

# ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 126**

12 May 2023

Farhan

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 on 29 March 2022 taken by the President of the Asian Development Bank (“ADB” or “the Bank”) to impose disciplinary sanctions on him, including immediate dismissal. The Applicant seeks rescission of that decision, reinstatement, damages and costs. 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 *Choudhry v. ADB*, Decision No. 125).

## **I. THE FACTS**

2. The relevant facts may be summarized as follows. The Applicant, who has worked for the Bank since 1 July 2009, was most recently a Level 6 (on a scale of 1-7) regular ADB administrative staff, Associate IT Assistant at 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 including child pornography during office hours and using Bank-issued equipment, the President agreed to impose disciplinary measures that included immediate dismissal.

### ***Investigation of the Applicant – Applicant Informed Through a 4 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 4 November 2019, the OAI informed the Applicant through a notice that he was the subject of an investigation concerning inappropriate personal conduct in the workplace. The Applicant was provided 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 staff members of their right to request to be accompanied by another staff member during interviews.

5. The Applicant was offered 24-hour notice to be interviewed but he waived this right and agreed to be interviewed on the same day. The same day, the Applicant signed the notice indicating he understood his obligation to cooperate with the investigation and voluntarily agreed to the investigation team accessing his ADB-issued devices.

6. The OAI also interviewed other staff, other individuals and conducted forensic imaging and analysis of ADB-issued devices.

7. The investigation findings established that the Applicant was a member of 41 WhatsApp chat groups which contained a total of 1637 inappropriate media and exchanges of inappropriate media with both resident mission staff, other ADB staff, and external parties from 2016 to 2019. Of these, the Applicant had made 339 inappropriate transmissions, 268 of which were during office hours. He also received on his ADB-issued mobile phone 1,298 pornographic materials, 641 of which were time stamped during office hours. The material included child pornography. According to the report, the Applicant did not hide anything, admitted the 'omission of an Administrative Order instruction', said he shared inappropriate material only with his personal friends outside ADB and few close friends at the resident mission, and apologized for his omissions and mistakes.

### ***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 engaged in misconduct by

transmitting pornographic material through WhatsApp during office hours both to mission and ADB staff and external parties on his ADB-issued mobile phone. The report found that 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 obligation of ADB personnel), which constitute misconduct as defined in AO 2.02, paragraph 2.10 (where such an activity, within or outside ADB, and 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 to the confidential memorandum in accordance with AO 2.04, para. 9.1(c). The Applicant admitted he had shared inappropriate material but said it was shared only with his personal friends outside ADB and 'few very close friends in [the resident mission].'

10. On 29 June 2020 the final confidential memo was sent by the OAI to Director General, Budget, People and Management Systems Department (DG BPMSD) for consideration of appropriate disciplinary or non-disciplinary action. On 2 July 2020, the OAI shared its final Confidential Memorandum with the Applicant.

### ***8 July 2021 - Applicant Informed of the Results of the OAI Investigation Report***

11. On 6 July 2021, DG BPMSD wrote a memo to Vice President Administration and Corporate Management (VPAC) reporting the findings of the OAI investigation that showed the Applicant had failed to comply with AO 2.02 paras 4.12(i) and 4.12(iv) and 4.05 paras. 5.3(a)(i), (a)(iii) and 5.4(f) when he transmitted pornographic material during office hours constituting misconduct as defined in AO 2.02 para. 2.10. In assessing the seriousness of the misconduct, DG BPMSD took into account the high volume of inappropriate pornographic media transmitted over several years and the fact that the material included child pornography which clearly did not meet ADB's highest ethical standard of conduct. DG BPMSD also

considered the Applicant's personal use of ADB's ICT resources and his position related to IT, and knowledge of the responsibility to safeguard the proper use of ADB's ICT resources, as an aggravating factor in his misconduct.

12. Three disciplinary measures were proposed including immediate dismissal for misconduct. Attached to the memorandum were: a document dealing with the background; a summary of the OAI findings; a description of the disciplinary proceedings (including the Applicant's response); and the applicable rules.

13. VPAC concurred and, on 8 July 2021, a memo was sent from the Director, Human Resources Business Partner Division (BPHP) to the Applicant informing him of the decision. The 6 July 2021 memo and summary of the disciplinary proceedings against him and the OAI findings were attached.

