ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

Decision No. 23
(13 August 1996)

Latif M. Chaudhry
v.
Asian Development Bank

Mark Fernando, President
R. Gorman, Vice-President
T. Sawada

1. The Applicant joined the Bank in September 1978 and now serves as a Senior Investment Office at Level 6 in the Financial Sector and Industry Division (West). Between 15 and 21 November 1992, the Applicant was on a mission to Hong Kong, where he placed several long-distance telephone calls from his hotel to the telephone operator at the Bank's Headquarters in Manila. Upon investigation, the Respondent ascertained that although the Applicant classified those calls as official, for which he was entitled to reimbursement, certain calls were routed to his home and to his automobile dealer. The Applicant acknowledged that, under the pressure of work, he had improperly and by oversight charged those telephone calls as official and he urged the Bank "to please disallow any phone calls which in your view are not related to official work." The Respondent, after conducting a preliminary investigation through the office of Budget, Personnel and Management Services Department (BPMSD), concluded that there were possible grounds for discipline and appointed a Committee of Inquiry (COI) to find facts and make recommendations to the President. The COI, after hearing from a number of witnesses, concluded that although the Applicant had indeed misrepresented personal calls made during his November 1992 mission as official, proof that he had done so purposely and with the intention to deceive the Bank was not made out beyond a reasonable doubt. It recommended that no disciplinary action be taken against the Applicant, a recommendation that was acted upon by the Respondent. Nonetheless, the Applicant contended that the entire investigatory and inquiry process was improper and was flawed in many significant respects, and he requested that the Respondent pay him damages well in excess of $1 million, a request that was refused. This refusal was unsuccessfully challenged before the Appeals Committee, and is now challenged before the Tribunal.

2. The parties devote a considerable part of their pleadings to such questions as whether or not the Applicant was in fact responsible for a knowing and deceitful misstatement regarding his personal telephone calls while on mission (including, for example, whether he had good reason to route those calls through the Bank operator rather than placing them directly to his home), and whether or not the Applicant was "exonerated" by the COI, which found proof of carelessness on his part but not proof beyond a reasonable doubt of fraudulent intention. The Tribunal affirms at the outset that these differences are irrelevant to the matter to be considered here. The Applicant has in fact conceded that he misstated the facts when he characterized as official several calls that were in truth of a personal nature; the Respondent has in effect conceded that there was inadequate proof that this misstatement was anything more than an oversight such that disciplinary measures could have been properly imposed. Whether this could be characterized as "exoneration" is beside the point. The issue here, given the fact that no discipline has been imposed upon the Applicant, is whether the proceedings utilized by the Respondent in the anticipation of possible disciplinary measures against the Applicant were so significantly flawed as to constitute a violation of his terms of appointment or contract of employment. This in turn depends upon whether the Respondent has materially failed to comply

with the pertinent Bank documents governing disciplinary measures or whether there has been a lack of due process that has caused injury to the Applicant.

3. The Applicant's challenges to the procedures utilized by the Respondent here relate to three phases: the preliminary investigation begun in March 1993 by the Controller's Office and BPMSD into the apparent misstatements concerning the Applicant's telephone claims; the procedure within BPMSD following upon the issuance of its Show Cause Notice of 27 May 1993; and the authority of, and procedures utilized by, the COI subsequent to the issuance by the Director, BPMSD, on 2 November 1993 of a Notice of Charge and Inquiry.

The Initial Investigation in the Controller's Office and BPMSD

4. The Applicant submitted on 10 February 1993 his Request for Reimbursement-Business Travel (RRBT) for two earlier missions: one during 11-18 October 1992 and the other, being considered here, during 15-21 November 1992. On 25 March 1993, the Control Officer, Administrative Expense Section of the Travel Claims Unit (CTEX), having concluded that the telephone charge for the two missions in the amount of US$900 was unusually high, requested the Applicant to secure the endorsement of his Director, Private Sector Department (PSD), for the RRBT claims. The Applicant did not produce such an endorsement for several weeks, during which time the Respondent investigated the claims further and the Control Officer, CTEX, informed the Applicant, on 23 April 1993, that "it was found out that the . . . Bank operator number was used to route your calls [during the November 1992 mission] to destinations which appear not related to official purposes (e.g., to your residence and other private residence/business enterprises) but [which] you have claimed as official." Within the week, the Control Officer informed the Applicant of similar irregularities in his RRBT claims for the October 1992 mission. (The Bank later chose not to pursue the latter irregularities, which has led the Applicant to charge that the investigation into the November 1992 misstatements was unfounded as well. The Tribunal does not, however, find this logic convincing; rather, the Bank's decision to press only the claim regarding the November 1992 telephone calls demonstrates if anything that it was not discriminatorily targeting the Applicant, as he contends.) On 4 May, the Applicant responded to the Control Officer, CTEX, and stated that the Applicant had filed his telephone reimbursement claims in a hurry due to the pressure of his work, and requested that the Bank should disallow any claimed calls not appearing to be official.

