

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 40
(5 August 1998)**

**Patricia Alexander
v.
Asian Development Bank**

**Robert Gorman, Vice-President
Martti Koskenniemi
Thio Su Mien
Shinya Murase**

1. The Applicant commenced her service as Economist with the Bank's Programs Department, West (PWD) , Division 3 (PW3) on 18 November 1992 at Level 4 on a fixed-term appointment for three years. Her appointment was later extended by a 12-month period, i.e. from 18 November 1995 to 17 November 1996 but was not renewed thereafter. The Applicant claims that the decision not to renew her appointment was based on performance evaluations that were characterized by procedural unfairness and a failure to observe due process and by errors of fact and other substantive flaws. Moreover, she claims that the Bank's decision not to regularize her appointment was tainted with gender-based discrimination . The Respondent denies all the Applicant's contentions.

Facts

2. The Applicant's first performance evaluation took place six months after her appointment. In a memorandum of 18 May 1993 to the Senior Personnel Officer, Human Resources, (BPHR), the Programs Manager, PWD, PW3 commended her work noting, however, that the Applicant could improve on the organization of her work, particularly in terms of setting more focused priorities.

3. In a Performance Evaluation Report (PER), prepared in November 1993 and covering the period from 18 November 1992 to 17 November 1993 the Applicant's overall performance was evaluated as satisfactory. The report, prepared by the Manager, expressed, however, some concern about the timeliness of the Applicant's work and her teamwork abilities. In the pertinent segment of her PER, the Applicant stated that it was regrettable that acknowledged assertiveness in women is criticized while it is applauded in men, and that the demand on us to meet the expectations of men who hold traditional views is not made reciprocally.

4. In 1994, the Applicant was assigned to work as Economist for Thailand, Laos and Cambodia. In a PER dated 1 June 1994 and covering the period 18 November 1993 to 31 March 1994, the Applicant's overall performance was again characterized by the Manager as C2 satisfactory. Her professional performance was commended although the concerns over timeliness and her working relationships with her colleagues in the Bank were restated. The Applicant did not concur with the performance evaluation but expressed the opinion that she had been penalized for forthrightness and determination that [had] been commended in [her] male colleagues.

5. In January 1995, a new Manager (who will hereinafter be referred to as the Manager) commenced work in the Applicant's Division while the previous Manager was promoted to the position of Deputy Director of their Department, PWD, PW3 (the Deputy Director, PWD). In a PER prepared by the previous Manager in January to February 1995 and covering the period 1 April 1994 to 31 December 1994, the Applicant was given an overall C3 rating (satisfactory

although on the lower side, with her teamwork ability rated marginal). The previous Manager restated the criticism concerning timeliness which was now said to impinge on her productivity and her overall contribution to the Divisions work. The concerns over her teamwork abilities were reiterated. In addition, she was criticized for an almost ... automatic tendency on her part to place the blame on gender bias for any critique of her performance. The Applicant noted now that she was unable to agree with the evaluation made of [her] performance and the rating assigned, as [she] felt strongly it [had] not been made in full compliance with the Guidelines and with good institutional practice, and that it [did] not truly reflect [her] performance. The Applicant was particularly concerned because she was informed that a C3 rating would effectively prevent conversion to a permanent appointment.

6. The Applicant felt unable to accept the criticisms in her 1994 PER due to their vagueness and lack of substantiation. She believed that her rating had been substantially influenced by a critical memorandum by a fellow staff member in the Division, the principal Program Officer for Cambodia. This was denied by her superiors. That memorandum but not the Applicant's response to it was placed in her Personnel (201) file. In February 1995, the Applicant was relieved without notification or explanation from the Cambodia desk.

7. Several discussions took place in February 1995 between the Applicant and her supervisors concerning the Applicant's performance as her fixed-term appointment was due to expire on 17 November 1995. The Applicant indicated on 24 February 1995 that she did not agree with the evaluation in her PER which in her judgment did not truly reflect her performance. After discussions with concerned officers, the Director, PWD, endorsed on 17 March 1995 the evaluation of the Applicant's performance at the C3 level. On the Managers advice, however, the Applicant did not pursue any grievance procedure against her 1994 PER.

