*, citing *Khelifati*, ILOAT Judgment No. 207 [14 May 1973]; see also *Bristol*, Decision No. 75 (2006) Volume VII, para. 45, citing *Zaidi*, ADBAT Decision No. 17, (13 August 1996)). In *Zaidi*, para. 22, the Tribunal adopted the test for the question of proportionality as developed in *Planthara*, WBAT Decision No. 143 (1995), para. 37:

“... to determine whether a sanction imposed by the Bank upon a staff member is significantly disproportionate to the staff member’s offense, for if the Bank were so to act, its action would properly be deemed arbitrary or discriminatory.”

38. In his written comments of 25 May 2020 on the initial Confidential Memorandum the Applicant challenged in detail the fact that his acts constitute violations of the internal law of the Bank. With *a contrario* reasoning he was seeking to establish, for example, that staff are allowed to use their private equipment to circulate inappropriate media during office hours or to use the office equipment for the same purpose outside office hours, or that this conduct was not forbidden and thus authorized under an earlier version of the Code of Conduct.

39. It is to be emphasized that the Applicant does not present these arguments before the Appeals Committee or this Tribunal, but the Tribunal deems it appropriate to make the following comments. Apart from seeking to downplay the seriousness of the ‘harmless or funny video’ incident, which allegedly triggered the investigation and subsequent disciplinary action, the Applicant does not contest, or rather no longer contests the essential facts and the serious charges brought against him with respect to receiving, storing and transmitting pornographic, erotic, or sexually-oriented media (“inappropriate media”), using *inter alia* Bank-issued office equipment, including during office hours.

40. The Tribunal cannot accept the Applicant’s contentions in his written comments of 25

May 2020 and considers the Applicant's conduct was proscribed by section 2 of the Bank's Staff Regulations which provides:

All staff members must avoid any action, and in particular any kind of pronouncement, which may reflect unfavorably upon their position as employees of an international organization, either in their own country or elsewhere. They should always bear in mind the reserve and tact incumbent upon them by reason of their international functions, and they are required to exercise the utmost discretion in regard to matters of official business.....

41. No person with common sense will contend that storing pornographic material on either the Bank's or personal equipment and displaying or transmitting these during working hours is in conformity with the highest professional standards expected from employees of an international organization. Simply put, one does not need a code of conduct to arrive at this conclusion.

42. The Bank's Code of Conduct, laid down in AO 2.02, elaborates in detail, on the essential duty of its staff given in the Staff Regulations. In the version in force between 31 March 2017 and 12 October 2020, when the facts occurred, the investigation was conducted and the disciplinary decision was taken, provides:

2. POLICY

.....

2.10. "Misconduct" is behavior, or an act or omission, which is unacceptable or improper, contrary to the principles or rules of ADB or illegal or unethical. Misconduct may not necessarily be intentional and can arise from neglect, recklessness or mismanagement. Misconduct includes, but is not limited to, (a) the failure to observe a Staff Regulation, Administrative Order, the Code of Conduct, or other rules, regulations, guidelines or procedures, or perform other duties and responsibilities, or (b) conduct, actions or omissions, within and outside ADB, that risk discrediting or disgracing ADB, bringing ADB into disrepute, or could undermine the integrity of ADB's policies, processes or procedures.

4. DUTIES OF STAFF

.....

4.12 Personal conduct and private activities

(i) The private life and activities of a Staff are personal matters; however, there can be situations where the activities or behavior of a Staff can impact or reflect negatively upon ADB, especially when the Staff concerned occupies a certain level of seniority or prominence within ADB. Therefore, Staff should bear in mind that their behavior,

conduct and activities¹ within and outside the workplace, may impact the reputation and interest of ADB even if it is unrelated to an official function.

.....

4.12(iv) Consistent with para. 4.8, Staff must not engage in any sexual behavior or activities which may reflect adversely or bring disrepute to ADB. Sexual relations on ADB premises, even if consensual, may constitute misconduct. Staff must not display, transmit or circulate pornographic, erotic, or sexually-oriented materials while in ADB premises, while on ADB mission or any ADB-related activity.

.....

6. DISCIPLINARY MEASURES

Staff who fail to comply with their obligations under the Code of Conduct will be subject to the disciplinary procedures for misconduct, including serious misconduct, as well as non-disciplinary measures as set out in AO 2.04 on Disciplinary Measures and Procedures.