5. The following day, 5 May 1993, the Controller in a memorandum to the Director, BPMSD, referred to the telephone claims filed by the Applicant and by another staff member (in connection with a mission to Beijing in January 1993), and noted "apparent abuses by some staff in connection with telecommunication expenses" and "apparent attempts by two professional staff to make incorrect claims. . . . These staff have been confronted with the problem and we have not been satisfied with [their] answers." On 27 May 1993 the Manager, Human Resources Division (BPHR), issued to the Applicant a "Show Cause Notice," asking the Applicant to explain why disciplinary measures should not be initiated against him for "misrepresent[ing] private telephone calls as official calls" arising from the October and November 1992 missions to Hong Kong; the latter misrepresentation was stated to derive from 17 phone calls routed through the Bank operator in Manila.

6. The Applicant raises a number of challenges to the fairness and legality of the procedures as thus far described. He contends that the Control Officer was prejudiced against him, in that she "predetermined" that the disputed telephone calls were personal rather than official. One response to that contention, of course, is that some of the disputed calls in fact were personal, and were routed beyond the Bank's headquarters to the Applicant's home and automobile

dealer; the Applicant so conceded on several occasions, as early as 4 May 1993 in a memorandum to the Control Officer.

7. But the more pertinent response to the Applicant's contention is that the record does not support any claim that the Control Officer was prejudiced or otherwise acted improperly in processing the Applicant's RRBT. Six weeks after the Applicant filed that RRBT, the travel claims unit noted that the telephone claims were high (and through confusion also believed that certain telefax claims were inordinately high as well), and requested that the Applicant secure the endorsement of the Director, PSD. This was a routine request, which derived from that unit's responsibility to ensure compliance by staff members with the Bank's guidelines regarding mission travel. There is no evidence that the request was made for other than legitimate reasons; making that request was not evidence of prejudice or of a closed mind.

8. In the one-month period following the unanswered request for the Director's endorsement of the Applicant's RRBT, the Control Officer turned to the Office of Administrative Services (OAS) to investigate the telephone calls, and OAS determined that certain calls had been routed to the Applicant's residence and to commercial establishments. This was called to the attention of the Applicant by the Control Officer on 23 April 1993, and the Applicant so conceded on 4 May, in a memorandum referring to an oversight committed in haste. The Controller found the Applicant's response unconvincing, and reported to the Director, BPMSD, -- who, under Bank administrative orders, is responsible for investigating whether disciplinary measurers might be warranted -- about the "apparent abuses" and "apparent attempts" by two staff members to make incorrect telecommunications claims.

9. The Tribunal concludes that these observations by the Controller, and their communication to the Director, BPMSD, cannot reasonably be viewed as "malicious," "clandestine" or "prejudiced," as the Applicant claims. Although the Controller could well have accepted the Applicant's explanation and pursued the matter no further, his decision to do otherwise cannot be deemed a violation of the Applicant's rights. The Tribunal notes, for example, that the Applicant had not, in six weeks from the request of the Control Officer, secured the endorsement of the Director, PSD, of the RRBT telephone claims; he had not explained why he had routed clearly personal calls through the Bank operator (such that they appeared on their face to be official); and the Applicant had made reimbursement claims for his telephone calls during both his October and November 1992 missions (even though the Bank's challenge to the former claims were later not pursued because of ambiguous evidence). The Controller's decision to refer the matter to BPMSD cannot, therefore, be regarded as arbitrary or as otherwise an abuse of discretion. Whether the BPMSD was empowered under the relevant Bank administrative orders thereafter to initiate disciplinary measures is an issue that will be discussed below.

Show Cause Notice and BPMSD Investigation

10. On 27 May 1993, the Manager, BPHR, sent to the Applicant a Show Cause Notice, asking him to explain why disciplinary measures should not be initiated against him for the excessive telephone claims relating to the October and November 1992 missions. As he had on 4 May, the Applicant responded on 17 June by admitting the oversight, affirming that the Bank should disallow the disputed claims, and attributing the mischaracterization of personal telephone calls as official to the strains resulting from the pressures of work. On 8 July, the Manager, BPHR, sent another memorandum to the Applicant, referring not to the RRBT but to the manner in which the Applicant had initially placed the telephone calls; he was asked why the calls to his home and to a business place were routed through the Bank operator and whether there was a

compelling reason not to place the calls directly. The Applicant did not respond to those inquiries until 16 September 1993, at which time -- in a memorandum to the Manager, BPHR, -- he adverted to concerns he had had about his security and that of his family as a result of threats deriving from his role in aborting a major Bank project; he therefore "found it prudent not to expose [his home number] to any outsiders."