8. On 17 March 1995, the Director, PWD, recommended to BPHR that the Applicant's appointment (expiring on 17 November 1995) be extended by one year (until 17 November 1996) instead of being made permanent because of the concerns about her performance as expressed in the 1994 PER. A work plan was to be designed for the Applicant for 1995 which was to be closely monitored. The work plan was set up by the Manager in connection with the February 1995 PER procedure. It was agreed upon by the Applicant as she produced a timetable for her main activities in a memorandum of 11 April 1995. The Applicant's work plan for 1995 consisted of three main assignments:

- a. the preparation of a Country Operational Strategy Study (COSS) for Lao PDR;
- b. the preparation of an Economic Review and Bank Operations Paper (ERBOP) for Lao PDR; and
- c. the preparation of an ERBOP for Thailand.

In accordance with the timetable prepared by the Applicant on 11 April 1995, each study was to be completed by the end of 1995.

9. From 7 April 1995, the Applicant started regularly requesting transfer to other departments through BPHR. These requests met with no success, however.

10. On 15 May 1995, the Director, Budget, Personnel and Management Systems Department (BPMSD), addressed a letter to the Applicant informing her of the extension of her appointment for one year from 18 November 1995 with a note about the concerns that had been expressed

about the Applicant's performance. The Applicant was informed that a review of her performance would again be made in February and May 1996 with a view to assessing whether her appointment might be regularized or whether her contract would not be extended beyond 17 November 1996.

11. In a letter of 4 June 1995 to the Director, BPMSD, the Applicant affirmed that she accepted the extension but made a number of objections against the criticisms of her work that had been voiced at her in the performance evaluation process. In particular, the Applicant could not agree that her performance had been poorer than that of the vast majority whose appointments are regularized at the end of a three-year appointment. In addition, she suggested that a transfer to another department might offer the best opportunity to her. The Director, BPMSD, replied on 20 June 1995 that there was no reason to revise the decision to extend her appointment for one year. Note had been taken of the Applicant's wish to transfer to another department or office and her profile had been forwarded to several departments and offices but so far no positive response had been received.

12. A mid-year review meeting between the Applicant, the Manager, the Officer-in-Charge, BPHR and a Personnel Officer, BPHR, took place on 27 July 1995. At this meeting the Manager detailed a number of criticisms of the Applicant's handling of her main tasks for 1995, focusing on her use of consultants and other resources, productivity and teamwork abilities and expressing doubts about the prospect of a timely completion of those tasks. The atmosphere at that meeting (of which the transcript and the recording have been submitted to the Tribunal) was quite tense at moments as the Manager went through a detailed list of concerns while the Applicant sought to defend her performance.

13. In a letter of 1 August 1995 to the Director, BPMSD, the Applicant provided a number of responses to the criticisms voiced against her at the July 27 meeting. She also complained about the irregular character of that meeting and the unfair, inaccurate or misleading nature of the criticisms voiced against her. She claimed that during the meeting the Manager had been hostile, sarcastic and at times abusive and she requested that the Manager be removed from any participation in her performance evaluation. She also reiterated her wish to be urgently transferred because the climate prevailing in the Division made it extremely difficult for [her] to carry out [her] responsibilities as a professional.

14. On 31 July 1995, a new Deputy Director (Personnel), BPMSD, commenced work in the Bank. On that day, the Applicant made an appointment with her, detailing her complaints about being discriminated against. On the basis of her discussions with the Applicant, the Deputy Director assigned two staff members (one male, one female) to conduct interviews with the colleagues of the Applicant in order to obtain clarification of the situation (including the management style of the Manager and the Deputy Director, PWD, (her former Manager), the Applicant's relationships with her team members and technical and personal characteristics that might affect evaluation and perceptions). The interviews - of which a set of handwritten notes made by the Deputy Director (Personnel) has been submitted to the Tribunal - gave a positive overall view of the Applicant's technical abilities. They also reveal that the Applicant was an opinionated person who would not give up easily on her views. The Manager was considered to be demanding of everyone, strict on timing and sometimes hierarchical. His behavior was not, however, felt to disclose any discrimination against the Applicant.

