

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

Decision No. 127

12 May 2023

Mr. M

v.

Asian Development Bank

Chris de Cooker, President

Raul C. Pangalangan, Vice President

Catherine Meier

John Murphy

1. The Applicant challenges his performance evaluation for calendar year 2020 and asks that his current performance rating be expunged and replaced with a higher rating, that measures be taken against his supervisor's alleged "*mala fide* acts" that downgraded his performance rating, and that he be awarded salary increases, compensatory and moral damages, and costs. The Applicant has also asked that, if the names of his supervisors are kept anonymous, his name be kept anonymous as well. For reasons discussed below, his request is granted, and the case will be reported as *Mr. M v. Asian Development Bank*.

Performance Management System

2. The Asian Development Bank (ADB) has a "performance management system" comprising a "continuous process where supervisors and staff work together to plan, monitor and review staff work goals and their overall contribution to ADB" (Administrative Order No. 2.03, *Selection, Talent and Position Management* [hereinafter A.O. 2.03], para. 12.1)

3. The ADB thus conducts a regular performance review of individual staff members that results in ratings that are considered in deciding staff members' promotions, regularization of tenure, salary increases, or performance improvement actions (A.O. No. 2.03, para. 12.1 and 12.6). The full-year review covers the period 1 January to 31 December, and a mandatory mid-year review is conducted between June and August each year (A.O. 2.03, paras. 12.2 and 12.3).

4. The performance management system begins with the setting of individual performance and development goals for the staff member which then forms the basis of the assessment of his or her performance (A.O. 2.03, para. 12.1). The staff member's supervisor evaluates performance against the agreed goals for the review period, taking into account the staff member's self-assessment and inputs from feedback providers (A.O. 2.03, para. 12.3).

5. The overall performance ratings are on a scale of 1 to 4, with 4 as the highest and 1 as the lowest, more specifically described as follows (A.O. 2.03, Appendix 9, para. 4.3(b)(iv)):

| Performance Rating | Description |
|--------------------|---|
| 4 | Staff who have demonstrated extraordinary achievements in all areas of their workplan. |
| 3 | Staff who have met expectations in all areas of the workplan, and/or exceeded in some areas. |
| 2 | Staff who did not deliver according to expectations in some areas in their workplan and need improvement. |
| 1 | Staff who did not deliver according to expectations in most areas of their workplan and performance is considered unsatisfactory. |

I. THE FACTS

6. The Applicant has worked for the ADB (or "the Bank") since 3 September 2007, most recently as International Staff, Level 5 ("IS5") as a Senior Financial Management Specialist (FMS). He appeals the rating he received in the annual performance review for the period of 1 January to 31 December 2020 ("2020 Performance Review"), in particular, his overall rating of "2" and the rating of "2" for two of his five outputs.

7. The Applicant's 2020 workplan was discussed in January, February, April and May 2020 and finalized in June 2020. His work goals for 2020 included the following 5 goal plans:

- “(i) Collaboration, Knowledge, and Innovation [“Goal Plan 1”];
- (ii) High-quality operations prepared and satisfactory [*sic*] implemented;
- (iii) Development finance mobilized and transferred [“Goal Plan 3”];
- (iv) Operations Successfully [*sic*]; and
- (v) Organization systems and processes improved.”

2020 Mid-Year Performance Review

8. In the Applicant’s 2020 mid-year performance review, his supervisor (“Supervisor”), noted that the assessment covered two parts, the “technical” and the “team work” parts.

9. On the technical part, the Supervisor noted that the Applicant continued to do well on financial management compliance, with thorough reviews and attention to timeliness. He called for improvement in specific areas of the Applicant’s performance including responsiveness but gave him overall a positive assessment.

10. On teamwork, the Supervisor highlighted the Applicant’s issues, saying, “I am not satisfied with teamwork in the Financial Management (FM) Unit. We agreed at the beginning of the year that all tasks need to be performed in the spirit of collaboration with colleagues in the FM unit, effective and respectful communication and positive working relationships.” The Applicant was encouraged to “demonstrate that he [is] interested in being a positive force of the FM team, be part of the team, and to follow unit coordinator guidance.” The Supervisor said to the Applicant, “teamwork performance is, to me, a more important performance criteria [criterion] than the technical criteria. Please spend considerable efforts from now until December to show positive relationships with your unit coordinator.”

11. In the Applicant’s comments on the mid-year performance review, he claimed that these issues caused him “serious mental suffering.” He accused a new IS6 FMS colleague [“IS6 colleague”] who was responsible for managing Developing Member Country’s (DMC’s) processing of using “all work-related matters to insult and charge” him. He submitted to the

Tribunal an email to him from the IS6 colleague to show an instance of alleged bullying, which he had reported to his Supervisor.