43. Moreover, AO 4.05 regarding Information and Communication Technology Principles stipulates:

.....

5.3 Limited Personal Use

a. Personal Use by Authorized Users only when such use:

- i. Is consistent with the highest standard of conduct for international civil servants;
- ii.
- iii. Would not reasonably be expected to compromise the interests or the reputation of ADB;

....

5.4 Prohibited Activities

.....

f. Knowingly, or through gross negligence, using ICT Resources or ICT Data in a manner contrary to the rights and obligations of ADB personnel.

.....

44. The disciplinary measures and procedures are laid down in Administrative Order 2.04 (AO 2.04). They will be discussed *infra*.

¹ Staff must, at all times, adhere to ADB's Guidelines on Social Media, irrespective of whether (a) the use of social media is personal or professional; (b) the devices used are personal or ADB-issued; and (c) the use of social media is within or outside ADB premises. Staff are expected to behave respectfully when using social media, in a way that will not bring themselves or the institution or its staff into disrepute, taking proper consideration of corporate decorum, privacy and integrity. (Footnote as appearing in AO 2.02)

45. There can in the Tribunal's view be no doubt that the Applicant's conduct amounts to serious misconduct entailing disciplinary measures.

46. This misconduct may reflect negatively on the Bank. That the harm identified so far is potential rather than actual does not detract from the seriousness of the misconduct. Data and equipment can, and often do, get into the "wrong" hands.

47. This being said, the Applicant does not challenge the facts or the charges of serious misconduct themselves, but submits that the BPMSD decision:

- (i) was disproportionate to the seriousness of the alleged misconduct; and
- (ii) was an abuse of process and discretion.

48. Under these circumstances, there is no requirement for the Tribunal to further review the facts and the evidence. Its task can thus be limited to dealing with these submissions.

Issue (1) Are the imposed disciplinary measures disproportionate to the seriousness of the misconduct ?

The Applicant's Position

49. The Applicant asserts the punishment is "too severe and too disproportionate to the alleged offense". He contends that there is no evidence that messages were sent during working hours and no analysis of the forensic material to identify when messages were sent using ADB WiFi. He then asserts that he fully cooperated with the investigation and that his exemplary service was not taken into consideration. He asserts there is no evidence that the 'missteps' in his lapse in judgment might have caused any damage to ADB reputation or caused any other harm to ADB's business interests. The Applicant submits that instead of demotion he should have been warned, shepherded, and guided, and at most, only be reprimanded or admonished.

The Respondent's Position

50. The Respondent asserts that the disciplinary measures were not disproportionate to the misconduct. It emphasizes that the test of proportionality as confirmed in *Zaidi*, Decision No.

17 (1996), was applied and that the BPMSD decision was made on the basis of the nature of the misconduct and taking into account the relevant aggravating and mitigating factors.

51. The Respondent contends that the OAI had ample evidence and information to substantiate that misconduct had occurred based on the preponderance of evidence – and that such misconduct was serious. In his response to OAI’s initial Confidential Memorandum, the Applicant did not deny that inappropriate material was found on his ADB-issued and personal mobile phones. Instead, he merely downplayed such findings and insisted that it is permissible for ADB staff to transmit pornographic material while not on ADB premises whether using personal phones or ADB ICT resources. The Respondent asserts in the Applicant’s case, that the volume of the pornographic material transmitted, received, and stored could not be considered insignificant. The Respondent therefore submits that the Applicant has not discharged his burden of proving that the misconduct was not serious.

52. With regard the Applicant’s assertions of exemplary service, the Respondent points out that through the OAI investigation pornographic material was found to have been transmitted from his ADB-issued phone from 2016-2019 (he joined the Bank in 2014). The Respondent also submits that while the Applicant had been recognized for his past performance, “the requirements of his employment extend beyond the functions of his role and include that he consistently demonstrates appropriate standards of conduct and comply with the code of conduct.” The Respondent adds that the Applicant’s senior NS role added to the expectation that he would comply with such standards. The Applicant’s actions despite his seniority over a prolonged period underline the seriousness of his conduct and contradict his conclusions regarding exemplary service.