15. In his response of 6 September 1995 to the Applicant, the Director, BPMSD, explained that the meeting of July 27 had been consistent with the Guidelines on the Performance Evaluation of Professional Staff. The two staff members of the BPHR who had been present at the meeting

had not felt that the Manager had been abusive: They felt that the overall tone of the meeting was very professional. The Director, BPMSD, also referred to the enquiries conducted under the auspices of the Deputy Director (Personnel), BPMSD, stating that although Manager, PW3, is considered to be exacting we see no evidence of bias against [her] in particular. The Director, BPMSD, did not therefore see any reason to remove the Manager from participation in the performance evaluation of the Applicant.

16. A meeting was again convened on 12 December 1995 to discuss the Applicant's work plan status. The Meeting was attended by the Applicant, the Deputy Director (Personnel), BPMSD, the Manager, the Officer-in-Charge, BPHR, and a Personnel Officer, BPHR. At this meeting, the Manager indicated that the Applicant's work planning and organization remained unsatisfactory. In particular he singled out excessive use of staff and staff consultant resources, time wasted and things left to be done at the last minute, and the fact that finalization of terms of reference and of consultant hiring had been left for other staff. The Manager pointed out that it was not possible that the documents targeted for completion in 1995 would be completed on schedule. The Applicant responded by producing data concerning the schedules of the other COSSs prepared within her Division - Cambodia, Thailand, Vietnam - plus the COSS on China, each of which had taken significantly longer than the Lao COSS would take even under the revised timetable she had produced. She pointed out that delays were not uncommon and that any comparison of her performance must take such comparative data into account. She also challenged the Managers accusations concerning the excessive use of staff resources or consultant time.

17. On 6 December 1995, the Applicant requested home leave for the period 21 December 1995 to 26 January 1996. Because she had not finalized the three main tasks assigned to her for 1995 the Director, PWD, granted the home leave as requested only reluctantly and for humanitarian reasons. During the Applicant's home leave, two of the main papers that she had been assigned to produce were edited elsewhere in the Bank and returned to the Applicant's Division. Because they were already belated, it was decided to finalize these drafts without waiting for the Applicant's return. The draft COSS for Lao PDR was thus finalized by another staff member who forwarded it to the Vice President (West) on 26 January 1996. The Board discussion of the COSS took place on 23 February 1996. The Applicant argues, however, that when she returned to work in January 1996 she had to correct certain errors in the draft COSS that had been introduced there due to the rush to go ahead with the printing of the draft in her absence. There were also delays in the production of the other two main papers assigned to the Applicant in 1995. The Lao ERBOP was forwarded to the Government in February and finalized in March 1996 (instead of November 1995 as envisaged in the Applicant's timetable of 11 April 1995). The Thai ERBOP was finalized in February 1996 (instead of October 1995 as foreseen in the 11 April 1995 timetable).

18. On 20 February 1996, the Manager handed over to the Applicant the draft PER he had prepared. The Applicant's performance was evaluated as marginal in respect of Planning and Organizing Work, Quality, Accuracy and Timeliness of Work and Productivity and as not fully meeting requirements in regard to Dependability/Responsibility, Teamwork and Leadership and Managerial Skills. The Applicant refused to discuss the PER with the Manager until having been prompted to do so by other staff members at a performance evaluation meeting on 4 March 1996. Present at this meeting were the Officer-in-Charge, PWD, the Manager, the Senior Budget and Management Services Officer, and a Personnel Officer, BPHR. The Manager indicated that none of the Applicant's three main targets for 1995 had been attained. He dismissed the Applicant's arguments about comparison with the COSSs prepared for other countries of the region inasmuch as special circumstances applied to each country and the level