2020 Full-Year Performance Review

12. For the year-end review, on 8 February 2021, the Applicant submitted online his self-assessment of his performance for 2020. On 10 February 2021, the Applicant and his supervisor discussed the self-assessment. The Supervisor then provided his comments and ratings. The Supervisor noted several contributions of the Applicant within the evaluation period, but also noted some issues. The Supervisor noted the following:

[The Applicant] continuously cited work load problems in 2020 when combining FDD [Financial Due Diligence] work with handling audit reviews. These tasks were, however, reduced with the deployment of a new IS6 [International Staff Level 6] in 2020, an NS1 [National Staff Level 1] in 2020, the addition of two PFFM IS [Public Financial Management Division International Staff] staff in 2020 ... and a reduction in his number of countries to cover. Overall work load is assessed as adequate with a scope to add more assignment to his portfolio. [The Applicant] was also in 2020 expected to address some issues in communicating and collaborating with colleagues. This was highlighted in the 2019 PR. At MYR [Mid-year Review] 2020 this issue was again discussed with [the Applicant] since insufficient progress was observed, and continued to be so in the remainder of 2020. Some staff and divisions have expressed reluctance to work with [the Applicant] and asked for team membership reassignments. This runs counter to good client relationship. In other projects staff appreciated [the Applicant's] support. Some staff expressed that [the Applicant's] contribution is not very visible to them. A stronger interaction with the PFFM compliance department was not noted, and the compliance department was not able to provide a PR [Performance Review] feedback. Strong communication and guidance to project FM [Financial Management] consultants to perform high quality work and a free-flowing communication channel with PFFM is required. Going forward, [the Applicant] needs to be more visible to his Unit Coordinator and PFFM; regularly share information with his Unit Coordinator and me; efficiently manage FM consultant's outputs within the Project Team Leader's (PTL's) timeframe of delivering a project; help diffuse FM issues prior to quality assurance meetings; and contribute to a more harmonious atmosphere in the FM Unit and with PTLs. Stronger client relationships and internal stakeholders and sector divisions are important.

13. For three of his five individual performance goals, the Applicant received a rating of "3-- *Achievements on this goal met expectations.*" However, he received a rating of "2. *Achievements on this goal fall below performance expectations and some improvement is needed*" for Goal Plan 1 (*collaboration, knowledge and innovation*) and Goal Plan 3 (*development finance mobilized and*

transferred). For his overall performance, he received a rating of “2. *Staff did not deliver according to expectations in some areas of their workplan and need improvement.*”

14. The Applicant’s next-in-line supervisor received the Applicant’s 2020 Performance Review on 26 February 2021 and provided no further comment. The Applicant’s 2020 Performance Review was shared online with the Applicant on 12 March 2021.

15. On 24 March 2021, the Applicant finalized the 2020 Performance Review by submitting six pages of his online comments in response. The Applicant objected to his Supervisor’s assessment and said the assessment was tainted by bias and misconduct. His comments stated *inter alia* that the “arbitrary assessments and rating on project processing (Goal Plan 5) and overall assessment are full of bias, and not acceptable.” The Applicant referred to a complaint made by the IS6 colleague to his Supervisor about Applicant adopting a “tight processing schedule.” The Applicant commented that “complaints [made behind] my back are not in good faith but against facts, which violates AO” and asked that matter “be reported to office of professional conduct.” Regarding communications and working with colleagues, the Applicant responded, “we always need to improve in our life, such as communications to different people. ... Staff need understanding and support.” The Applicant questioned whether the Performance Review assessment had been in line with ADB procedure and requested management to consider the impact of the Performance Review assessment on his mental health.

Request for compulsory conciliation

16. On 8 April 2021, the Applicant sought compulsory conciliation of his overall assessment and of Goal Plan 3 as “2” in his 2020 Performance Review in terms of A.O. 2.06, para. 3.3. The Applicant did not contest the rating “2” for Goal Plan 1. On 5 May 2021, the conciliation ended without settlement.

Request for administrative review

17. On 19 May 2021, the Applicant elevated this matter to the Director General, Budget,

Personnel and Management Systems Department (DG, BPMSD). On 17 June 2021, the DG, BPMSD found that the assessment that the Applicant's performance had not improved to a generally satisfactory level was founded on a reasonable and observable basis and that all procedural requirements had been complied with, and accordingly affirmed the questioned performance ratings.

Appeals Committee

18. On 2 July 2021, the Applicant appealed this decision to the Appeals Committee. The Appeals Committee found that the Applicant's 2020 Mid-Year Review exercise flagged "concerns (without a lowered rating) followed procedure and acted to forewarn the Applicant of the Supervisor's concerns and highlighted needed actions well ahead of the Annual Performance Review for the 1 January to 31 December 2020 period." It also found the 2020 Performance Review presentation of both positive and negative elements of the Applicant's performance supported the Supervisor's decision as not being arbitrary.

19. The Appeals Committee found that "communication across the Unit and between the Applicant and the Supervisor was not optimal and seemed to have deteriorated over time. The Committee note[d] the important role of communication between parties in addressing any observed or perceived performance concerns, and the strains placed on such by the COVID lockdown in place across 2020 and the remote work environment this created...." At the same time, the Committee noted that the Applicant's claims of mental health deterioration, and whether it was attributable to the performance evaluation exercise, fell outside its scope and competence.

