

# ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 38  
(6 January 1998)**

**Ronald Chan  
v.  
Asian Development Bank  
(No. 3)**

**Mark Fernando, President  
Toshio Sawada  
Thio Su Mien**

## **Facts**

1. This is an Application by the Applicant to challenge the C3 rating given to him in the 1995 Performance Evaluation Report ("PER") on the ground that it was a "reprisal" for not accepting a proposal by the Bank's Budget, Personnel and Management Systems Department ("BPMSD") to withdraw his grievance relating to a mid-year performance review meeting held on 30 June 1995. Furthermore, his supervisors failed to apply fair, impartial and transparent personnel policies in the evaluation process.

2. The Applicant joined the Bank in 1978 as a project engineer. In 1993, he was transferred under a job rotation program from a department now known as the Central Operations Services Office ("COSO") to the Private Sector Department. In January 1995, as a result of a major reorganization within the Bank, he was transferred to the Infrastructure, Transport and Communications - West Division ("IWTC"), in the Infrastructure, Energy and Financial Sectors - West Department ("IWD"). The Bank's Personnel Handbook for Professional Staff provides that "[t]he 'Home' Department/Office is obliged to take participants back at the same or higher level after the rotation", and the memorandum dated 22 January 1993 from the Bank's Vice-President (Finance and Administration) stipulates that the conditions of transfer will include an assurance that participants may return to their original departments within a maximum period of three years.

3. In February 1995, the Applicant received an overall relative rating of "C2 - fully satisfactory" for his performance evaluation for the period April to December 1994 (the "1994 PER"). However, the Deputy Director of the Private Sector Department noted that the Applicant's performance was on the low side of the C2 rating and he was advised to improve his performance. There are three main generic overall relative performance rating categories, namely "satisfactory", "marginal" and "unsatisfactory". The "satisfactory" category is divided into three performance levels:

C1: where the staff member has contributed significantly beyond expectations;

C2: staff below C1 who have met the expectations of their work unit;

C3: staff whose performance is satisfactory on an overall basis but whose performance does not meet requirements in some areas and who need supervisory guidance to improve their performance.

4. On 30 June 1995, the Applicant's Director, convened a meeting (the "June 30 Meeting") attended by the Applicant, the Deputy Director, IWD, and the Manager, IWTC. At the Meeting, the Applicant was informed that the Bank perceived his work performance to be "marginal", and that a six-month probationary work program was to be imposed to give him a chance to improve his performance. He was told that if his work did not improve, BPMSD may have no alternative other than "to review his usefulness as [a] Bank staff member".

5. The Applicant protested the June 30 Meeting, as "irregular", a "farical process" and a "travesty" of the Bank's rules of due process and procedure. He filed a grievance contending that the imposition of the six-month work program was unauthorized, arbitrary and "improperly motivated". He then filed an appeal with the Appeals Committee (Appeal No.17 of 1995), which declined jurisdiction on 20 June 1996, and an application with the Tribunal, which on 7 August 1997 ruled in his favour, holding that the June 30 Meeting and the imposition of a six-month probationary work plan was a violation of due process. (Ronald Chan (No. 2), Decision No. 36 [1997], III ADBAT Reports 111)

6. The present Application arises out of the Applicant's 1995 PER. On 1 February 1996, he completed Part 1 (Ratee's self assessment) of the 1995 PER, and submitted it to the Manager, IWTC, for approval.

7. Although the Manager, IWTC, completed his evaluation of the other professional staff as early as 9 February 1996, he had not evaluated the Applicant's performance even by 16 February 1996. Accordingly, the Applicant inquired as to the progress of his PER, and was informed by his Manager that he was awaiting further instructions from BPMSD on how to deal with the PER. The Applicant subsequently sent a memorandum dated 27 February 1996, to his Manager expressing his concern about the delay in processing his PER and requesting prompt action. On 28 February 1996, the Manager showed the Applicant the draft performance checklist and narrative assessment by him of the Applicant (Part 2 of the 1995 PER). The Applicant disagreed with the Manager's evaluation and asked the Manager to make appropriate revisions. The Manager said that he would consult with BPMSD on this matter. He also mentioned that the Applicant's request - made on 30 October 1995 - for transfer to COSO, could be implemented very quickly if the Applicant would accept a C3 rating.