53. The Respondent contends that in assessing the seriousness of the misconduct, AO 2.04 does not require the Applicant’s conduct to have caused actual damage to ADB’s reputation. Rather, the connection is between the conduct and its likelihood to jeopardize ADB’s reputation. The Respondent notes that storing and distributing to other individuals within or outside ADB pornographic material during office hours and/or using ADB ICT resources creates significant reputational risk to ADB. The Respondent further argues that “not only may the transmission of such material violate laws in the countries where that material is transmitted – jeopardizing ADB’s reputation in those countries, but as an international organization and

development bank, its reputation as well as the trust it has gained from its members in assisting vulnerable communities and advancing gender equality, has been, and continues to be, paramount to its ability to operate and achieve its mandate.”

54. The Respondent adds that DG, BPMSD also considered the fact that the Applicant did not express regret, acknowledge the inappropriateness of his conduct or apologize.

The Appeals Committee’s Conclusions

55. The Appeals Committee referred to the criteria laid down in AO 2.04 for imposing Disciplinary Measures, which should be proportionate to the seriousness of the misconduct. Among these are the degree to which the standard of conduct was breached, and the gravity of the damage or potential damage to ADB, and recurrence and repetition of the misconduct. The Committee found that the Applicant’s actions, which recurred over a lengthy period, risked damage to ADB’s reputation. That the harm was potential rather than actual does not diminish the seriousness of misconduct. The Committee noted clarity in the language of AO 2.02 on types of conduct that could adversely affect ADB or its reputation, and the explicit link made in proscribing transmission of pornographic material. It also noted clarity in AO 4.05 on limits on personal use of ADB ICT resources, especially as this relates to ADB’s interests and reputation. On this basis, the Committee found the disciplinary measures imposed to be appropriate.

The Tribunal’s Assessment

56. The Tribunal would certainly not dissociate itself from the conclusions of the Appeals Committee, but it must recall its basic mandate mentioned in paragraph 36, *i.e.* that it cannot substitute its assessment for that of the head of the organization unless it notes a clear disproportion between the gravity of the offence committed and the severity of the resulting penalty.

57. The Applicant is a NS officer whose actions were in direct contravention of his responsibilities. As the record shows he clearly misused ADB property by transmitting and storing pornographic material on ADB-issued property, including during working hours, which clearly undermined ADB’s operations. AO 2.02 para. 4.12(iv) clearly articulates transmission

of pornographic material while on ADB duty as constituting misconduct.

58. In conclusion, having regard to the case file, the repeated character and seriousness of the misconduct, and the position held by the Applicant, the Tribunal finds that the Bank properly took into account the relevant factors of the nature of the misconduct and multiplicity of the offences in deciding the disciplinary measures to be applied. AO 2.04, para. 4.1 states that “disciplinary measures imposed by the Bank on a staff member shall be determined on a case-by-case basis ...”. This was done in the present case, and the Tribunal finds that the penalties imposed on the Applicant were “not significantly disproportionate” or disproportionately harsh in view of the gravity of the offence. The penalty falls within the reasonable range of options available in the managerial discretion. Indeed, if anything the penalty falls on the lighter side of the scale on the margin of appreciation. There is no abuse of discretionary power, so the Tribunal has no justification to substitute its assessment for that of the President.

The Tribunal’s Finding

59. The Tribunal finds that there is no clear disproportion between the gravity of the offence committed and the severity of the resulting disciplinary measures.

Issue (2) Was the disciplinary decision tainted by an abuse of process and/or significant procedural lapses?

i. The Investigation by the Office of Anti-Corruption and Integrity (OAI)

The Applicant’s Position

60. The Applicant asserts that it was an abuse of discretion on behalf of the OAI to investigate when they had no probable cause justifying such investigation. The Applicant describes the pornographic material, which was at the origin of the investigations, as a “harmless video” and its transmission an “innocent mistake.”

61. As regards procedural lapses on behalf of the OAI, the Applicant asserts the following:

- (i) The Applicant contends that he was not notified in a timely manner that he was

under investigation and was not informed that he could be joined by another staff member at the interview conducted as part of the investigation (as provided for in AO 2.04, para. 5.1 of Appendix 2).