20. On 23 June 2022 the Appeals Committee concluded that the 2020 Performance Review did not constitute an abuse of discretion and was not discriminatory, and that the Respondent had followed proper procedures. It did allow, however, that "some consideration might be granted in such decisions given the pandemic's impact on staff's general welfare and ability to work remotely." The Appeals Committee recommended that the President affirm DG BPMSD's decision of 17 June 2021.

21. The President approved the Appeals Committee's recommendation on 8 July 2022 and the Applicant was so informed on 11 July 2022. It is this decision ("contested decision") that is contested and now brought before the Tribunal.

Application to the ADB Administrative Tribunal

22. On 9 October 2022, the Applicant filed this Application to the Administrative Tribunal contesting the decision confirming his performance ratings of "2" for Goal Plan 1 (collaboration, knowledge and innovation and related assessment) and Goal Plan 3 (development finance mobilized and transferred and related assessments), and also a rating of "2" for his overall assessment rating on the grounds that the performance rating decisions were in breach of the terms of his "contract of employment and in breach of the precepts of administrative law as applicable to the ADB."

23. In his Application, the Applicant asserts that he was "one of the best financial management specialists (FMS) in ADB" with 15-years' experience at the Bank, and that this was the first time he was given an overall rating of "2." He also asserts that he has suffered mental health issues since January 2020 and that he has been subject to various "bullying and other misconducts" from colleagues which he had reported to his Supervisor since February 2020 but his Supervisor had failed to take action.

24. The Applicant alleges that the 2020 rating decisions were:

- “(i) unreasonable;
- (ii) failed to take into account at all or properly the relevant facts;
- (iii) took into account irrelevant facts;
- (iv) were biased, improper and unfair;
- (v) were made in breach of the requirements of AO 2.02 Code of Conduct;
- (vi) were in breach of BPMSD's guide on workplans;
- (vii) were made in breach of the provisions of performance management in that there was

a failure to discuss matters with [him] prior to making the assessment and a failure to be in line with [his] workplan agreed with ‘mutual understanding’ and ‘shared expectations’;

- (viii) were made *mala fide*;
- (ix) were an abuse of discretion;
- (x) were made in a discriminatory manner;
- (xi) and represented the manifestation of a bullying and harassing approach by a supervisor towards [the Applicant] and thus were motivated by an improper purpose.”

25. The Applicant asks the Tribunal to order the following:

- “(i) The decision of a “Rating 2” on Goal Plan 1: Collaboration, Knowledge and Innovation and related assessments be expunged from [his] record, and be changed to Rating 3.
- (ii) The decision of a “Rating 2” on Goal Plan 3: Development finance mobilized and transferred (Level 3B) and related assessments be expunged from [his] record, and be changed to Rating 3.
- (iii) The decision of a “Rating 2” on Overall Assessment and related assessments be expunged from [his] record, and be changed to Rating 3.
- (iv) Determine [the Supervisor’s] *mala fide* acts and deliberately distorting facts to mislead Management, and recommend to ADB’s President for disciplinary actions.
- (v) Reprimand BPMSD for supporting [the Supervisor’s] *mala fide* acts with deliberately distorted facts, for insulting [the Applicant] with biased and invalid after-the-fact statements, for violating BPMSD’s own guides, and for violating AO 2.06 by not reviewing all cases to determine “improper motivation”.
- (vi) Criticize the Appeals Committee for violating AO 2.06 by not reviewing all cases to determine “improper motivation”, for failing to be impartial but mistakenly concluded the case.
- (vii) Increase salary additionally of \$3,000 retrospectively from 1 January 2020, and accordingly increase pension with ADB’s contribution.
- (viii) Increase salary of \$5,000 retrospectively from 1 January 2021, and accordingly

increase pension with ADB's contribution.

- (ix) Compensate moral damages in the amount of \$1,000,000 for mental suffering, humiliation, and health impacts in 2020 and 2021.
- (x) Compensate \$60,000 for [the Applicant's] time at nights and weekends in preparing all documents for Administrative Review, Appeal, and Tribunal, caused by [the Supervisor's] *mala fide* acts."

26. The Respondent rejects the Applicant's allegations that the 2020 Performance Review was procedurally defective, biased, arbitrary or an abuse of discretion and asks the Tribunal to dismiss the Applicant's claims as without merit and deny the requested relief and costs.

II. FINDINGS

Preliminary matters

a. En banc

27. In light of the complexity of the issues in this case, 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. Anonymity

28. In his Application, the Applicant requests that if his supervisors are granted anonymity that his identity likewise be kept anonymous "for equal treatment."