11. This explanation too might reasonably have been accepted as satisfactory by BPMSD (although it surely does not explain the routing of calls to the Applicant's automobile dealer), but it was not found convincing (as was also to be the later conclusion of the Committee of Inquiry), and on 21 October 1993, the Director, BPMSD, recommended to the President that he appoint a COI under A.O. No. 2.07, sec. 4.1(d). The Director, BPMSD, also recommended that such a COI be appointed in the future to deal with "all disciplinary cases," and not only those in which termination of employment was contemplated as a possible disciplinary measure.

12. On 2 November 1993, the Director, BPMSD, sent to the Applicant a memorandum entitled "Disciplinary Procedure -- Notice of Charge and Inquiry." It summarized the alleged claims for reimbursement of personal calls as official in both the October and November missions and the Applicant's failure adequately to explain why such calls could not have been placed directly, and stated:

> [W]e are of the opinion that you have violated Sections 2.12 and 5 of the Administrative Order No. 2.02 by:
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> a. misrepresenting private telephone calls as official business calls in your expense statement for the 15-21 November 1992 mission to Hong Kong; and
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> b. exhibiting total disregard and ignorance of the Bank's established regulations and procedures on business trips and use of telecommunications facilities.

The memorandum informed the Applicant that a Committee of Inquiry had been constituted for the purpose of investigating the charges and providing an opportunity to the Applicant to defend himself. The Applicant's contentions regarding defects in the creation and proceedings of the COI will be considered below.

13. The Applicant claims that the investigation pursued by BPMSD, both before and after its issuance of the Show Cause Notice, were defective in several material respects. Most significant are his assertions that BPMSD was prejudiced against him, that its Show Cause Notice was "without legal basis," and that it had no power to initiate disciplinary proceedings.

14. At the threshold, the Respondent contends that any procedural flaws or lack of due process in the BPMSD investigation are immaterial and should be disregarded by the Tribunal, because the COI conducted an altogether independent investigation and made altogether independent findings, purposefully ignoring any fruits of the antecedent BPMSD investigation. The COI did indeed express concerns about the fairness of the BPMSD investigation following upon the issuance of the Show Cause Notice on 27 May 1993, and concluded: "[T]he Committee decided that it was unsafe to rely on any documentary evidence provided by Mr. Chaudhry after 27 May. . . . Rather, the Committee focused on the alleged misrepresentations in the 23 February Memorandum and the RRBT, respectively, and sought to establish the facts by independent Inquiry."

15. The contention of the Respondent on this issue cannot be sustained. It may well be that neither the COI nor the President in later imposing discipline was tainted by any alleged procedural improprieties in the antecedent investigation by BPMSD, and that their conclusions with respect to fraudulent misrepresentations are substantively unassailable. Nonetheless, it is conceivable that there might have been antecedent procedural shortcomings that were so unfair to the Applicant, and that so disadvantaged him in responding to the Show Cause Notice, that it would be proper for the Tribunal to provide him with a remedy in order both to rectify tangible or intangible injury and to serve as a deterrent to the Respondent in comparable future cases. For those shortcomings may constitute a breach of the terms and conditions of his employment -- which, as the Tribunal has held, encompass inter alia general principles of law, Staff Rules and Regulations of the Bank, Personnel Handbooks for professional and support staff, and Administrative Orders and Circulars. (Lindsey, Decision No. 1 [1992], para. 4.) If so, then the Tribunal has the power to issue an appropriate remedy.

16. The Applicant appears to claim that the issuance of the Show Cause Notice of 27 May 1993 reflected prejudice on the part of BPMSD. That notice, however, constituted no more than an assertion that, on the evidence at hand, there was a reasonable basis to believe -- absent further explanation or justification from the Applicant -- that he had improperly claimed reimbursement for telephone calls and that a third-party investigatory body would have to investigate further and draw conclusions about that matter. BPMSD was in effect declaring that it had no authority to make a dispositive determination of the Applicant's culpability vel non, and that such authority reposed only in a separate and independent body. This was also the message underlying the Notice of Charge and Inquiry, communicated by the Director, BPMSD, on 2 November 1993; and it too cannot be regarded as providing evidence of bias or prejudgment by the Respondent.

17. The Applicant contends, for a number of reasons, that BPMSD acted in excess of its proper authority when it issued a Show Cause Notice. The principal assertions are that A.O. No. 2.07 made no provision whatever for the issuance of such a Notice, and that that administrative order reposed power to discipline in department heads and not in the BPMSD.

18. It is true that A.O. No. 2.07 made no express provision for the issuance by BPMSD of a Show Cause Notice. Yet it is the conclusion of the Tribunal that even though the Show Cause Notice was not required or even provided for in that administrative order, it was within the implied authority of BPMSD to issue such a Notice. A.O. No. 2.07 gave to BPMSD a central role in the implementation of disciplinary measures for unsatisfactory performance, including providing written charges and conducting a hearing. It would be undesirable for charges and an investigation to follow immediately upon allegations or suspicions of wrongdoing; rather, it is reasonable to assume that A.O. No. 2.07 contemplated that BPMSD would first assure itself that charges were warranted. To do this, it was within its authority to hold a preliminary investigation, including the affording of an opportunity to the suspected staff member to proffer evidence or explanation. That was the purpose of the Show Cause Notice. Surely no staff member can reasonably question this procedure, which is intended to assure due process.