8. On 26 March 1996, the Deputy Director (Personnel), BPMSD, pursuant to negotiations with the Applicant, wrote to the Applicant (the "BPMSD Proposal") as follows:

You have expressed the strong desire to return to COSO. While the 1993 program (COSO/PEO staff movements to operational areas and vice versa) allowed for such a re-assignment, it is the Bank's preference that such moves be minimized. Furthermore, at this time, there is no level 5 position available in the Consultant Services Division.

....

I will recommend and ensure that:

- Appropriate funding be allocated to COSO for you to move back to Consultant Services Division, as discussed with the Chief COSO, Mr. Nalin Samarasinghe.
- I get the agreement from Director IWD for the minutes of the [June] meeting and subsequent correspondence related to the meeting be removed from your file.

- The 1995 PER is finalized within two weeks, ensuring that the content and overall rating given is fair and truly reflective of your performance, without comments which could affect negatively your future promotions opportunities.

In counterpart, in order to show your goodwill and commitment to work positively, you will agree to withdraw your appeal and forego your request for apology and acknowledgment of wrong doing by Director IWD.

9. The Applicant rejected the BPMSD Proposal on 3 April 1996, on the basis that his transfer back to COSO and his 1995 PER were separate matters, to be resolved under the Bank's rules and procedures, and independently of his pending appeal with the Appeals Committee. He claimed that BPMSD's refusal to transfer him under the terms of the job rotation program and the "irregular" handling of the 1995 PER "can only be seen as reprisals for [his] pending Appeal...."

10. On 12 April 1996, the Applicant's Manager completed Part 2 of the 1995 PER and gave it to the Applicant for signature. However, the Applicant refused to sign, contending that the ratings and narrative assessment did not reflect a fair evaluation of his work performance and returned it to the Manager with written comments and reasons for not signing. Part 2 was substantially the same as in the draft shown to him earlier.

11. On 8 May 1996, the 1995 PER was returned to the Applicant, with a rating of C3 specified in Part 3 ("Overall Relative Performance Rating"). The Applicant's Manager asked him to complete Part 4.1 ("Ratee's Comments") but he refused to sign on the grounds that the remarks were unwarranted and baseless, and that the C3 rating presented an unfair and grossly inaccurate evaluation of his performance.

12. On 20 May 1996, the Applicant was transferred from IWTC back to COSO.

13. On 26 June 1996, the Director, IWD, endorsed the Applicant's 1995 PER without the Applicant's signature.

14. On 22 July 1996, the Applicant commenced his formal grievance concerning the C3 rating. He alleged that, despite having successfully completed all his assignments and the work program, as agreed upon in the 1994 PER, he had received "unfair" performance ratings which "do not represent a fair evaluation of [his] ... performance." He also alleged that his 1995 PER was a reprisal for not accepting the BPMSD Proposal and that fair and reasonable procedures had not been observed. His grievance was rejected and he filed an appeal to the Appeals Committee on 7 November 1996 which was dismissed on the grounds that, although consultation with BPMSD prior to and during the PER exercise was unusual, it did not constitute a violation of fair and reasonable procedures; and that the proposed "deal" though "unusual" did not constitute a threat of reprisal.

## **Issues**

15. There are two issues:

- a. whether there was a breach of due process by the Bank in the 1995 PER exercise which led to the Applicant being given a C3 rating; and

- b. whether there was any basis for the C3 rating.

### **Breach of Due Process**

16. The Applicant contends that there is a breach of due process by the Bank contrary to Section 2.14 of Administrative Order No. 2.02 (Personnel Policy Statement and Duties, Obligations and Rights of Staff Members) on three grounds:

- a. that the Applicant's Manager, IWTC, in his assessment of the Applicant's performance for the 1995 PER exercise had improperly consulted BPMSD;
- b. that the BPMSD Proposal was improper as it constituted a threat of reprisal; and
- c. that there was bias because the three raters who evaluated the Applicant for the 1995 PER were the same three persons who participated in the June 30 Meeting.