29. The Respondent actually requests that the Tribunal keep confidential the name of the Supervisor given that the Applicant has made serious allegations of misconduct against him which are not substantiated and have been assessed by the Respondent's Office of Professional Conduct (OPC) as in accordance with proper procedure. The Respondent asserts that the OPC found that

there was insufficient basis to refer these allegations to the Office of Anti-corruption and Integrity (OAI) for further investigation. Disclosing the Supervisor's name may risk prejudice against him and adversely impact his interaction with other staff. The Respondent further submits that disclosure may deter other supervisors from fully discharging their role in performance management for fear of unsubstantiated charges levied against them publicly. The Respondent thus asks that the Supervisor's name be kept confident on grounds of fairness and due process.

30. The Tribunal finds merit in the parties' requests for anonymity. The name of the Applicant's supervisor is not mentioned in this decision and instead he is referred to throughout this decision simply as the "Supervisor." For consistency, the names of other supervisors are kept anonymous as well. In keeping with the above reasoning the identity of the Applicant is also kept anonymous.

c. Oral proceedings

31. The Applicant has also requested that, "[g]iven the nature of the breaches and complexity of this matter", an oral hearing be held in order to hear specified witnesses.

32. The Respondent objects to this request and submits that an oral hearing is unnecessary in this case.

33. The Tribunal has considered the request in accordance with Article VIII of the ADBAT Statute, and Rule 11 of the Rules of Procedure. The Tribunal has previously held that oral proceedings are not warranted when there is "more than ample documentation satisfactorily illustrating the facts, and both the Applicant and the Respondent have been able to support their positions fully" (*Ms. N*, Decision No. 124 (2022), para. 39). In another performance evaluation case, the Tribunal similarly declined to hold oral proceedings "[t]aking into account the nature of the allegations made by the Applicant and the very extensive and detailed comments with supporting documents given by her and the Bank to substantiate their arguments" (*Claus*, Decision No. 105 (2015), paras. 52 and 53; see also *Drilon*, Decision No. 110 (2017), para. 27; *Mr H*, Decision No. 108 (6 January 2017), para. 39).

34. In this case, both parties have submitted extensive, written evidence and submissions that are sufficient to resolve the issues before the Tribunal. Accordingly, the request for oral proceedings is denied.

The Merits

35. The Administrative Tribunal, in its very first case, established the scope of its review power in cases involving the exercise of managerial discretion. In *Lindsey*, Decision No. 1 (1991), para 12, the Tribunal held:

The Tribunal cannot say that the substance of a policy decision is sound or unsound. It can only say that the decision has or has not been reached by the proper processes, or that the decision either is or is not arbitrary, discriminatory, or improperly motivated, or that it is one that could or could not reasonably have been taken on the basis of facts accurately gathered and properly weighed.

36. As regards the Tribunal's power to review performance evaluation decisions, the Tribunal held in *Claus, supra*, para. 75 that "the assessment of staff members' annual performance is essentially made by the Bank and it is not for the Tribunal to substitute its assessment."

37. The Tribunal further held in *Ms G*, Decision No. 106 (2015), para. 35 (see also *Mr. E*, Decision No. 103 (2014)):

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

38. As one factor in the determination of whether there was an abuse of discretion or arbitrariness, the Tribunal considered whether proper procedure had been observed. The Tribunal held in *Drilon, supra*, paras 64:

Arbitrariness may manifest itself by the lack of regard for observance of proper procedure in assessing the alleged performance of an employee.

39. The Tribunal affirmed in *Ms G, supra*, para. 36, the basic principle that the "burden of

proof rests on the person who makes allegations, namely, the Applicant in the present case”. The Tribunal held in *Azimi*, ADBAT Decision No. 88 (2009), para. 40 that this also applies to allegations of abuse of discretion or arbitrariness .

40. As stated above, it is not enough for the Applicant to assert his opinion that his performance has been satisfactory (*Ms. G, supra*, para.48).

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

41. In the Tribunal’s view as held in *Drilon, supra*, para. 64, “the Applicant’s opinion of her performance capabilities as more than satisfactory cannot be taken as a substitute for the assessment made by her supervisor and other reviewers who have arrived at a different conclusion as per the relevant rules.”

42. Although, the Applicant did not contest the Goal Plan 1 rating in earlier stages of administrative review as pointed out by the Respondent, the Tribunal can properly consider matters in relation to Goal Plan 1 to review the overall assessment rating because they are inextricably linked. Therefore, the Tribunal will decide:

- (i) Whether the contested decision was made in accordance with the prescribed process laid down in ADB policy, procedure and guidelines for the 2020 performance evaluation;
- (ii) Whether the contested decision was made in a way that was arbitrary, discriminatory, improperly motivated, an abuse of discretion and one that was reasonably taken based on the relevant facts;
- (iii) Whether the Supervisor’s assessment was motivated by *mala fides*; and
- (iv) Whether the Applicant is entitled to moral damages for mental suffering, humiliation and health consequences in 2020 and 2021.

Issue (1) Was the Applicant's 2020 performance evaluation procedurally flawed?