19. What has just been stated refutes as well the Applicant's assertion that the Head of his Department was the only "competent authority" authorized by A.O. No. 2.07 to initiate proceedings and to impose disciplinary measures upon him. That administrative order does provide, in Section 6.1, that "Heads of Departments/Offices are responsible for maintaining discipline of all staff members under their general supervision." But it must also be noted that Section 4.1 of A.O. No. 2.07 expressly empowers BPMSD to assure that "[t]he staff member will be acquainted in writing with the nature of the charges against him." It therefore cannot

reasonably be maintained that BPMSD was not the competent authority to issue the Notice of Charge and Inquiry. Whatever might be said for treating the Department Head as the "competent authority" under Section 4.1(e) to "determine whether the misconduct alleged has been proven to his satisfaction, and if so, what penalty should be imposed," that does not negate the authority of BPMSD to initiate charge and inquiry proceedings that are antecedent to the actual imposition of discipline. Moreover, A.O. No. 2.07 provided that it was only for verbal or written reprimands that the Head of Department was empowered to take effective action without the President's authorization, and even then Section 3.1(c) required that there be consultation with the Director, BPMSD. More severe discipline, such as deferment of salary or demotion in rank, did not contemplate unilateral decision-making by a staff member's Head of Department.

20. In any event, A.O. No. 2.07 reiterates that it is the President who has the power to administer discipline -- a power earlier granted under the higher authority of Article 34 of the Charter of the Bank and Section 24 of the Staff Regulations -- and the administrative order purports simply to declare the manner in which the President delegates that power regarding stipulated disciplinary measures. The administrative order does not purport to declare that the President cannot in particular cases choose to exercise, in effect to re-claim, that power himself.

21. The Applicant also asserts that the Show Cause Notice was defective for the reason that it placed the burden upon him to explain or justify his behavior, i.e., to prove absence of culpability, and that it thereby violated his right to remain silent in the face of accusations and to rely upon a presumption of innocence. To the extent that the Applicant means to suggest that it was improper for BPMSD to issue the Show Cause Notice until it was convinced of the Applicant's culpability beyond a reasonable doubt, that misconceives the respective responsibilities of BPMSD and the COI; it was for the COI, not BPMSD, to reach adjudicatory-like conclusions about culpability. To the extent the Applicant means to suggest that no adverse implication could properly be drawn by BPMSD from his failure adequately to respond (or to respond at all) to the Show Cause Notice, this too represents an improper transfer of criminal law precepts into internal Bank procedures designed to assess possible disciplinary measures. The Respondent has made convincing reference to staff rules and Tribunal decisions of other international organizations to support 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. See, e.g., World Bank Staff Rule 8.01; In re Saunoi (No. 4), ILOAT Judgment No. 1085 (1991), para. 3; Wallach, UNAT Judgment No. 53 (1954), para. 7.

22. The Applicant's contentions relating to the breach of the confidentiality of Bank documents in his case are, in the view of the Tribunal, more troubling. The Applicant claims that, despite the Bank's acknowledgment at every stage that all communications and proceedings were to be strictly confidential, there was wide and careless disclosure that caused direct injury to the Applicant and that influenced the decisions made by BPMSD and by the COI. It is indisputable that the disciplinary procedures contemplated by the Bank's pertinent instruments are to be carried out with the utmost discretion and attention to confidentiality. That is particularly true in a case such as this, in which there are charges of serious ethical wrongdoing and in which those charges have been contested and remain technically unproven until the end of a lengthy process of investigation.

23. The record shows that one document setting forth the allegations and proceedings against the Applicant was intentionally distributed at least to the following: the President, the Vice President (Finance and Administration), the Office of the General Counsel (OGC), BPMSD, the

Controller's Department, the Office of Administrative Services (OAS), and the Heads of Departments in which worked the Applicant, his accused fellow staff member, and each of the three members of the COI. It is contended by the Bank, however, that each of these individuals or departments was necessarily involved or directly interested in the Applicant's disciplinary proceeding and that it was essential that they be contacted at one or another stage of that proceeding. Beyond that, pertinent documents were marked "Strictly Confidential."