- (ii) The Applicant submits that the OAI investigation was intimidating and threatening and that, although staff have the duty to cooperate, he was not informed properly of the technical difference between the OAI's "preliminary assessment" as opposed to the commencement of the investigation nor was he informed of a "right to remain silent."
- (iii) The Applicant further asserts that his work area was improperly searched, that improper coercion was used to gain access to his private property, which included a personal mobile phone, and that he was denied the right to review forensic evidence. He asserts that the OAI could only request access to his personal mobile phone during the formal investigation process and not during the process of assessment.
- (iv) The Applicant refers to the ruling in *Whalen v Roe*, 429 US 589 (1977) on informational policy and decisional privacy, which is the right not to have private information disclosed and the right to live freely without surveillance or intrusion. The Applicant also relies on the Philippine Supreme Court's ruling in *Disini v Secretary of Justice* No. 203335, February 11, 2014, regarding 'zones of privacy', stipulating that "Within these zones, any form of intrusion is impermissible unless excused by law and in accordance with customary legal process."
- (v) The Applicant challenges the applicable standard of proof. He refers to the 'preponderance of evidence' threshold as sufficient evidence that a party has engaged in misconduct. He argues that this creates an undue reversal of the burden of proof. He asserts that AO 2.04 section 2 effectively mandates the investigative body to make a finding of liability even at the stage wherein, ideally, only a *prima facie* case ought to be made out. He also asserts that he was not provided with the forensic material that constituted the evidence levelled against him and that this violated due process. He notes there was no attempt to locate any logs recording

whether he was or was not connected to the ADB WiFi at any relevant time during the investigation.

- (vi) The Applicant contends that he was interviewed by the OAI officers in a “makeshift ‘interrogation room’” in clear breach of para. 7.1 of the Conduct of Investigators which stipulates there should be no intimidation throughout the investigative process.

The Respondent’s Position

62. The Respondent asserts there was ample evidence to substantiate that misconduct occurred on the basis of the preponderance of the evidence and the Applicant’s own admissions supported the finding of misconduct. The Respondent submits that the Applicant has not discharged his burden of proving that the misconduct, which he admitted to engaging in, was not serious. It adds that it followed all proper procedures set out in AO 2.04 in arriving at the disciplinary measure decision, affording the Applicant due process.

63. Regarding the Applicant’s submission that it was mandatory that he be informed of the allegations at an earlier time than he was, the Respondent contends that informing a person in advance that an investigation will be undertaken is not a requisite element of due process. AO 2.04 does not stipulate that the subject of an investigation must be informed of the allegations ‘at the proper time’. In fact, AO 2.04, Appendix 2, section 2 says that as a general rule the staff member should be advised they are under investigation “However, if the investigator determines in his/her discretion, that such notification could lead to the concealment or destruction of evidence or attempts to improperly influence witnesses, the investigator may delay notifying the staff until such threat is reasonably abated ...” It refers to concurring jurisprudence of ILOAT and UNAT².

64. The Respondent notes that the Applicant was given written notice prior to his interview that he was the subject of an investigation of inappropriate conduct in the workplace and the

² See *Mr. J.d.W. vs. IOM*, ILOAT Judgment No. 2605 (2007), para. 11; *S v. ILO*, ILOAT Judgment No. 4106 (2019), para. 9; and *Benamar v. Secretary-General of the UN*, 2017-UNAT-797 (2017), paras. 54-55.

allegations were then discussed with the Applicant during his interview with the OAI. The Respondent submits that after the investigation, the OAI provided the Applicant with the initial Confidential Memorandum affording him the required due process in accordance with AO 2.04. The Applicant's assertion that he was not aware of the allegations being investigated are thus not supported by the facts. The Applicant has failed to substantiate his contention that it was mandatory that he be informed of the allegations at an earlier time than he was informed.

65. Regarding the short notice the Applicant was allegedly given about the investigation, the Respondent notes that the Applicant was advised by the OAI by a phone call on 5 November 2019 that he was the subject of an investigation, that he was requested to appear for an interview and that he was entitled to a 24-hour notice period before the interview, which he agreed to waive. Following the phone call, the Applicant was provided with a Notice which set out his right to 24 hours' notice before the interview, and that if he agreed to waive this notice his interview would be scheduled the next day. The Applicant signed the Notice on 5 November 2019 indicating he had read the content and attended the interview on 6 November 2019 consistent with his earlier agreement with the OAI. In attending the interview, the Applicant waived his right to 24-hours' notice.