43. The Applicant alleges that his performance evaluation had been carried out in breach of the duties of managers and supervisors in A.O. 2.02 (Code of Conduct), para. 1.2, 4.4 and 4.27 (to foster a professional environment, to support staff who raise a misconduct concern, and be responsive to anyone who complains of misconduct), more specifically set forth below.

1.2 ADB is committed to fostering and maintaining a work environment characterized by the Staff Values set out in para. 2.17. The Code of Conduct is designed to embed these principles in the standards of behavior required of staff, and to support the right of staff to work in an environment free from inappropriate behavior, misconduct (including integrity violations), harassment and bullying.

4.4. In addition to the above, managers and supervisors must actively promote and encourage a workplace culture that upholds ADB's Staff Values and Code of Conduct, and they must:

- a. Serve as models of integrity;
- b. Encourage an ongoing dialogue on professional conduct issues and provide guidance to staff;
- c. Ensure that internal systems, policies and procedures are applied consistently and objectively;
- d. Support staff who raise a misconduct concern; and
- e. Decide based on relevant facts, observations and assessments, regardless of internal or external pressures.

4.27. Staff must not engage in retaliation or reprisal against anyone reporting misconduct, whether formally as a whistleblower, witness, or person associated with such whistleblower or witness, or otherwise, or for cooperation with an ADB investigation in relation to the complaint. (Administrative Order No. 2.02, Code of Conduct)

44. The Applicant has also alleged breaches of BPMSD's guidance on workplans (which states that what is agreed in the workplan should be based on a mutual understanding and shared expectations, and able to be realistically achieved, and throughout the performance cycle, feedback should be a continuous process) and Performance Management Implementing Guidelines. Among these are the guidelines on the need for supervisor feedback.

Supervisor responsibilities. ADB requires you to have a minimum of two documented formal performance and development discussions - a mid-year review discussion and an annual performance review discussion. However, research consistently shows that mid-year and end-of-year appraisals are too few conversations to have any meaningful performance impact and it is critical that you have regular performance and development discussions with your staff throughout the year. (*Preparing for a Performance and Development Discussion – Guide for Supervisors*)

45. The Applicant further asserts that the decisions were in breach of A.O. 2.03, Selection, Talent and Position Management, and its Appendix 9 *Guidelines on Performance Management*. He also asserts breach of BPMSD's Guide for Supervisors: Preparing for a Performance and Development Discussion; A.O. 2.02 Code of Conduct, and breach of Integrity Principles and Guidelines (IPG, 2015).

46. The Applicant argues that his Supervisor's original assessments for the 2020 Performance Review were not discussed with him during the Performance Review discussion or throughout the year and his Supervisor's 'after-the-fact statements' violate BPMSD's expectation that feedback is a continuous process throughout the cycle. The Applicant alleges that his Supervisor failed to substantiate his assessments and failed explain the methodology and relevant rules employed to arrive at the assessments and the level 2 ratings on the two goals and the overall rating.

47. The Applicant refers to *Ibrahim*, Decision No. 86 (2008), where the Tribunal set aside a performance evaluation rating for lack of "timely notification" or "written documentation" of feedback on the staff member's below-par performance. The Tribunal considered these as a "reasonable prerequisite to any improvement in employee performance if an employee is to benefit from such criticism, particularly to avoid negative evaluations" (*Ibrahim*, para. 70). The Applicant pointed out that the Tribunal held in *Ibrahim* that "after-the-fact statements", the lack of "timely discussion" and feedback rendered the performance evaluation *mala fide*. There had been no note-to-file signed by the supervisor and staff in *Ibrahim*. A.O. 2.03 Appendix 9 Guidelines on Performance Management state that as soon as performance issues appear, a meeting should be called with staff and supervisors should prepare a note-to-file. The Applicant contends that the absence of a record of any informal discussions or notes-to-file concerning his performance issues constitutes an abuse of process.

48. The Respondent maintains that the Applicant participated in the performance evaluation process, and agreed to the goals used to assess his performance. He also participated in the mid-year review which offered structured and fact-based feedback on deficiencies in performance. The Applicant therefore received clear notice at the mid-year performance review of areas required for improvement, which were revisited at the 12-month performance evaluation.

49. The Respondent submits that A.O. 2.03 sets out the mandatory requirements with respect to performance management. The Applicant had his performance and individual development goals for the performance period defined, and in conjunction with his Supervisor in accordance with A.O. 2.03, Appendix 9, section 4.1. These goals were submitted online on 12 May 2020. The Respondent submits that while staff may revise goals throughout the performance year to recognize necessary changes in business priorities, subject to supervisor approval, this option was not availed of by the Applicant.

50. The Respondent notes that in accordance with A.O. 2.03, para., 12.2, the Applicant was provided feedback on his performance in the mid-year review and that the Supervisor raised concerns at the time, and indicated specific areas of the Applicant's performance for improvement, particularly in the area of collaboration and teamwork.