24. The Tribunal concludes that, by and large, the Respondent made reasonable attempts to keep communications and proceedings relating to the Applicant's case confidential. It is indeed inevitable that various persons within the Bank will be involved in, and can reasonably be kept informed about the course of, disciplinary proceedings. But it is important that the Bank, rather than relying on past practice and a generalized claim of "need to know," identify with care the precise need of particular Bank officials to know of the details of particular disciplinary proceedings. For example, it is not obvious to the Tribunal why the Heads of Departments in which COI members are employed must, or should, know of anything more than that those three persons have been appointed to a committee of inquiry in an unspecified disciplinary matter; identification of the charged staff member, and details of the charges against him, seem to be altogether unnecessary. Similarly, the Tribunal expresses its concern that information about both the Applicant and his accused fellow staff member were too often disseminated in a single document, so that, for example, each Department Head knew of the accusations against a staff member who was not in his Department. This was unnecessary, and impaired the Applicant's right to confidentiality.

25. The Applicant asserts that members of the support staff learned of the BPMSD investigation at an early stage, and exerted pressure to take stern disciplinary action. The record clearly shows that the support staff did get wind of an investigation into improper telephone claims by some professional staff members. But it has not been established that the Applicant or his colleague was personally identified as a person under investigation, or that responsible Bank authorities were responsible for any such disclosures, or that any such disclosures to the support staff improperly influenced the investigation or the outcome of the Applicant's case. The fact that two support staff members had recently been discharged, for more serious offenses (including the submission of fraudulent medical claims), in all likelihood did induce the Bank to pursue the Applicant's case with particular seriousness of purpose. But that alone cannot be regarded as arbitrary, discriminatory or an abuse of discretion by the Bank; indeed, had the Bank been markedly less thorough in the proceeding here than it had been in the earlier cases of support staff, such behavior could well have been condemned as discriminatory.

26. Finally, any such disclosures appear rather clearly not to have improperly influenced the investigation or the outcome of the Applicant's case; the COI found inadequate proof of wrongdoing and the President took no disciplinary action. Although the COI had apparently learned through hearsay evidence that the wife of the Applicant had been "victimized" as a result of the investigation against him, it is once again difficult to ascertain that any such spreading of rumors can be attributed to lapses in confidentiality on the part of Bank officials, and there is even a serious question about whether there was indeed an identifiable adverse impact upon the wife of the Applicant.

The Creation of the COI

27. The Applicant raises several challenges pertaining to the creation of the COI. He asserts that BPMSD had no authority to appoint a COI in his case. In particular, he claims that A.O. No. 2.07 provides for the appointment of a COI only when termination of employment is

contemplated as a disciplinary measure, which was not the case here, and that that administrative order makes no provision for the designation of a COI on an ad hoc basis for lesser disciplinary cases. Moreover, he claims that the subsequently revised administrative order, now numbered A.O. No. 2.04 (issued to staff in January 1994, with an effective date of 1 November 1993), was the actual foundation for the appointment of a COI in his case, and that this constituted an invalid retroactive modification of the terms of his appointment.

28. As already noted, Section 4.1(d) of that administrative order required that a COI be appointed only "where the case involves misconduct which, if proven, will be a ground" for termination or summary dismissal. At all times in this case, however, BPMSD acknowledged that the issue of sanction was not meant to be foreclosed, and that the COI was not "strictly" based upon A.O. No. 2.07 but was merely "similar to" the kind of Committee contemplated in that administrative order. The Respondent has explained its creation of a COI as a proper, if not a required, response to the Tribunal's decision in Lindsey, Decision No. 1 [1992], which emphasized the need for due process by the Bank when refusing to extend a fixed-term appointment on account of poor performance. The Bank inferred that it should have an independent third-party investigation of essentially all disciplinary charges and not merely those likely to culminate in termination or summary dismissal. The Bank concluded, among other things, that there should be a separation of functions between the accusatory, as reflected in the Notice of Charge and Inquiry filed here by BPMSD, and the investigatory.

29. The Tribunal has no doubt that, as a general matter, the President has the institutional authority to create committees of inquiry to assist in investigating and making recommendations concerning disciplinary matters, even when those might not be specifically mentioned in an administrative order. Apart from anything in A.O. 2.07, there are more authoritative Bank instruments which furnish such a source of Presidential authority. Article 34, Section 5 of the Agreement Establishing the Asian Development Bank (the Charter) expressly provides that "The President shall be chief of the staff of the Bank . . . [and] shall be responsible for the organization, appointment and dismissal of the officers and staff in accordance with regulations adopted by the Board of Directors." Section 24 of the Staff Regulations also provides that "The President may impose disciplinary measures on staff members whose conduct is unsatisfactory." The power to impose discipline must include the power to determine the facts upon which disciplinary action is to rest, and the creation of a committee of inquiry -- accompanied by assurances of due process -- is a reasonable method for the exercise of this power. The Tribunal therefore concludes that, simply because the COI that was created to investigate the Applicant's alleged wrongdoing was not expressly contemplated by A.O. No. 2.07, that alone did not render the appointment of such a committee beyond the powers of the President. Even if a COI was not required under that administrative order, neither was it prohibited.