of staff resources in respect of them was different. The Manager then went over the PER rating point by point, judging the overall performance of the Applicant as marginal. In her response, the Applicant stated that there had been a serious failure of objectivity and that her working environment throughout 1995 had been difficult. In the part on self-assessment in the PER, the Applicant had noted that she had had to work under conditions of unrelenting hostility and isolation from [the] Manager. She also pointed out that it was impossible to form an objective view about the matter without recourse to comparison. In fact, she pointed out, performance evaluation is an exercise in relative assessment and the relevant question was did she perform at least as well as an average staff member of the Bank at her level?.

19. On 10 April 1996, the Applicant's performance of 1995 was rated as overall marginal. This rating was challenged by the Applicant in her memorandum of 12 April 1996 addressed to the three Vice-Presidents of the Bank. The Panel of Vice-Presidents reviewed the Applicant's 1995 PER on 13 May 1996. The Panel endorsed the Director, PWDs recommendation for a marginal rating and decided that the Applicant's fixed term employment with the Bank would lapse on 18 November 1996.

20. In a letter of 16 May 1996 the Director, BPMSD, informed the Applicant that the Bank had decided not to extend her appointment beyond 17 November 1996 and that she had been relieved of her responsibilities in the Bank until that time. This letter was handed over to the Applicant by the Deputy Director (Personnel), BPMSD, on 20 May 1996.

21. On 14 November 1996, the Applicant began formal grievance proceedings against this decision and, pursuant to Bank regulations, filed her claim with the Head, Personnel Section, BPMSD, and the Director, BPMSD, who respectively rejected her grievance and concluded that the Bank did not violate her right to due process and did not discriminate against her on the basis of gender. She appealed to the Appeals Committee which, in a decision she received on 4 July 1997, rejected her grievance for the same reasons, adding that the Bank did not deny her request for transfer and cannot be "blamed for the absence of suitable opportunities."

22. On 1 October 1997, the Applicant filed this Application with the Tribunal.

Preliminary Matters

23. The Applicant asked that the case be decided by a Panel consisting of all the members of the Tribunal, because of its detailed, fact-intensive nature and because of issues which are being presented before the Tribunal for the first time. In an Order dated 6 April 1998, the Tribunal decided that this Application should be considered by a Panel consisting of all its members. The President of the Tribunal excused himself from the proceedings, and did not take part in this decision.

24. The Applicant also asked for preliminary measures in her Application, namely, the production of documents and information. The Tribunal directed her to describe each item of evidence requested, and to identify the specific issues and contentions to which each item was relevant. After considering the objections in the Respondent's Answer, the Tribunal granted the request, in the same Order dated 6 April 1998, and required the production of the following: (a) record of interviews conducted by the Deputy Director (Personnel), BPMSD, on the Applicant's performance and her claims; (b) samples of her work output in specific projects, which formed the basis of the performance evaluation ratings in question, and other project-related documents and information pertaining to schedules and costs; (c) other documents relied upon by the Bank in evaluating the performance of the Applicant, as well as the tape recording of a performance

evaluation meeting; and (d) statistics on hiring and promotion of professional staff within the Applicant's Department and Division, classified by gender and salary level.

Discussion of the Applicant's Contentions

25. The Applicant contests the decision by the Bank's Panel of Vice-Presidents of 13 May 1996 to confirm her marginal rating and not to extend her term of employment beyond the expiration of the fixed-term deadline of 17 November 1996. In addition, the Applicant challenges her performance evaluations for 1994 and 1995 and the process leading to them. She claims these are flawed by procedural irregularities, errors of fact and discrimination.