### ***11 February 2022 Appeals Committee Report***

14. On 5 August 2021, the Applicant filed an appeal to the Appeals Committee. On 11 February 2022, the Committee completed its report and transmitted its recommendation to the President on 15 February 2022.

15. After carefully reviewing and considering ADB's AOs 2.02 (code of conduct), AO 2.04 (disciplinary procedures and measures), AO 4.05 (information and communications technology principles), and AO 2.06 (administrative review and appeals procedures), and relevant documents including statements from the Applicant, the Appeals Committee found 'no abuse of discretion, arbitrariness, discrimination, improper motivation, or violation of fair and reasonable procedure'. It also found the disciplinary measures proportionate to the seriousness of the misconduct and recommended affirmation of the VPAC decision.

16. Specifically, the Committee found:

- (i) No obligation to notify the Applicant he was under investigation prior to the interview on 6 November 2020. Delay in notification is allowed if the investigator considers there is a risk that such notification could lead to the concealment or destruction of evidence';

- (ii) No evidence of intimidation in the interview;
- (iii) The Applicant had willfully cooperated with the investigation;
- (iv) No inappropriate search of workplace noting that AO 2.04 does not set out any expectations of workplace privacy in the context of an investigation;
- (v) The Applicant's access to evidence was not unduly restricted;
- (vi) While the process was abnormally lengthy, it was not unreasonable given the circumstances;
- (vii) Compliance with formal disciplinary procedures; and
- (viii) Disciplinary measures proportionate to misconduct. The Committee noted the Applicant's actions, which recurred over a lengthy period, risked damage to ADB's reputation.

17. In view of this the Appeals Committee recommended not to grant the relief sought by the Applicant and that the 6 July 2021 decision by VPAC be affirmed.

***29 March 2022 - President Affirmed the Appeals Committee Recommendation***

18. On 29 March 2022, the President affirmed the Appeals Committee's recommendation and directed:

- (i) dismissal of the Applicant for misconduct, effective immediately;
- (ii) permanent ineligibility to work as a consultant or contractual employee with the ADB or any ADB-financed activity; and
- (iii) access to the ADB premises only with approval of Director, BPHP.

19. The Applicant was informed thereof by email on 7 April 2022.

***4 July 2022 - Application to the ADB Administrative Tribunal***

20. On 5 July 2022, the Applicant electronically filed the present Application with the ADB Administrative Tribunal (ADBAT). The Applicant seeks the following relief:

- (i) rescission of the 6 July 2021 and 8 July 2021 memoranda;
- (ii) reinstatement of the Applicant's employment at ADB and the payment of all

arrears which ought to have accrued in favor of the Applicant or in the alternative, the payment of the Applicant's salary and benefits which may accrue from the date of the Applicant's dismissal on 8 July 2021 up until the date of the Applicant's mandatory retirement; and restoration of Applicant's eligibility to work either as a consultant or contractual employee with ADB or any ADB-financed activity;

- (iii) damages in the amount of US\$ 100,000 for injuries suffered due to the irreparable damage to the Applicant's reputation among the ADB staff/colleagues and in the Applicant's social circle;
- (iv) damages in the amount of US\$ 250,000 for undue mental anguish the Applicant suffered and to the Applicant's family; particularly his school going children who had to be withdrawn from private schooling and admitted to public sector schooling due to financial woes; and
- (v) payment of costs incurred by the Applicant in the present case, which includes engagement of counsel in the amount of US\$ 10,000.

21. 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 are:**

- (i) the decision represents an abuse of discretion;
- (ii) the decision is discriminatory;
- (iii) the decision was an abuse of process;
- (iv) proper procedures were not followed; and
- (v) the disciplinary measures were not proportionate to the seriousness of the alleged misconduct.

### **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. It submits that the Applicant's conduct amounted to serious inappropriate conduct, that due process was observed during the investigation and 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 confidentiality for one staff member of the Pakistan Resident Mission other than the Applicant.

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, communicated to him on 7 April 2022, to dismiss him for misconduct, to declare him permanently ineligible to work as a consultant or contractual employee with the ADB or any ADB-financed activity, and to grant access to the ADB premises only with approval of Director, BPHP.