30. But the creation of a COI under the specific facts and circumstances of a given case might properly be challenged as an abuse of the Bank's discretion. It has been argued that the creation of the COI in the instant case was an unwarranted formality, because the issue was focused, the facts were essentially undisputed, the alleged wrongdoing was not egregious, and the likely discipline was modest. Indeed, after considering the two cases assigned to it regarding misrepresented telephone expenses, the COI itself so asserted in its Observations on the Conduct of Disciplinary Investigations, dated 10 March 1994:

> The facts of the two cases were quite straightforward, they were reasonably well documented and involved claims for relatively small amounts of money. Such relatively simple cases should have been decided quickly, but fairly and, arguably, need not have

> been considered by a formal inquiry. BPMSD seems to believe, or has been advised, that the only way to ensure fairness is for virtually all allegations of misconduct to be referred to Committees of Inquiry before disciplinary action is instigated.
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> We do not agree with this view.
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> The Bank should have fair, transparent and equitable procedures, which enjoy the confidence of staff, for dealing with disciplinary matters. If such procedures were in place and properly administered, only the most serious allegations would need to be referred to formal inquiries; the rest could be handled in a confident, discreet and professional manner by executive action.

The COI, in effect, concluded that this was a minor case in which its own establishment constituted an excess of due process.

31. The fullest response provided by the Bank in the record of this case is in the 17 March 1994 memorandum to the President drafted by an Assistant General Counsel, OGC, which was designed to rebut many of the criticisms set forth by the COI in its Observations memorandum. There, the Assistant General Counsel explained the reasons for creating a COI in all cases except those involving the most minor wrongdoing:

> . . . The old A.O. [No. 2.07], under which the initial investigator of the alleged misconduct, the initiator of disciplinary proceedings and the final recommender of disciplinary action were the same, would not withstand the review and scrutiny of the Administrative Tribunal. We have to have a formal third party fact-finding body to determine whether BPMSD's charge is accurate or not. This requirement of "due process" is independent of how small the staff member's monetary gains were. A "verbal reprimand" and "warning" are excluded from disciplinary measures. They are treated as part of normal supervisory functions to be exercised by the supervisors concerned.
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> . . . [T]he establishment of a third party committee to ascertain facts concerning the alleged misconduct and to provide appropriate procedures, in which the right of the staff member concerned to answer the allegation is properly safeguarded, is "a general practice accepted as law" in the areas of disciplinary proceedings to fulfill due process. [Reference is made to the Tribunal decision in Lindsey.] . . .
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> It is correct that under Section 4.1(d) of old A.O. 2.07, the establishment of a Committee was envisaged for the misconduct which would, if proven, warrant the termination of appointment for misconduct or summary dismissal for serious misconduct . . . . In the wake of the Lindsey case, however, we concluded that a committee of inquiry should be established in all cases except summary dismissal for serious misconduct in accordance with the established practice of international organizations. . . .

The Reply of the Assistant General Counsel indicates his view that any such investigatory committee should be sensitive to the "degree of economy and selectivity" warranted in the particular circumstances of the case, the need for maximum dispatch, the brevity of statements and rebuttals, and the desirability of forwarding recommendations within two weeks after being convened.

32. The Tribunal concurs in what it perceives to be common ground between the COI Observations and the Reply of the Assistant General Counsel: that there are certain cases in which the alleged offense is so trivial, the likely discipline so minor, and the facts so straightforward, that it might reasonably be viewed as an abuse of discretion for the Bank to initiate an elaborate investigatory proceeding. In those circumstances, what might be regarded as due process could otherwise be viewed as an unreasonable exhaustion of the resources and energies of the accused staff member as well as of those sitting in judgment, as well as of the Bank and of its staff who participate in the disciplinary proceedings. In other words, the principle of proportionality may sometimes apply not only to the substantive sanction but also to the disciplinary procedures themselves.

33. The Tribunal concludes, however, that the present case does not involve such disproportionality. Here, although most of the facts were undisputed, there was an issue relating to the Applicant's state of mind when he made the misrepresentations concerning telephone charges -- a matter about which he was persistent in his defense and to some extent evasive (e.g., his reason for routing family calls through the Bank operator rather than dialing them directly). Moreover, when the proceedings before the COI were initiated, the nature and quantum of the Applicant's wrongdoing could not have been regarded as clearly trivial, and the discipline that was contemplated, although not at the level of termination of employment, was such as possibly to have resulted in considerable monetary and reputational harm to the Applicant. In all of these circumstances, it cannot be said that the Bank acted arbitrarily or abused its discretion in conducting its investigation with the assistance of the COI. It should be pointed out, moreover, that the COI held very limited hearings and heard only two witnesses (one of them by telephone) other than the Applicant and his Manager. It can therefore be said that the COI acted with reasonable dispatch and economy of proceedings.