### **(a) Consultation with BPMSD**

17. The position of the Bank was that the Applicant's Manager consulted BPMSD only after the Applicant said he would not sign the 1995 PER if he was given a C3 rating, and that such consultation was not about the correct rating to be given to the Applicant, but to get advice about the procedure to be followed if he did not sign the 1995 PER. Such a statement could only have been made on or after 28 February when the Manager first disclosed his draft evaluation to the Applicant. However, it is clear that the Manager had consulted BPMSD even before 16 February, at a time when there was no need for such advice about procedure. At that stage, the Manager's task was to make his own independent evaluation of the Applicant's performance, and in the absence of an explanation from the Manager, it is legitimate to infer that such consultation was about the Applicant's performance. Further, the Applicant's request for a transfer back to COSO had been pending since 30 October 1995. He was entitled to have that request considered under the rules applicable to the job rotation program, independently of the performance evaluation process. The Manager's statement to the Applicant that his transfer to COSO could be expedited if he would accept a C3 rating not only establishes an improper link between his transfer and his performance evaluation, but strongly suggests that both matters had been discussed with BPMSD. The Tribunal holds that the consultation with BPMSD was in breach of due process.

### **(b) Reprisal**

18. The letter of 26 March 1996 may reasonably have been understood to mean that the Applicant would receive a rating which would be "fair and truly reflective" of his performance "without comments which could negatively affect [the Applicant's] future promotion opportunities" only if he withdrew his Appeal No.17 of 1995 and his request for apology. That was not only a breach of due process but also a threat of reprisal in contravention of Section 6.6(a) (Freedom from Reprisals) of Administrative Order No. 2.06 (Grievance and Appeal Procedures).

### **(c) Bias**

19. The Applicant contends that his Director, Deputy Director and Manager ("the said raters"), who evaluated him for the 1995 PER were the same persons involved in the June 30 Meeting,

and hence there was a real likelihood of bias on their part. The Tribunal notes that at the time of the evaluation of the Applicant in 1996, the Tribunal had not yet made its ruling in Ronald Chan (No. 2), supra, that the June 30 Meeting and the imposition of a six-month probationary work program was a violation of due process. The said raters cannot be faulted for having acted on the basis that the June 30 Meeting and that work program were valid. The Tribunal is of the view that the circumstances in this case are not such as to create an appearance of bias and partiality on the part of the raters, giving rise to an apparent absence of objectivity in the rating process. (cf. Cabal, Decision No. 22 [1996], II ADBAT Reports 163, 167)

### **The C3 Rating had no basis**

20. In previous decisions, the Tribunal has ruled that the evaluation of the performance of employees is a matter of managerial discretion and that the Tribunal may not substitute its discretion for that of management (Lindsey, Decision No.1 [1992], I ADBAT Reports 1, 14). The Tribunal may intervene only when there is an abuse of discretion or if the decision is arbitrary, discriminatory or improperly motivated or if it is one that could not reasonably have been taken on the basis of facts accurately gathered and properly weighed. The Applicant has not established any of these factors.

### **Conclusion**

21. The Tribunal holds that the Applicant's 1995 PER must be set aside for breach of due process. However, it seems to the Tribunal that a re-evaluation of the Applicant's performance by his three former supervisors in IWD would not be meaningful: such evaluation is likely to be criticized if they maintain their previous assessment, and, on the other hand, they may feel inclined to give him a more favourable rating simply to avoid such criticism. Evaluation by other persons at this stage would not be warranted as they would not have adequate knowledge of his work. Further, the work program established in consequence of the June 30 Meeting for part of the evaluation period has been set aside in Ronald Chan (No.2), supra, making the basis of re-evaluation for that period uncertain. As the Applicant was transferred back to COSO in May 1996, his performance thereafter in that Department will be subject to evaluation. The Tribunal therefore does not order a re-evaluation of the Applicant's performance in 1995, but directs that the absence of a PER for 1995 shall not prejudice him in any respect whatsoever.

### **Decision:**

For these reasons, the Tribunal unanimously decides that:

- a. the 1995 Performance Evaluation Report be set aside;
- b. the Bank shall pay the Applicant the sum of US\$1,000 as compensation;
- c. the Bank shall pay the Applicant the sum of US\$1,000 as costs; and
- d. all other claims of the Applicant are dismissed.