***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. Apart from seeking to downplay the seriousness of the ‘funny video’, the circulation of which allegedly triggered the investigation and subsequent disciplinary action, the Applicant does not contest the established facts and the serious charges brought against him with respect to receiving, storing and transmitting more than a thousand pornographic, erotic, or sexually-oriented media (“inappropriate material”), including involving children, thereby using *inter alia* Bank-issued office equipment, and regularly doing so during office hours.

39. Section 2 of the Bank’s Staff Regulations 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...

40. No person with common sense will contend that storing pornographic material on either Bank or personal equipment and displaying or transmitting them 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.

41. The Bank's Code of Conduct, laid down in AO 2.02, elaborates 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

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### 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 activities<sup>1</sup> 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

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<sup>1</sup> 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)

well as non-disciplinary measures as set out in AO 2.04 on Disciplinary Measures and Procedures.

42. 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.

.....

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

44. As the Tribunal also held in *Choudhry*, ADBAT Decision No. 125 (2023), there can in the Tribunal's view be no doubt that the conduct the Applicant was accused of amounts to serious misconduct entailing disciplinary measures.

45. This misconduct may reflect negatively on the Bank. That the harm identified so far was potential rather than actual does not diminish from the seriousness of the misconduct, since data and equipment can, and often do, get in the "wrong" hands.

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

- (i) the decision to dismiss him is characterized by an abuse of discretion;
- (ii) the decision was discriminatory;

- (iii) the decision was tainted by an abuse of process;
- (iv) the decision was tainted by significant procedural lapses; and
- (v) the disciplinary measure being disproportionate to the seriousness of the alleged misconduct.

47. 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.

48. The first set of submissions considers the proportionality and the alleged discriminatory character of the disciplinary sanction, the other submissions challenge the procedures followed.

***Issue (1) Was the disciplinary measure disproportionate to the seriousness of the misconduct and was it discriminatory?***

***i. Is the punishment too severe and disproportionate to the alleged offense?***

**The Applicant's Position**

49. The Applicant alleges that the sanctions imposed were not proportionate to the seriousness of the alleged misconduct. He alleges there was no evidence either that messages were sent during working hours or that he connected to the ADB network through his phone. The Applicant also alleges his exemplary service with ADB was not taken into consideration and there is no evidence that the Applicant's possible lapse in judgment might have caused any damage to ADB's reputation or any harm to ADB's business interests. The Applicant asserts 'at most, he should have been only reprimanded or admonished to desist from repeating the missteps that he may have committed.'

**The Respondent's Position**

50. The Respondent submits that it did take into consideration the relevant factors in determining the serious disciplinary sanction of dismissal. Mitigating factors, including the Applicant's admission of and apologies for the misconduct, expression of not intending to cause harm, were taken into account. However, other aggravating factors, including the Applicant's role as IT officer, who should be well aware of the purpose of the Bank's ICT resources as well as his responsibility to safeguard their proper usage, and the fact that materials

transmitted included pornographic or sexually-oriented materials involving minors, were also taken into account in supporting the disciplinary measures that were imposed.

### **The Appeals Committee's Conclusions**

51. The Appeals Committee recalled that AO 2.04, section 6, sets out criteria for imposing disciplinary measures and states that such measures 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**

52. The Tribunal would certainly not dissociate itself from the conclusions of the Appeals Committee, but it must recall its basic mandate mentioned in paragraph 37, 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.

53. AO 2.04 on Disciplinary Measures and Procedures sets out criteria for imposing disciplinary measures, including relevant factors to be considered (para. 6). Para. 6.3 specifically states that, *"The disciplinary measure of dismissal for misconduct is particularly appropriate when the misconduct is serious or recurrent, or has jeopardized, or would in the future be likely to jeopardize, the reputation of ADB and its staff; ... when it has found that a staff has misused funds, assets, resources or other property of ADB .... Dismissal for misconduct is also appropriate when the breach of trust is so serious that continuation of the staff member's service is not in the interest of ADB."*

54. The Applicant was a trusted senior IT officer who was required to have a particular sensitivity to compliance with AO 4.05, paragraphs 5.3 and 5.4. He was required to act consistently with the highest standards of conduct for an international civil servant and not knowingly use ICT resources in a manner contrary to the obligations of ADB personnel. His position as a senior assistant working in the field of information technology exacerbates the gravity of the offence in this instance and is thus a relevant aggravating factor. In addition, he clearly misused ADB property by transmitting pornographic material on an ADB-issued device which undermined ADB's operations. AO 2.02 para. 4.12(iv) expressly proscribes the transmission of pornographic material while on ADB duty as constituting misconduct. In the Applicant's case the volume of that pornographic material was considerable.