66. As far as the Applicant's allegations are concerned that he was not told the difference between the preliminary assessment and the investigation itself and therefore was not provided with his right to remain silent, the Respondent submits that the information provided by the Applicant was all part of the investigation and that he did not give any information during the preliminary assessment stage. The Respondent further maintains that, in contrast to a criminal investigation, there is no provision in AO 2.04 for a 'right to remain silent' or obligations regarding the need to detail the difference between the preliminary assessment and the investigation itself. Instead, AO 2.04, Appendix 2, section 4, sets out that staff are obliged to cooperate.

67. The Respondent submits that the OAI requested the Applicant hand over his ADB-issued mobile phone, personal mobile phone and laptop, consistent with AO 4.05. In addition, the Applicant signed the "Agreement to access ADB-issued and/or personal electronic devices" indicating he had voluntarily agreed to the OAI accessing these devices. The interview record of his 6 November 2019 interview with the OAI also indicated that such consent had been

reasonably sought. In addition, in Applicant's response to the initial Confidential Memorandum he stated that "[i]n the spirit of good faith and pursuant to para. 4.2 of Appendix 2 to AO 2.04, I decided to share my personal phone. I cooperated fully with OAI investigators per para. 4 of Appendix 2 to AO 2.04." The Respondent therefore submits that the evidence clearly shows the Applicant freely gave permission to examine his personal phone and ADB-issued phone and that no coercive conditions existed.

68. The Respondent also maintains that contrary to the Applicant's assertions, his work area was not searched by the OAI. The OAI only visually inspected his work area to record the location of ADB-assigned ICT equipment.

69. With regard the national court decisions allegedly establishing a right to informational privacy and decisional privacy, the Respondent contends that the applicable rules are set out in AOs 2.02, 2.04 and 4.05 and that the national court decisions references are not relevant, nor applicable in this case. The Respondent notes that the Tribunal has previously held that the decisions of national courts are not generally applicable to the internal workings of the ADB.

70. The Respondent further contends that the Applicant has failed to demonstrate the relevance of the WiFi logs to the disciplinary decision in his case. The Applicant admitted that inappropriate media were found on his ADB-issued and personal mobile phones and that the Applicant transmitted pornographic material during office hours.

71. The Respondent rejects the assertion that the location of the interview at the hotel was an 'interrogation room' designed to intimidate him. The Respondent chose a location away from the resident mission to provide staff an opportunity to meet with the OAI confidentially. The hotel is located in the same secure compound as the resident mission and the World Bank office. The Respondent submits the interview lasted one hour and 6 minutes which was not particularly lengthy and in line with standard practice, the room had appropriate ventilation and lighting and the Applicant was made comfortable and provided with water. The Applicant has provided no evidence to substantiate the allegation that he was placed under duress.

72. The Respondent maintains the Notice signed by the Applicant detailed in para. 15.C the right of the Applicant to be accompanied by another staff member during interviews. The

Applicant was aware of his right and chose not to be accompanied by another staff member.

73. The Respondent rejects the Applicant's allegations that he was denied the right to review forensic evidence. The Respondent submits that the Applicant was open to review any of the findings of material or seek further information but chose not to. The Respondent also notes the Applicant admitted to his conduct, acknowledging he transmitted pornographic material and that such materials were found on his ADB-issued and personal mobile phones. The Applicant did not raise concerns or question the evidence at any time during the investigation. Accordingly, the Respondent submits there is no basis for the Applicant's claim that he was denied the right to review the evidence against him.

The Appeals Committee's Conclusions

74. The Appeals Committee found that there was no obligation to notify the Applicant of the investigation prior to the interview on 6 November 2020. It notes that Appendix 2, section 2, of AO 2.04 allows for a delay in notification.

75. The Committee did not find evidence of intimidation or of the interview having been conducted in an improper manner. It noted that the Applicant had signed a Notice document detailing his obligations under the investigation and had signed a form acknowledging he had voluntarily provided his devices to the Investigator.

76. The Committee found no evidence of inappropriate search during the investigation. It noted that AO 2.04 does not set out any expectations of workplace privacy in the context of an investigation.

77. The Committee accepted that the Applicant had an opportunity to review evidence during the investigation but did not do so.