34. The Applicant contends that the Respondent's departure from A.O. No. 2.07 in establishing a COI to investigate his situation was unprincipled, and that its invocation of the Lindsey decision was merely an afterthought. The record does not support this conclusion. The Applicant points to the fact that the Tribunal decided the Lindsey case in December 1992 and that it was not invoked in his case until nearly a year later. There was no need, however, for the Bank to consider the impact of Lindsey upon the Applicant's situation until the latter date, for it was only then that it had to address the question whether the investigation by BPMSD should be followed by a more "neutral" fact-finding proceeding undertaken by a third party such as the COI. BPMSD referred to the desirability of a COI in all disciplinary cases when it wrote to the President in October 1993; and Lindsey was cited to the Applicant's Director, PSD, within one week after the issuance of the Notice of Charge and Inquiry in this case.

35. Related to the contention just discussed is the Applicant's further contention that A.O. No. 2.04 -- announced in January 1994 as a replacement for old A.O. No. 2.07 -- was improperly applied to him retroactively, in violation of the principle articulated in such decisions as that of the World Bank Administrative Tribunal in de Merode, WBAT Reports 1981, Decision No. 1. To apply to disciplinary proceedings conducted in November 1993 procedures incorporated in an administrative order not adopted until January 1994 would indeed raise the most serious questions of retroactivity in violation of a staff member's terms of appointment.

36. The Tribunal is, however, satisfied that all of the proceedings in this matter were conducted under the terms, express and implied, of the "old" A.O. No. 2.07, as in operation at the time of those proceedings. Indeed, when this COI was appointed, there were many references to A.O. No. 2.07, so that a number of parties (particularly the Heads of Departments in which the two accused staff members were employed) expressed misgivings about the severe sanctions

apparently contemplated under that provision. Several documents to reach the Applicant, including the 2 November 1993 Notice of Charge and Inquiry itself, expressly referred to A.O. No. 2.07. The COI stated in the first footnote to its 7 March 1994 report: "In accordance with the accepted convention that penal regulations should not have retroactive effect, the Committee has based its proceedings on Administrative Order No. 2.07 which was in effect at the time of the alleged commission of the violations, namely January 1993. This is the A.O. referred to in the BPMSD documentation." There was thus no improper retroactive application of the Bank's administrative orders.

The COI Proceedings and Report

37. The remaining claims of procedural error and lack of due process that are presented by the Applicant relate to the proceedings before the Committee of Inquiry. Principal among these are the initial insecurity resulting from the uncertainty by both the COI regarding the Committee's procedures and terms of reference, and the disciplinary sanction to which the Applicant was exposed; the COI examination of a witness not in the Applicant's presence; and the denial of access to important documents, particularly the COI Report and Observations ultimately transmitted to the President.

38. The COI heard testimony and gathered documentary evidence in January and February 1994. The Applicant was represented by counsel throughout these proceedings and copies of all documents received by the COI, and its formal notes, were made available to him. The COI, operating on the assumption that all facts necessary to make out the charge against the Applicant had to be proved beyond a reasonable doubt, reached the following conclusions: the Applicant misrepresented to the Bank in his RRBT that certain personal telephone calls made during his Hong Kong mission were official expenses; there was insufficient evidence to prove beyond a reasonable doubt that the misrepresentation was made fraudulently with the intention to deceive the Bank, or to prove that the Applicant had disregarded the Bank's regulations concerning business trips and telecommunications facilities; and there was evidence to suggest that the Applicant's misrepresentation was merely careless. Accordingly, the COI Report of 7 March 1994, which was forwarded to the President, stated: "[T]he Committee finds that there is insufficient evidence to prove, beyond a reasonable doubt, that Mr. Chaudhry either violated the Administrative Orders or breached the Staff Regulations." On 10 March, the COI also forwarded to the President a report entitled "Observations on the Conduct of Disciplinary Investigations," in which it commented at length, often critically, upon the proceedings undertaken by BPMSD and by the COI in connection with the two staff members (including the Applicant) charged with fraudulent misstatements concerning personal telephone calls; a memorandum in response was prepared by an Assistant General Counsel, OGC, and dated 17 March 1994.

39. On 12 April 1994, the Applicant was informed, in a memorandum from the Director, BPMSD, of the findings of the COI in his case and of the decision of the President to pursue no further action against him. Although the Applicant or his counsel requested a copy of the COI Report, or both the Report and Observations, on several occasions in April, May and June of 1994, these (along with the OGC response) were not furnished to the Applicant until 1 July 1994. On 7 October, the Applicant filed with the Manager, BPHR, a claim for compensation for injuries arising from the investigation against him; the Manager, and later the Director, BPMSD, rejected the claim as time-barred. The Applicant on 15 December 1994 filed his Statement of Appeal with the Appeals Committee, which rejected all of his claims on the merits, and thus declined jurisdiction, on 21 April 1994.