26. The principal remedy sought by the Applicant is reinstatement with full retroactive pay and revision of her PERs of 1994 and 1995 with salary and benefits adjustments accordingly. As a secondary remedy the Applicant seeks compensation in terms of retroactive pay plus 2 years additional salary and other benefits. In addition, she claims US\$20,000 damages for mental anguish and stress.

27. A large number of the Applicant's contentions relate to the evaluation of her professional performance by her superiors in the Bank - particularly issues of timing and productivity, planning and organization as well as teamwork abilities - and to comparing these with the Bank's other staff members. Many of these arguments are made without elaboration or evidence and will therefore not be dealt with here. Having considered all of the Applicant's claims, the Tribunal will concentrate on her principal claims.

28. The Respondent, for its part, claims that the decision on the renewal of a fixed-term appointment is a discretionary one and for the Respondent to take. Accordingly, the Respondent states that it does not fall within the Tribunal's competence to substitute its discretion for that of the Respondent in the evaluation of a staff members performance. The standard of review is simply whether the Respondent has acted in a clearly unreasonable way. This, the Respondent states, it has not done.

29. As the Tribunal has repeatedly stated, a general review of the evaluation of Bank employees by their superiors is beyond its jurisdiction:

[T]he fact that the Tribunal may review the exercise of [] discretion by the Bank does not mean that the Tribunal can substitute its discretion for that of the management. 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. (Lindsey, Decision No.1 [1992], I ADBAT Reports 5, para. 12)

The matter of evaluating the performance of the Applicant is a matter for her supervisors. 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. However, the Applicant makes several specific complaints against actions by the Bank the purpose of which is precisely to demonstrate that in the process leading up to the decision of 13 May 1996, there

was procedural unfairness and a failure to observe due process, both in substantive and formal matters.

30. Despite basing itself principally on the procedural terrain of contesting the Tribunal's competence, the Respondent also challenges all these substantive points, holding that the problems in the Applicant's working environment resulted not from any errors or bias on the part of her superiors but from her continuous failure to organize her work properly, from her inability to meet deadlines and to work harmoniously with other people, problems that had been present since her entry into the Bank's service in 1992. The Respondent does not seek to deny the Applicant's technical competence but argues that she is disorganized and unreliable in her work. The bulk of the Respondent's Answer is geared at showing how, in 1995 and early 1996, the Applicant failed to meet the timetables that she herself had agreed to. The Respondent argues that the Applicant had all procedural avenues open for her so that her evaluation process as well as the decision to separate her from the Bank were fully in compliance with the requirements of due process. The Respondent emphasizes the breadth of its discretion in such matters.

31. One caveat is in order. The Applicant requests the review of both her 1994 and 1995 PERs. However, she has not contested her 1994 PER within the period of time (6 months) required. Therefore, the Tribunal does not have jurisdiction in regard to whatever irregularities she claims tainted the preparation of the 1994 PER. The Applicant claims, however, that in 1995 she was improperly dissuaded from challenging her 1994 PER. Inasmuch as the Tribunal does have jurisdiction in regard to the events of 1995, that dissuasion comes properly within its jurisdiction. It is to these facts - the claim by the Applicant that her grievance over the 1994 PER was curtailed and that her efforts of transfer were obstructed - that the Tribunal shall now turn.

A. "Grievance Curtailed"

32. In March 1995 the Applicant expressed her intention to file a grievance against the C3 level of her recently completed 1994 PER. Having discussed the matter with senior officials in the Bank and especially with the Manager, she was advised against this because it would detract her attention from urgent tasks required. She claims that the Manager had said that pursuing a grievance would create negative talk, exacerbate hostilities, and take time from [her] work. The Applicant further claims that during these discussions she had never been informed of the Administrative Order of the Bank according to which no one should be subjected to reprisals for the use of a grievance procedure. She then contends that this fact together with the views of her superiors prevented [her] from filing it as surely as refusing to issue grievance forms or other similar acts.