78. The Appeals Committee therefore concluded that the 6 July 2021 decision did not involve abuse of discretion, arbitrariness, discrimination, improper motivation, or violation of fair and reasonable procedure.

The Tribunal's Assessment

79. It is appropriate to recall at this stage the provisions of AO 2.04 as in force at the relevant time:

8. THE INVESTIGATIVE PROCESS

8.1 Allegations of misconduct by staff shall be investigated by OAI in accordance with Appendix 2 of this AO

8.2 Upon completion of the Investigation, if the Investigator finds sufficient information during the Investigation to substantiate the allegation of misconduct, he/she will document his/her investigative findings in a Confidential Memorandum and OAI will proceed with formal disciplinary procedures set out in Section 9. If there is insufficient Evidence to substantiate the allegation of misconduct, OAI may close the matter and promptly inform the staff against whom the allegation was made that the matter has been closed, notwithstanding any non-disciplinary measures that have been taken or may be taken by ADB to address the staff conduct.

.....

80. Appendix 2 to AO 2.04 provides in relevant part:

Appendix 2

INVESTIGATION OF SUSPECTED MISCONDUCT

1. Purpose

This Appendix sets forth the general principles and procedures for the Investigation of suspected misconduct of staff described in AO 2.04.

2. Notification

As a general rule, the Investigator shall advise the staff that he/she is under investigation. However, if the Investigator determines, in his/her discretion, that such notification could lead to the concealment or destruction of Evidence or attempts to improperly influence Witnesses, the Investigator may delay notifying the staff until such threat is reasonably abated. The explanations of the staff may be sought with a view to determining if the initiation of formal disciplinary proceedings is warranted. In such a case, the staff shall be informed that, if his/her explanations prove unsatisfactory, formal disciplinary proceedings may be initiated.

3. Period to investigate

The investigation of misconduct should be completed within a reasonable period of time, normally not later than one year from the date when the staff is notified that he/she is under investigation.

4. Duty to cooperate

4.1 Staff have a duty to cooperate fully in an Investigation when requested by ADB to do so. Such cooperation includes, but is not limited to, the following:

- (a) Staff must make themselves available to be interviewed and must reply fully and truthfully to all questions asked;
- (b)
- (c)
- (d)
- (e) Staff must cooperate with reasonable requests to search or physically inspect their person and/or work areas, including files, electronic databases, and personal property used on ADB premises, or that utilizes ADB's IT resources or systems (including mobile phones, personal electronic devices, and electronic storage devices such as external disk drives). ADB e-mail accounts, ICT resources and ICT data and other electronic information may be access by the Investigator in accordance with AO 4.05.

.....

5. Accompanying staff members during investigation

5.1 Subjects may request to be accompanied by another staff during interviews conducted as part of an investigation so long as such request does not delay or impede the investigation. However, such accompanying staff shall attend as an observer and shall not otherwise participate in the interview, and may not be from the Office of the Auditor General (OAG), Office of the President (OPR), Board of Directors (BOD), OGC, SEC, OAI, OAS, or BPMSD.

.....

7. Conduct of investigation

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7.4 Assessment of Complaint: Upon receipt of a complaint and/or discovery of an alleged misconduct, OAI will evaluate the complaint to determine whether there is a legitimate basis to warrant an Investigation. ...

.....

7.9 Content of the Confidential memorandum: Following an Investigation pursuant to paragraph 8 of this AO, and there is sufficient information obtained during the investigation to substantiate the allegation of misconduct, the investigator will initiate formal disciplinary procedures and shall prepare a confidential memorandum, including, at a minimum:

- (a) A description of the alleged misconduct and charges against staff;
- (b) Investigative findings based on the facts and related analysis, which may include reasonable inferences;
- (c) Exhibits of all relevant Evidence with due care to protect confidential information

from Witnesses; and

(d) Any written statements by Subjects or Witnesses.

8. Standard of Proof

The standard of proof for the investigation is a preponderance of evidence.

81. In relation to the Applicant's claims to a right to remain silent, the Tribunal emphasizes that the investigation at issue is administrative in nature and not a criminal investigation. Under AO 2.04, section 4 staff must cooperate fully in an investigation and failure or refusal to do so, under certain circumstances, may at least give rise to an adverse inference and may indeed constitute independent grounds for disciplinary action (*Cf. Chaudhry*, Decision No. 23 (1996), para. 21).