51. The Respondent asserts that the facts in this case differ significantly from those in *Ibrahim, supra*. In *Ibrahim* the Applicant had not received timely and adequate feedback on her performance shortcomings during the course of the evaluation period. In comparison, in the present case the Applicant received such feedback, specifically during the mandatory mid-year review, which was fully documented as required in A.O. 2.03. The performance issues in the Applicant's case were recurring and documented issues. As such, the Applicant's case was not one devoid of a record such that a note-to-file was required to avoid the suggestions of arbitrariness.

Findings in relation to Issue (1)

52. The elements in the Bank's performance evaluation system most relevant to this case are the following: *first*, the preparation of the staff member's "individual performance and

development goals” by the staff member and his supervisor (A.O. 2.03, para. 12.1); *second*, the evaluation of the staff member’s performance against these agreed goals, taking into account the staff member’s self-assessment and inputs from feedback providers (A.O. 2.03, para. 12.3); and *third*, feedback from the supervisor to the staff member, “a minimum of two documented formal performance and development discussions”, namely, the “mid-year and end-of-year appraisals” (*Preparing for a Performance and Development Discussion – Guide for Supervisors*).

53. The Applicant’s 2020 Performance Review was carried out squarely in accordance with the Bank’s performance management procedure. The Applicant and his Supervisor agreed on his performance goals. He complains that his Supervisor added some items to the list of goals, but those items were actually brought to the Applicant’s attention, and he agreed with their inclusion.

54. The Supervisor assessed the Applicant’s performance against those individual goals and provided comments and a performance rating for each individual goal. The Supervisor conducted the required mid-year performance review, in which the Applicant received feedback on his work. The Applicant also had the opportunity to make his self-assessment for each of the five individual goals of his 2020 workplan. Indeed, on 10 February 2021, for the year-end evaluation, the Applicant and his Supervisor discussed the Applicant’s performance, areas of necessary performance improvement, and opportunities for personal development and growth.

55. The Supervisor then submitted the Applicant’s performance review to his Director General, the over-all head of their unit, who approved it. In accordance with procedure, the Applicant was given the opportunity to comment online on that rating.

56. The Applicant has alleged a specific procedural defect, namely, that there were no regular performance discussions with him and, in particular, that there was no note-to-file on his performance.

57. A.O. 2.03, Appendix 9 (Guidelines on Performance Management), para. 4.7(a)(ii) provides for the use of a note-to-file for managing performance issues. The Respondent submits that the calling of a meeting between Supervisor and staff, documented through a formal note-to-file is not

a mandatory requirement but simply one of a number of feedback tools to address performance-related issues.

58. The Applicant's contention that there was insufficient feedback on his performance cannot be sustained. The Tribunal notes from the record that during the year there were exchanges and feedback by email and otherwise between the Applicant and his supervisor regarding his performance. More importantly there was a mid-year performance review.

59. With regard to those exchanges discussing performance that were not documented in a note-to-file, the Tribunal reiterates what was said in *Lindsey, supra*, that it is desirable that after an exchange of views it should be recorded in written form.

60. However, the Tribunal has previously held that it is only in the *Guidelines* that a note-to-file is referenced and that the *Guidelines* "are not mandatory and therefore their simple breach cannot be breach of due process" (*Ms G, supra*, para. 46). Indeed, the Tribunal in *Ms G* cites the *Ibrahim* decision invoked by the Applicant, which stated that being mere guidelines, notes-to-file, although encouraged, are not required, and accordingly the Tribunal concluded there was no managerial impropriety (*Ibrahim, supra*, para. 51).

61. Moreover, the Tribunal noted in *Ibrahim*, that the notes-to-file were made only after the issuance of the end-of-year performance review. In other words, the aggrieved staff member received written feedback only after the performance review exercise had been completed, not during the period of review when the staff member could have improved her performance.

It is difficult to characterize such after-the-fact discussion and imposition of a "U" rating as being helpful feedback to help the Applicant in her performance when the Note-to-File is not provided until that performance period had already closed. Rather, it appears to be an effort to buttress the Bank's position at a time when the employee was past opportunity for benefiting therefrom. (*Ibrahim, supra*)

In the present case, the Applicant received feedback *during* the review process, most importantly, during the mid-year review, when he could still improve his work performance.

62. Therefore, the Tribunal finds that the 2020 performance review of the Applicant was carried out in accordance with the prescribed procedure, and was not vitiated by any procedural irregularity.

Issue (2) Was the performance rating decided in a manner that was arbitrary, improperly motivated or an abuse of discretion, and could it have reasonably been made based on the facts?

63. The Applicant alleges that the performance assessment made by his Supervisor was “biased (including collusive bias), ignorant, arbitrary, hypocritical, logically absurd and procedurally flawed.” He submits he was one of the best financial management specialists (FMS) in ADB with 15 years’ experience as staff and 11 years as a consultant for ADB financed projects, and his 2020 Performance Review was the first time he was rated “2.”

64. The Respondent rejects the Applicant’s contention that the 2020 Performance Review was biased, arbitrary or an abuse of discretion. The Respondent submits that the Applicant has provided no evidence to support his claims of bias or abuse of discretion.