33. The Respondent does not specifically deny these facts. It points out, however, that they do not provide evidence of the exercise of pressure on the Applicant and that the Applicant had been made aware of the appropriate procedures for contesting her 1994 PER by the Officer-in-Charge at the meeting of 20 February 1995. The question remains whether advice against recourse to a grievance procedure in early 1995 constituted a procedural irregularity. The provision of that advice took place in the context of a series of meetings between the Applicant and her supervisors in which the Applicant's performance and the Bank's reasons for not converting her fixed-term appointment to a regular one - as well as her 1995 work program and future in the Bank - had been under continuous discussion. The Manager was anxious that the Applicant's performance meet the agreed goals while the Applicant worked under a rather negative PER, knowing that her performance would be closely observed. Under such circumstances, it was not fully proper for the Manager to express his view on whether the

Applicant should or should not use the grievance procedure. It is understandable that the Applicant might have viewed recourse to such procedure as seriously contrary to her interests. On the other hand, it appears from the record that the Applicant was made aware of the existence of procedures for challenging her PER. Besides, as an active employee she had no trouble finding out the details of the grievance procedure. Although ill-advised at the time, the suggestion not to use the grievance procedure but to concentrate on fulfilling the work programme of 1995 on which her future in the Bank depended cannot be considered a formal failure of due process.

B. "Efforts to Transfer Obstructed"

34. Having learned that her fixed-term appointment with the Bank would be extended for only one year during which her performance would be closely observed, the Applicant communicated to the Officer-in-Charge, BPHR, on 7 April 1995, her wish to be transferred to another department or office in the Bank. She believed that under the circumstances it would be difficult to maintain a good working atmosphere in her Division. In the course of the same year she renewed this request several times in her oral and written contacts with the personnel of the BPMSD. No transfer took place, however. The Applicant contends that despite the Bank's policy of encouraging transfers in cases such as hers, she was in fact denied access to a transfer inasmuch as the efforts of the BPMSD had been perfunctory and that de facto BPMSD had refused and would refuse to help her in this.

35. The Respondent states that it did explore the possibility of transfer but that any transfer would have been appropriate only after the Applicant had successfully completed the assignments listed in her work plan and that in any case any decision on whether or not to transfer is within the Bank's discretion. It appears from the documentation available to the Tribunal that the BPMSD had taken account of the Applicant's requests for transfer and had contacted other departments and offices in search for a position for her. The documentation discloses no evidence to support the contention that the Applicant was positively denied transfer and that the BPMSD would not help her. In any event, it is clear that the Bank is under no obligation positively to guarantee another position to an employee who believes that he or she is working in a difficult environment. In this case, furthermore, the Applicant had not finalized her work program for 1995 and it was not unreasonable for the Bank to wait for such conclusion as well as the eventual evaluation of her output before taking decisive steps in support of a transfer. Hence, the facts disclose no failure of due process or discrimination against the Applicant in regard to her request for transfer in 1995 or thereafter.

C. General Relations with the Programs Manager, PW3

36. A large part of the Applicant's grievances has to do with the strained relationship in 1995 and early 1996 between her and her immediate superior, the Manager. She claims that a negative attitude was already present in her previous Manager, although the matter appears to have become acute only with her 1994 PER and the appointment of the Manager in January 1995. In the Applicant's view, her evaluation arose from an inappropriately negative attitude towards [her] on the part of the Manager(s), which [she] was never given the opportunity to confront and dispel. It is particularly problems in the relationship with the Manager that are claimed by the Applicant to amount to lack of due process and discrimination. It is convenient to divide the problems into three groups: the general behavior of the Manager towards the Applicant; the treatment of the Applicant by the Manager in comparison to the treatment of other Bank employees, and questions of alleged discrimination of the Applicant on account of her

gender. The first of these is treated in the present section while the two latter claims are discussed in the immediately following two sections.