82. The Tribunal finds that the Applicant was properly and timely informed of his rights and duties under the Bank's internal law. It is clear from the record that he did cooperate and waived his right to the 24 hours' notice. Regarding the Applicant's contention that he was given insufficient notice of the investigation, the investigators had good reason to fear that notification of the investigation could lead to concealment or destruction of evidence and did not abuse their discretion when delaying the notification. The Applicant was advised of his right to be accompanied by another staff member but did not avail himself of this opportunity.

83. The OAI must have access to the Bank's property including Bank-issued computers and the workspace. Moreover, staff under investigation must cooperate with reasonable requests to search their personal property, such as mobile phones, which, in fact, the Applicant did. The Tribunal finds that the Applicant's arguments that he consented or waived his rights under duress and that he was subjected to pressure and intimidation are unsubstantiated and unpersuasive.

84. The Applicant claims that his workspace was improperly searched and physically inspected but the Applicant has failed to discharge his evidentiary burden. The Applicant has also failed to indicate that any items went missing and to what extent these were relevant in determining the disciplinary sanctions, considering that all evidence regarding the misconduct was found on the devices voluntarily handed over by the Applicant. The Respondent denies any physical inspection took place. Therefore, the Applicant has not met his evidentiary burden

to establish any improper physical search or inspection or that such search materially affected the Tribunal's overall conclusion in this matter.

85. With respect to the Applicant's access to the evidence, the Tribunal notes the statement of the Respondent that the Applicant had an opportunity to review evidence during the investigation but did not do so.

86. The Applicant refers to national jurisprudence (*Whalen v Roe*, 429 US 589 (1977) and the Philippine Supreme Court's *Morfe v Mutuc*, 22 SCRA 424 (1968)) defining the limits to governmental powers to intrude into the personal life of a citizen. Leaving aside the question whether this Tribunal is bound by national jurisprudence, the Tribunal underlines that the evidence was collected in the context of an internal administrative investigation and not a criminal one. The Tribunal cannot but repeat what it held in *Zaidi*, Decision No. 17 (1996), para. 50, that criminal law precepts should not improperly be introduced in internal Bank procedures designed to assess possible disciplinary measures.

The Tribunal's Finding

87. The Tribunal finds that the investigation was regularly executed in accordance with AO 2.04 and respected the Applicant's rights.

ii. The Review by BPMSD

The Applicant's Position

88. The Applicant asserts that a lengthy period, approximately 12 months, passed before a decision was communicated to him, longer than the six months indicated in AO 2.04, para. 3.5.

89. Moreover, he contends a lack of evidence that DG, BPMSD considered the revised final memorandum and "the matter in its whole" before reaching a decision on "the basis of the 'preponderance of evidence' or otherwise" and recommending disciplinary measures as described in AO 2.04, para. 9.2. The Applicant notes that the 6 July 2021 memo to DG, BPMSD was merely initialed by DG, BPMSD and that there is no evidence that DG, BPMSD as the decision maker has actually considered the final memorandum of the investigation or any

attachments. The Applicant asserts the attachments for the DG, BPMSD to consider were merely a summary of findings made by the investigators/BPMSD staff and the actual evidence of the facts was not provided to the decision maker.

The Respondent's Position

90. The Respondent rejects the Applicant's assertions regarding the disciplinary decision in terms of the 1) time taken and 2) the material the decision maker considered. The Respondent notes that it complied with the applicable procedures.

91. AO 2.04 para. 4.2 stipulates that the recommendation of disciplinary measures should take place 'within a reasonable period of time, normally not later than six months from the date OAI informs BPMSD in writing that it has determined that misconduct has occurred.'

92. The Respondent submits that 'six months' is not the maximum amount of time but an indicative period that would normally be expected. The Respondent submits the Applicant's case was one in a number of connected cases of considerable complexity and the material collected sizable (in the Applicant's case over 600 sexually explicit videos were discovered). DG, BPMSD reached his decision on the disciplinary measures to be imposed 12 months after receiving OAI's report, but this period was not inordinate or excessive given the particular set of circumstances arising in the Applicant's case. The Respondent also submits that the case presented a set of circumstances that had not arisen in previous ADB misconduct cases and so a review was conducted of the disciplinary measure imposed in other international organization in similar cases to ensure that a consistent and reasonable framework was developed to determine the disciplinary measure to be applied.