55. 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 transgressions in deciding the disciplinary measures to be applied. AO 2.04, para. 4.1 states that "disciplinary measures imposed by ADB 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 severity of the penalties imposed on the Applicant were "not significantly disproportionate" to the gravity of the offence. Indeed, the penalty falls within the range of reasonable options available in the managerial discretion. Accordingly, there is no abuse of discretionary power, and the Tribunal has no justification to substitute its assessment for that of the President.

### **The Tribunal's Finding**

56. The Tribunal finds that there is no clear disproportion between the gravity of the offence committed and the severity of the resulting penalty.

#### ***ii. Are the disciplinary sanctions discriminatory?***

57. Lastly, the Applicant submits that the decision to dismiss him amounts to unequal treatment, alleging that other PRM national staff who were found to also be involved in sharing inappropriate material were not dismissed.

58. The Bank has denied that the disciplinary measure imposed was discriminatory and asserted that it determined disciplinary action on a case-by-case basis, “taking into account (i) the nature and weight of the evidence gathered in each case; (ii) the individual circumstances; and (iii) the criteria set forth in para. 6 of AO 2.04.”

### **The Tribunal’s Assessment**

59. The Tribunal notes that one of the elements of due process is fair and equal treatment, and that the imposition of a sanction may not be discriminatory (see *Bristol, supra*, para. 45). In *Gnanathurai, supra*, para. 43, the Tribunal adopted the applicable rule as stated in *Khelifati, supra*, [ILOAT Judgment No. 207 (1973)]:

“[O]fficials enjoy the protection ... of the rule of equality as between officials within the same category, but this rule does not apply to officials against whom disciplinary action has been or may be taken for different reasons and in different circumstances.”

60. The Tribunal notes, first of all, that the burden of proof of discrimination lies with the Applicant. He has not substantiated his claim. He has in particular failed to demonstrate that other staff members were similarly situated in fact and law and were treated differently. Moreover, the principle of equal treatment cannot ordinarily be invoked to challenge a finding of misconduct or to protect misconduct (*cf.* for example, ILOAT Judgments 4247, consideration 13, and 3575, consideration 5). Also this submission fails.

### **The Tribunal’s Finding**

61. The Tribunal finds that the imposition of the penalty of dismissal was not clearly disproportionate to the severity of the misconduct and was not discriminatory.

***Issue (2) Was the decision to dismiss the Applicant 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**

62. The Applicant contends that the OAI investigation was not conducted regularly nor in accordance with prevailing rules and regulations and that the search and seizure of personal

property and work area was conducted in contravention of an individual's fundamental rights. He argues in particular the following:

63. He claims that the investigation by the Office of Anti-Corruption and Integrity (OAI) was not conducted pursuant to prevailing rules and regulations and was contrary to the generally accepted principles of law, and thus represents an abuse of discretion and due process. The Applicant argues that the OAI pushed to implicate other ADB staff in the 'funny video' without probable cause for such intrusion and that the circumstances did not warrant such intrusion.

64. The Applicant claims that the OAI did not inform him of the allegations being levelled against him with sufficient information or sufficient time to allow him to refute these and defend himself. Instead, he was provided with a broad and vague OAI notice against 'subjects of investigation'. The Applicant alleges the same notice did not state clearly the allegations and the offense of which the subjects thereof were being charged. He claims he was provided the notice at 9:23 AM on 4 November 2019 and instructed to appear for interview the same day at 1pm.

65. AO 2.04, Appendix 2, 4.1 states that staff have indeed the duty to cooperate in an 'investigation' but the Applicant claims he was not properly apprised of the technical difference between a 'preliminary assessment' and the investigation proper, at which time a person's right to remain silent arises.