37. The Applicant claims that the Manager took steps to build a negative record about [her] performance, to which [she] was not permitted input or a right of reply; that at successive performance evaluation meetings the Manager displayed an overbearing, sarcastic and hostile attitude towards her; that the Applicant was held to account for decisions over which [she] had been denied control, and was faulted for exercising the critical judgment that was part of [her] job. As the relations deteriorated:

The Manager did not meet with [her], did not hold discussions, and allowed [her] no discretion on minor or major matters. He communicated by means of written notes. By the middle of 1995 he no longer spoke to [her], and before the one-year extension had even begun he made clear that he had already made up his mind about [her].

38. The claims about the inappropriateness of the behavior of the Manager are relevant for this case to the extent that they might disclose a failure to follow due process in the decisions to evaluate the Applicant's performance and might thus be instrumental in the decision of the Panel of Vice-Presidents of 13 May 1996 not to extend her contract beyond the date of expiry, 17 November 1996. As noted above, decisions with respect to the evaluation of staff members performance are in principle within the discretion of the Bank. The Tribunal must, however, ensure that the exercise of its discretion by the Bank is not arbitrary, discriminatory, unreasonable, improperly motivated, or adopted without due process (cf. Lindsey, Decision No. 1 [1992], I ADBAT Reports 5, para. 12; Behuria (No. 2), Decision No. 11 [1996], II ADBAT Reports 28, para. 3). The Bank's discretion in deciding whether to regularize a fixed-term appointment is somewhat greater than in a decision to terminate a staff members continuing employment. In the instant case, the Applicant bears the burden of proving abuse of discretion.

39. The Applicant claims that the evaluation process was distorted and did not truly capture her value to the Bank. Hostile or inconsiderate behavior by a superior might amount to a denial of due process to the extent that it has a direct and material effect on the performance evaluation of a staff member. As the Tribunal has had occasion to point out:

In any community, including the work place, something more than what is legally correct is desirable. Under some circumstances, lack of thoughtful consideration can be viewed as verging on abuse of discretion or denial of due process. (Behuria (No. 2), Decision No. 11 [1996], II ADBAT Reports 32, para. 15)

40. It appears from the records that the management style of the Manager was regarded by the staff in general to be demanding. He emphasized timeliness and required high performance standards of his staff. An exacting managerial style does not, however, amount to abuse of discretion. It was undoubtedly the case that the relations between the Applicant and the Manager were particularly strained. The tension between the Manager and the Applicant is clearly present in the tone of their statements and their behavior as reflected in the records of the several performance evaluation meetings that took place in 1995 and early 1996 as well as in the written messages the Manager sent to the Applicant and that are part of the record in this case. The mere fact that these relations were strained, however, is not sufficient proof of a procedural irregularity particularly as it can be reasonably said that both the staff member and the supervisor bear some responsibility for the strain. It is therefore necessary to look in more detail 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.

Memorandum of 21 December 1994

41. The Applicant claims that a substantially negative impression of her was created by the inclusion in her files of a critical memorandum of 21 December 1994 while her response was not included in those files; and that no proper investigation of the allegations took place although she requested this from the Director, PWD. She claims that it was substantially this memorandum that caused her previous Manager to downgrade her PER to C3 level in a way that made conversion to permanent staff impossible.

42. The Respondent denies these contentions, arguing that it never refused to place the response of the Applicant to the memorandum of 21 December 1994 in her files but that she did not even copy her memorandum to the file. In any case, her rating was not based on that memorandum but on her performance in 1994 as a whole.

43. The Tribunal observes that the Applicant's response to the 21 December 1994 memorandum should have been included in her files and also be given due regard in the evaluation as well, regardless of whether the Applicant had copied it to the files. It should have been the Applicant's superiors task to see to it that the response was filed in the same way as the memorandum to which it referred. However, whilst the memorandum cannot be regarded as irrelevant for the performance evaluation of the Applicant in 1994, its precise effect remains a matter of speculation.