65. The Respondent submits that the Applicant’s view is incongruent with the assessment of his Supervisor and management. The mid-year review and 2020 Performance Review provided an assessment that was “balanced, constructive and based on relevant factors and examples of Applicant’s work during the concerned year.” The 2020 Performance Review actually reflected accomplishments in various areas. Those positive comments are consistent with the assessment of Applicant as meeting expectations for three of his five work goals, which Applicant is not contesting. However, the 2020 Performance Review identified shortcomings and areas for improvement in Applicant’s performance and each of the “2” ratings indicated why and where improvement was necessary.

Findings in relation to Issue (2)

66. For the following reasons the Tribunal finds that the Applicant’s 2020 performance evaluation was not tainted by arbitrariness, improper motivation or abuse of discretion, or was

beyond what could be reasonably concluded on the basis of the facts.

67. The Applicant bears the burden of proving such defects in the contested decision. The Applicant has gone into much detail showing his exchanges with his Supervisor. The Tribunal finds that it cannot be said that the Supervisor had no factual basis to arrive at the Applicant's performance rating. The Supervisor had properly identified the weaknesses in the Applicant's work, and duly conveyed those to him.

68. The Applicant cites the *Ibrahim* case where the Tribunal found the Bank to have acted arbitrarily, with improper motivation or abuse of discretion. This case is different from *Ibrahim*. In that case, the contested negative overall performance rating was inconsistent with the individual goal plan ratings. The negative rating was also inconsistent with the favorable ratings just the year before, and timely feedback and notice was therefore even more important to ensure fairness to the staff member. In addition, the supervisor in that case came into office shortly before the performance evaluation exercise.

[The supervisor] apparently had had only four months' supervision of the Applicant. That short exposure made it even more important that he provide some explanatory comments to support a decision at such odds with the rest of the then available record. (*Ibrahim, supra*).

In this case the Applicant's performance problems were noted by the same Supervisor in the previous year's Performance Review.

69. Further on *Ibrahim*, it was only after the year-end performance review process that the Bank "bolster[ed] the record" belatedly with the note-to-file. The Tribunal in that case thus raised the question of the supervisor's *mala fides* and found improper motivation.

Given that record of after-the-fact efforts to alter or modify the record that was before the rating officials ..., it is difficult to find any justification for the disparity in view represented by the imposition of the "U" rating in the light of the then available record. Accordingly, the Tribunal finds the "U" rating in the light of the entire written record at the time to have been arbitrary and without any justification or explanation. (*Ibrahim, supra*)

70. In this case the Applicant's performance issues were properly conveyed to him in his mid-year performance evaluation.

71. Moreover, the mere fact of strained relations between the Applicant and his Supervisor does not in itself render the performance review unfair or irregular. As the Tribunal held in *Ms. L.C.*, Decision No. 67 (2005):

It is also evident from the record that the Applicant's attitude towards her work and colleagues was respectively negative and non-congenial. In expressing her disagreement with the observations of her supervisors, the Applicant has made several complaints against them. But those "complaints are not sufficient to characterize the observations in question as being the result of bias or prejudice.

72. In *Alexander*, Decision No. 40 (1998), para. 40, it was also said:

The mere fact that these relations were strained, however, is not sufficient proof of a procedural irregularity.....It is therefore necessary....to look in more details at the specific accusations that the Applicant makes regarding the behavior of the Manager (and management generally) so as to determine whether it might reflect an illegitimate prejudice or the kind of ill will and malice against her that would amount to a procedural irregularity in her performance evaluation.

73. The Tribunal has examined the Applicant's allegations that several "cases" or episodes where problems arose demonstrated unfairness or prejudice on the part of his Supervisor. The first pertained to the Applicant's complaints about "tight processing schedule[s]." The second pertained to the Applicant not being "visible" to his work team. The third pertained to issues about the Applicant's communication and collaboration with colleagues. With respect to all of these, the Applicant has asserted his disagreement with his Supervisor, but allegations cannot substitute for proof that the Supervisor "had it in" for him and had been unfair or prejudiced. As the Tribunal held in *Behuria (No. 2)* Decision No. 11 (1996):

It is true, as the Applicant says, that prejudice is usually concealed and its existence has to be established by inference. Yet, in the view of the Tribunal, the allegations of the Applicant are not sufficient to establish bias or lack of responsibility on the part of his Manager or the Director with respect to the three items of the PER. The Applicant has,

basically, asserted his disagreement with several of the Respondent's assessment of his performance; but this cannot take the place of proof of discrimination or bias, which the Tribunal finds to be absent from the record.

74. Therefore, the Tribunal finds that the Applicant has not discharged his burden to prove that his performance rating was attended by arbitrariness, improper motivation or abuse of discretion, or that that decision could not have been made reasonably on the facts.

Issue (3): Was the Supervisor's assessment motivated by mala fides?