66. The Applicant further claims that he was not notified at the correct moment that he was under 'investigation' as required in AO 2.04 Appendix 2, para. 2.

67. The Applicant asserts that, as CCTV footage would show, his personal property and work area were improperly searched by the OAI, in his absence, and his personal property was improperly seized. The Applicant has further asserts that the OAI did not have the right to demand that he bring his personal laptop to the interview in an interrogation room at the Serena Hotel.

68. The Applicant claims that the OAI should have set up an interview room within the PRM premises instead of setting it up in a remote corner of the Serena Hotel placing him under



an oppressive atmosphere. He claims that he was subjected to pressure and intimidation.

69. The Applicant also alleges that he was not provided nor advised of his right to be joined by another staff as an observer during the interview.

70. The Applicant refers to AO 2.04 section 2 which defines “preponderance of evidence” as “evidence sufficient to support a reasonable belief, taking into consideration all relevant factors and circumstances, that on the balance of probabilities a given party has engaged in misconduct” and claims that this creates an “undue reversal of the burden of proof, contrary to generally accepted principles of equity and procedure” which “egregiously deprived” him of due process.

71. The Applicant alleges he was not provided with a confidential memorandum specifying and describing the alleged misconduct and its investigative findings and informing the staff of the charges against him which was in contravention of AO 2.04 para. 9.1(a). He claims he was denied the right to examine the evidence levelled against him.

72. The Applicant alleges that the 13 month period of time between the OAI’s investigation report and BPMSD’s decision on disciplinary action constituted an unreasonable delay as it was meant to normally take no longer than six months (AO 2.04, para. 3.5).

73. The Applicant alleges the Appeals Committee ignored his submissions indicating violations of relevant rules by the OAI and the Appeals Committee failed to provide proper and adequate reasoning to substantiate its conclusions. The Applicant alleges a failure of the Appeals Committee to obtain CCTV recordings of the search and seizure operation on 3 November at the PRM premises and of the ‘interrogation room’ in the hotel.

### **The Respondent’s Position**

74. The Bank observes, first of all, that the Applicant has failed to outline why he did not raise any of these allegations either in response to the initial Confidential Memorandum report he was invited to respond to, prior to the OAI reaching its decision on the Applicant’s conduct, and/or after he received the final OAI investigation report, which outlined the decision on misconduct. The Applicant also failed to substantiate his allegations and therefore the

Applicant has not met the burden of proof regarding these allegations. Therefore, the Respondent notes that the Applicant is both out of time and has failed to substantiate his allegations.

75. Regarding the claim that the Applicant was not timely informed that he was under investigation, the Respondent notes that AO 2.04 does not set out when the subject of allegations being investigated must be informed of the allegations and it may, in fact, be delayed by the Investigator if necessary. The Respondent maintains that the Applicant was in fact informed before the interview.

76. The Respondent emphasizes that the investigation phase is not a disciplinary proceeding, which is only initiated after the completion of the investigation. It is only after the investigative process is over and the disciplinary process has begun that the staff member has a right to receive written notification of the formal allegations and to respond to them; these due process entitlements do not exist during the investigation stage.

77. Regarding the advance notice of the interview the Respondent notes that the Applicant was provided with a notice that set out his right to 24 hours' notice. The notice indicated that the Applicant had the right to waive the notice requirement. He had, however, the right not to waive it and the interview would then have been scheduled on the following day. The Applicant in fact signed the notice indicating that he had read it and attended the interview that same day and thus waived his right to the 24 hours' notice.

78. The Respondent considers untenable the allegation that the Applicant was not told of the difference between "the preliminary assessment" and the investigation itself and therefore was not provided with his "right to remain silent". The information provided by the Applicant was all part of the investigation after he was duly notified that he was under investigation. He did not give any information during the preliminary assessment stage. Further, the Respondent notes that an international administrative investigation differs from a criminal investigation. The administrative investigation procedures set out in AO 2.04 do not provide a "right to remain silent" or obligations regarding the need to detail the difference between the preliminary assessment and investigation itself. Instead, AO 2.04 sets out that staff are obliged to cooperate with an investigation (see Section 4 of Attachment 2 to AO 2.04). Similarly, the Notice signed by the Applicant detailed his obligation to cooperate with the investigation. It adds that this

Tribunal has recognized the principle that staff members may be required to cooperate in a disciplinary inquiry and that failure or refusal to do so may at the least give rise to an adverse inference and may indeed constitute independent grounds for disciplinary action.