40. The Applicant contends that it was arbitrary and unfair to subject him to uncertainty, in November and December 1993, regarding the applicable procedures before the COI and particularly the disciplinary sanction to which he was subject on account of the alleged misrepresentations by him in making reimbursement claims. The record shows that the COI was indeed unsure through November and December 1993 of its terms of reference from the President and to some extent of the applicable procedures and the contemplated disciplinary sanctions. By referring to Section 4.1(d) of A.O. No. 2.07 in a number of communications, BPMSD did -- as the Applicant contends -- contribute to that uncertainty. That was surely regrettable. The Tribunal notes, however, that more or less contemporaneously there were further communications that made clear to both the Applicant (who by mid-November was represented by counsel) and the Committee that the contemplated COI was only "similar to" one appointed under Section 4.1(d), that it was created ad hoc to deal with the alleged instances of telephone overcharges, and that the contemplated discipline was within a flexible range and not necessarily termination or summary dismissal. Moreover, the procedural rules to be used by the COI were rather firmly in place and explained to the Applicant within two weeks of the COI's appointment. Nor is it likely that any uncertainty about the relationship between the COI and the President materially disadvantaged the Applicant.

41. The Applicant further contends that due process was violated when one of the members of the COI interviewed his secretary by telephone, without his participation. The Respondent points out, however, that the secretary was on indefinite leave from the Bank due to an illness in her family, and that a copy of the written record of the telephone interview was given to the Applicant. Under these circumstances, the Tribunal concludes that the COI interview was reasonable and did not deny the Applicant due process. It is also to be noted that the secretary's testimony was characterized by the Applicant's attorney as corroborating his case, and that that testimony formed one of the elements which ultimately induced the COI to recommend that no disciplinary action be taken against the Applicant.

42. The Applicant further contends that he was improperly denied access to important documents presented to or authored by the COI. The most significant among these documents, in the judgment of the Tribunal, are the reports transmitted by the COI to the President on 7 March and 10 March 1994, particularly the former, which scrutinized in detail the charges against the Applicant and assessed the evidence in support of those charges. It is true that the factual conclusions reached by the COI were reiterated to the Applicant on 12 April 1994 when he was informed of the President's decision to take no action against him, and also that the COI reached conclusions that in most respects favored the Applicant; thus, his need to have access to those reports in order to protect his rights, interests and reputation was not as great as if the COI findings had been uniformly adverse.

43. Nonetheless, there were observations, analyses and conclusions in that Report that were not altogether exculpatory and that should have been communicated to the Applicant. Section 5 of A.O. No. 2.08, concerning Access to Personal Career Files, provides:

> The contents of all documents and notes which form part of the personal file of a staff member, written by their Managers and other officers in various functions should be divulged to and made known to the staff member concerned at an early stage. It is, therefore, essential that such documents or notes be copied to the concerned staff member upon the completion of said documents in order to avoid misinterpretation and to enable the staff member to comment or take such action as is allowed to rectify any inaccuracy contained in said documents.

The Tribunal concludes that, at least until acted upon by the President, the 7 March Report and the 10 March Observations of the COI were properly treated as internal documents intended for the purpose of advising and making recommendations to the President. Once the President communicated his formal decision that no disciplinary measures should be imposed, A.O. No. 2.08 appears to contemplate that the two pertinent COI documents should have been made available to the Applicant, upon request, with reasonable promptness. It is true that the Reports were (after repeated requests by the Applicant's counsel in April, May and June) ultimately given to the Applicant on 1 July 1994, well before he filed a claim with the Manager, BPHR, and his appeal to the Appeals Committee. Nonetheless, the delay of more than two months was unnecessarily long, even if the Applicant can point to no precise injury that resulted from such delay.

44. Other, more incidental, contentions of the Applicant regarding procedural flaws in the disciplinary proceedings have been thoroughly considered by the Tribunal and have been found unpersuasive.

Conclusion

45. In sum, almost all of the Applicant's contentions must be rejected. There were some respects in which proper procedure was not carefully followed, in particular with regard to the breach of confidentiality of the disciplinary proceedings and the delayed disclosure of the COI Report and Observations. In these latter respects, it is likely that some intangible injury was caused to the Applicant; the extent of that impact cannot be precisely measured, although it is clear to the Tribunal that it did not rise to the level of warranting a significant compensatory judgment. The Tribunal considers an award of US$ 5,000 to be equitable. Although the Applicant has requested that the Respondent be directed to pay his costs, the Tribunal notes that it would ordinarily be appropriate to make such an award taking into account the proportion of his claims that were ultimately sustained by the Tribunal. Here, however, in view of the extensive and unwarranted prolixity of the pleadings and annexes proffered by the Applicant, his claim for costs should be denied.

Decision:

For these reasons, the Tribunal unanimously decides that the Respondent shall pay the Applicant equitable compensation in a sum of US$ 5,000. In all other respects, the Application is dismissed.