75. The Applicant requests the Tribunal to “determine [the Supervisor's] *male fide* acts and deliberately distorting facts to mislead management, and recommend to ADB's president for disciplinary actions.” He also requests the Tribunal to “reprimand BPMSD for supporting [the Supervisor's] *male fide* acts with deliberately distorted facts, for insulting [the Applicant] with biased and invalid after-the-fact statements, for violating BPMSD's own guides, and for violating A.O. 2.06 by not reviewing all cases to determine ‘improper motivation’.”

76. The Applicant alleges that, in contravention of A.O. 2.02, his Supervisor failed to foster and maintain a professional work environment by not taking prompt action when the Applicant reported bullying by the IS6 colleague against the Applicant. He alleges his Supervisor maliciously created trouble for him and deliberately set a trap for him.

77. The Tribunal recalls A.O. 2.02 is the Bank's “Code of Conduct” for its staff. A.O. 2.02 defines “bullying” and “harassment” as follows—

“Bullying” is a form of Harassment consisting of repeated or persistent aggression or other malicious behavior in any form by one or more persons which has the effect of humiliating, belittling, offending, intimidating or discriminating against another person. It may include persistent, unwarranted or unconstructive criticism, personal abuse and/or ridicule, either in public or private, which humiliates or demeans the individual targeted, gradually eroding his or her self-confidence or intending to do so. Criticism, disapproval, negative performance assessment and similar appraisal, appropriately conveyed, do not, by themselves, constitute bullying or harassment. (A.O. 2.02, para. 2.1)

“Harassment” is any unwarranted or unwelcome behavior, verbal, psychological or physical, that interferes with work or creates an intimidating, hostile or offensive work environment. Harassment includes but is not limited to sexual harassment and bullying. Sexual harassment is any unwelcome sexual advance, request for sexual favors or other verbal or physical conduct of a sexual nature which results in physical, sexual or psychological harm or suffering to another person, or which is made or suggested to be a condition of employment, promotion or other personnel action or creates an intimidating, hostile or offensive environment. (A.O. 2.02, para. 2.5)

78. A.O. 2.02 also provides for “disciplinary measures” to enforce the Code of Conduct (A.O. 2.02, para. 6).

Findings in relation to Issue (3)

79. The record shows that the Applicant’s allegations of misconduct by his Supervisor were duly referred to the Office of Professional Conduct (OPC) for review. Following that review, OPC advised the Applicant on 31 March 2021 that there was “no sufficient basis to refer this matter for further investigation to OAI” and that the Applicant’s concerns were best addressed by following the administrative review process.

80. Accordingly, the Tribunal finds that the Respondent followed the required process for addressing allegations of misconduct and that, pursuant to that process, the proper authorities concluded, on the basis of evidence before them at the time, that there was insufficient basis to warrant an investigation of the alleged misconduct. The Applicant has not produced sufficient evidence in rebuttal of that finding and accordingly has not met his burden to show that the Supervisor’s assessment or the actions of the DG BPMSD were motivated by *mala fides*. The fact that OPC and the Applicant have continued to communicate from time to time concerning alleged harassment by the Applicant’s Supervisor does not constitute evidence of misconduct on his part or on the part of DG BPMSD in the Applicant’s 2020 performance evaluation.

Issue (4): Can the Applicant claim moral damages for mental suffering, humiliation and health consequences in 2020 and 2021?

81. The Applicant alleges that his Supervisor’s “misconduct and *mala fide* acts” have caused

him to suffer mentally in the past two and a half years and seeks moral damages for mental suffering, humiliation and health impacts in 2020 and 2021.

82. The Respondent recognizes the importance of mental health concerns and staff welfare, particularly in relation to the COVID-19 pandemic. In the Applicant's case, the Respondent submits that when the Applicant noted his mental health issues in his request for administrative review, HR reached out to the Applicant to ensure that he was informed of the available resources for appropriate support.

83. However, the Respondent contends that the Applicant has not substantiated his mental health problems, and how these were linked to his work conditions and related performance evaluation issues.

Findings in relation to Issue (4)

84. The Tribunal notes that the Applicant has not substantiated his mental health problems with independent professional medical evidence or that those problems were caused by the disputed performance evaluation. Considering the findings made by the Tribunal regarding the regularity and fairness of the performance review process, this claim is in any event unsustainable.

2021 Workplan and Performance Review

85. The Applicant has also raised his 2021 workplan and his appeal regarding his 2021 Performance Review in these proceedings. He accuses his Supervisor of making "substantial subsequent changes without discussing with me and without my knowledge, that violates procedure and BPMSD's guides for workplan." The Respondent notes that these matters have been raised by the Applicant in a separate and pending appeal to the Appeals Committee. Considering that the Applicant has not exhausted internal remedies with respect to his 2021 Performance Review, the matter is not properly before the Tribunal and is excluded from the Tribunal's review in this case.

Conclusion

86. For the above reasons, the Tribunal concludes that the 2020 Performance Review was not procedurally defective, biased, arbitrary, or motivated by *mala fides*. Accordingly, all of the Applicant's claims are rejected.

DECISION

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

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