79. The Respondent notes that the Applicant has referred to his “personal property” in the context of his ADB-issued laptop and ADB-issued mobile phone. While these devices were assigned to the Applicant, they remained the property of ADB and the OAI had every right to request to be provided with them. Moreover, the Applicant signed the ‘Agreement to Access ADB-Issued and/or Personal Electronic Devices (of ADB staff member)’ indicating he had voluntarily agreed to the OAI accessing these devices.

80. The Respondent further notes that the Applicant has failed to substantiate his claim that his work area was improperly searched. As part of its investigation, the OAI visually inspected his work area to record the location of ADB-assigned ICT equipment. The Applicant’s work area was not searched.

81. The Respondent notes that the Applicant was interviewed in a room at the Serena Hotel that the OAI secured for the purposes of conducting interviews with relevant staff and subjects outside of the PRM. Conducting the interviews in an office outside of the PRM reduced disruption to the office and provided the staff and subjects with an opportunity to meet with the OAI confidentially, without their colleagues being aware that the interviews and investigation into their conduct were taking place.

82. Regarding the allegation that the Applicant was not provided nor advised of his right to be joined by another staff as observer during an interview, the Respondent notes that the Notice signed by the Applicant detailed, in paragraph 15.C., the right of the Applicant to be accompanied by another staff member during interviews. In signing the Notice, the Applicant indicated that he had read the document prior to signature. It was a matter for the Applicant to organize and be accompanied by another staff member if he so wished. However, notwithstanding his awareness of his right to do so, the Applicant did not do so.

### **The Appeals Committee’s Conclusions**

83. The Appeals Committee concluded that there was no obligation to notify the Applicant

of the investigation prior to the interview on 6 November 2020. It noted that Appendix 2, section 2, of AO 2.04 allows for a delay in notification.

84. The Committee noted that the Applicant willfully cooperated with the investigation. He signed a notice document detailing his obligations under the investigation and signed a form acknowledging he had voluntarily provided devices to the Investigator including his personal phone.

85. The Committee found no evidence of intimidation in the interview or that the interview was conducted in an unprofessional manner.

86. The Committee also 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.

### **The Tribunal's Assessment**

87. 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.

.....

88. 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

.....

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.

89. The Tribunal emphasizes that the investigation at issue is an administrative and not a criminal investigation. Under AO 2.02 section 4, staff must cooperate fully in an investigation and failure or refusal to do so may at least give rise to an adverse inference and under certain circumstances may indeed constitute independent grounds for disciplinary action (*Cf. Chaudhry*, Decision No. 23 (1996), para. 21).

90. 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. The Investigators had indeed 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.

91. 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 notes that the Applicant's arguments that he consented or waived his rights

under duress and that he was subjected to pressure and intimidation are not substantiated and finds them unpersuasive.

92. The Applicant claims that his workspace was improperly searched. There is no evidence of this and the Respondent denies that this was the case. The Applicant has also failed to indicate which 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 turned over voluntarily by the Applicant to the Investigators.

93. 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 search took place 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**

94. 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 and VPAC***

95. It is recalled that on 11 May 2020 the OAI shared its investigation findings with the Applicant, that the Applicant provided his written response thereto on 25 May 2020, and that on 29 June 2020 a memo was sent by the OAI to DG BPMSD for consideration of appropriate disciplinary or non-disciplinary action. On 8 July 2021, the Applicant was informed of the impugned disciplinary decision.

### **The Applicant's Position**

96. The Applicant alleges that the 6 July 2021 memo from BPMSD to VPAC recommending disciplinary sanctions has the initials of the VPAC but that there is no evidence

that he, as the decision maker, had actually considered the final Confidential Memorandum and any attachments thereto and actually made a decision on the basis of the ‘preponderance of evidence’. The Applicant alleges this is a reversible error.