93. The Respondent submits DG, BPMSD made the decision on disciplinary measures based on the information available to him in accordance with AO 2.04. This included being provided with a copy of the final OAI Confidential Memorandum which included the Applicant's response of 25 May 2020 and the initial OAI Confidential Memorandum. In addition, prior to reaching his decision he was provided access to the relevant material and provided with a recommendation from Director, BPHP and a document summarizing the findings from the final OAI Confidential Memorandum. This complied with the 'Formal

Disciplinary Procedures' set out in Sections 9 and 10 of AO 2.04.

The Appeals Committee's Conclusions

94. The Appeals Committee acknowledged that the time that elapsed had imposed a heavy burden on all parties involved. This notwithstanding, it found that it falls within the bounds of a reasonable period of time given the complexity of the case and unprecedented circumstances due to the COVID-19 pandemic.

95. With respect to compliance with the formal disciplinary procedures the Committee noted that AO 2.04, section 9, states that based on BPMSD's review of the Final Confidential Memorandum, Director BPHP shall decide on "whether discipline is appropriate and, if so, what disciplinary measure to impose" (non-dismissal cases). The Committee concluded that there was no evidence that this process was not followed.

The Tribunal's Assessment

96. There is no evidence that the proper procedure was not followed. Considering that the essential facts were admitted by the Applicant, in such circumstances, no further consideration was required and only the severity of the disciplinary measures had to be determined by DG, BPMSD. The Tribunal finds no basis to conclude on the evidence that the DG, BPMSD did not consider the file before initialing it in such a serious matter.

97. As regards the time it took between the OAI report and the disciplinary sanction, the Tribunal emphasizes that the disciplinary process should generally be as expeditious as possible. It understands that the present case was a case amongst several entailing detailed interviews and forensic analysis in parallel. The Appeals Committee has also referred to the prevailing public health situation at the time. The Tribunal is therefore satisfied that under the circumstances the process was completed within a reasonable period. The Tribunal notes, moreover, that the Applicant did not suffer any financial prejudice as a consequence of the time taken to finalize the matter.

iii. The Appeals Committee process

The Applicant's Position

98. The Applicant maintains that the Appeals Committee's recommendation was flawed as it failed to obtain CCTV footage of the search and seizure operation of the OAI team at the request of the Applicant.

99. The Applicant also alleges he was disadvantaged by the Appeals Committee delay of four days in transmitting its recommendation to the President.

The Respondent's Position

100. The Respondent notes that the Applicant has failed to explain how the CCTV footage was necessary for the Appeals Committee to reach its decision. The Respondent also notes the Tribunal's role is not to be an appellate body from the Appeals Committee.

101. As for the timeframes, the Respondent asserts that the Applicant benefitted from the Appeals Committee's decision to grant him an extension of time to file his counterstatement of 7 days. The Respondent therefore rejects any assertion that the Applicant was disadvantaged by the Appeals Committee's delay of 4 days in transmitting its recommendation to the President.

The Tribunal's Assessment

102. The Tribunal reiterates that its role is to review the legality of the final decision of the President.

103. Given that the evidentiary basis for the decision was all obtained from devices voluntarily provided by the Applicant there is no basis to conclude that additional material, such as CCTV footage, would have led the Committee to different conclusions and recommendations and the President to a different decision.

The Tribunal's Finding

104. The Tribunal finds that the Appeals Committee regularly executed its functions in the present procedure.

Conclusion

105. In summary, the Tribunal concludes that the disciplinary measures are clearly not disproportionate to the severity of the misconduct, and the procedures leading to the imposition of the disciplinary measures were properly followed. The Applicant's claims on these points are rejected.

DECISION

For these reasons, the Tribunal unanimously decides to dismiss the Application and all claims for relief.

Chris de Cooker

/s/

President

Raul C. Pangalangan

Catherine Meier

/s/

Vice-President

/s/

Member

John Raymond Murphy

/s/

Member

Attest:

Cesar L. Villanueva

/s/

Executive Secretary

In Manila, 12 May 2023