97. The Applicant further alleges that the decision maker must conduct his own independent inquiry and analysis of the case in full and come to his own independent conclusion and that this cannot be delegated to another for the latter’s recommendation. He should not rely merely on the findings of an investigator. The Applicant alleges that in this matter the evidence has not been provided in full or at all. A summary of evidence cannot be considered as evidence.

98. Lastly, the Applicant objects to the long period it took between the OAI investigation report and BPMSD’s decision, which should normally not be longer than six months.

### **The Respondent’s Position**

99. The Respondent contends that the six-month period given in AO 2.04 is not the maximum amount of time that a decision maker must take to reach a decision. Rather it is an indicative period of time that would normally be expected. The Applicant’s case was, moreover, one in a number of connected cases of considerable complexity.

100. Regarding the allegation that there was no evidence that VPAC had made his decision independently, having regard to the investigation report and evidence, or that he made his decision that the allegations were proven on the preponderance of the evidence, the Respondent observes that VPAC was provided with the recommendation from DG BPMSD on disciplinary measures to be imposed and a document summarizing the findings from the OAI’s final Confidential Memorandum and the Applicant’s response to the initial Confidential Memorandum. The Applicant’s response to the initial Confidential Memorandum included his admission that he had engaged in the conduct described. This followed his admission of the same in his interview with the OAI. As a consequence, the facts and evidence underpinning the misconduct finding were not in dispute and VPAC was left to consider any aggravating and mitigating circumstances that would apply to the application of a disciplinary measure. The Respondent refers in this respect to the Tribunal’s jurisprudence in *Mr. H, supra*, para. 76, where also the facts were not in doubt and there was little need for undertaking an investigating



process and other procedures to assess the facts.

101. The Respondent submits that the Applicant has failed to substantiate his claims that the process followed rendered the decision unlawful, that he was not afforded due process or that it impacted the outcome of the decision in his case.

### **The Appeals Committee's Conclusions**

102. The Appeals Committee recalled that AO 2.04, section 9, states that, based on BPMSD's review of the Final Confidential Memorandum, Director BPHP may recommend disciplinary measures where there is a finding of preponderance of evidence. On this basis, and under delegated authority from the President, VPAC shall decide "whether dismissal is appropriate, and if so, impose such measure upon the recommendation of the Director General BPMSD." The Committee did not find any evidence that this process was not followed.

103. The Appeals Committee further noted the Respondent's position that it took longer than the normal 'not later than six months' (it took more than 12 months) given the complexity due to its link with other cases, and because the process took place during the COVID-19 pandemic. The Committee acknowledged that the time had created a heavy burden for all parties involved. This notwithstanding the Committee found that the process fell within the bounds of a reasonable period of time given the complexity of the case and unprecedented circumstances of the pandemic.

### **The Tribunal's Assessment**

104. 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 VPAC upon the recommendation of the DG, BPMSD. The Tribunal finds no basis to conclude on the evidence that the VPAC did not consider the file before initialing it in such a serious matter.

105. As regards the time it took between issuing the OAI report and imposing 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 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**

106. The Applicant maintains that the Appeals Committee ignored his arguments indicating numerous violations of relevant rules and that it did not consider the evidence and arguments presented by him. It also did not provide proper and adequate reasoning to substantiate its conclusions and findings. He contends that the Committee should have obtained CCTV footage of the search of his workspace and of the interview.

#### **The Respondent's Position**

107. The Respondent notes that the Tribunal, in its own jurisprudence, has outlined a number of times that the Tribunal's role is not to review the determinations or recommendations of the Appeals Committee and that it is not an appellate body from the Appeals Committee.

108. It observes regarding the CCTV footage that the Applicant has failed to outline how the Appeals Committee could be directed in the way described or how the CCTV was necessary for the Appeals Committee to reach its recommendation. As outlined previously, it is the Applicant who bears the burden of proving the allegations he is making in this case.

#### **The Tribunal's Assessment**

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

110. 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**

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

***Conclusion***

112. In summary, the Tribunal concludes that the disciplinary sanction of dismissal was clearly not disproportionate, considering the severity of the misconduct and was not discriminatory, and the procedures leading to the imposition of the penalty of dismissal were properly followed. The Applicant's claims on these points are rejected, as are his challenges to the other sanctions imposed.

**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