Negative Rumors

44. The Applicant claims that management spread negative rumors about her, and particularly the erroneous information that she had had employment problems with her previous employer, the Canadian International Development Association (CIDA). The Applicant has shown that no such employment problems ever existed. The Respondent does not comment upon this accusation. The Tribunal holds that however regrettable it may be that erroneous information on the Applicant's previous work was spread among the staff, it has not been established that such rumors were maliciously designed or distributed by her superiors or that these had a direct effect on her evaluation. The possibility cannot be excluded that the circulation of such rumors may have contributed to a generally negative attitude towards the Applicant on the part of some staff as well as management. Their precise effect remains, however, a matter of speculation in which it would not be proper for the Tribunal to engage.

Lack of Consultation

45. The Applicant makes a number of claims intended to show that the Manager or her other superiors made decisions concerning her or her assignments without consulting her or informing her in advance, in a manner that was not conducive to the creation of a constructive working atmosphere in the Division. For instance, the Applicant contends that she was removed from the Cambodia desk in February 1995 without being informed and that she learned of this only when all the 1994 PERs of the Division were finalized. The Respondent observes that she was removed in order to ease her workload.

46. There is no doubt that relieving the Applicant from the Cambodia desk was a legitimate exercise of authority by the Applicant's superiors, all the more so as the Applicant had had

difficulty in meeting deadlines. The Tribunal holds, however, that it would have been proper for the management to inform the Applicant in advance of a decision with such obvious relevance to the Applicant's assignments.

47. The same problem appeared when the Manager requested a staff member in late summer 1995 to prepare a critique of a draft paper written by a consultant on gender issues, engaged by the Applicant for the preparation of the Lao COSS, without mentioning this either to the Applicant or to the consultant in question. The Bank argues that it was the Applicant's highly positive assessment of the consultant and not the quality of the consultants work that was the object of the Managers concern. Nonetheless, the Managers unwillingness to communicate on the matter directly with the persons concerned does not suggest an attempt to improve teamwork in his unit or to contribute to the Applicant's output but has the appearance of an effort to prepare evidence against the Applicant's judgment in her choice and evaluation of consultants.

Home Leave

48. The Manager criticized the Applicant for taking home leave in May 1995 and at the end of 1995 because in his opinion this had an adverse effect on the fulfillment by the Applicant of her work program. The Bank argues that the fact that work - including the finalization of consultant contracts - was then left for others does indeed prove the unprofessional attitude of the Applicant and her inability to organize her work properly. It appears that the dates of the home leave had been on both occasions earlier accepted by the Manager. The Applicant claims that she designed her work schedule so as to minimize any effect that this might have on the completion of her work program. The Applicant also denies the charge that work was left over for others to finalize during her absence. She had chosen the consultants and drafted their terms of reference which then became part of their contracts before going on home leave in May 1995. In December, she had prepared the draft COSS for Laos and worked hard after returning from leave in order to finalize it.

49. The Tribunal regards it as understandable that the Applicant's Manager and other superiors expressed concern over the Applicant taking her home leave when her main assignments were being delayed - even though the dates of the home leave had been agreed upon in advance. Although the Applicant did try to minimize the inconvenience that was caused, in particular the lengthy home leave in December 1995-January 1996 must have had an effect in further delaying the completion of her work. It may have been the case that the generally strained relationships in the Division made it difficult to agree on a compromise over the timing of the home leave. The Manager might have shown more understanding towards the Applicant's reasons for taking such leave. On the other hand, the criticism seems justified inasmuch as it was not so much directed at her taking of the leave but at her inability to organize her work so that her absence would not disturb the carrying out of her Divisions assignments.

Mid-Year Performance Evaluation Meeting

50. The Applicant claims that the performance evaluation meeting on 27 July 1995 was held in a manner that was irregular, unfair, and worrisome. The Meeting was attended by the Applicant and the Manager, also by the Officer-in-Charge, BPHR and a Personnel Officer, BPHR and lasted for two and half hours. At the meeting, the Manager went through the nine sections of the PER form, laying out detailed criticisms of the shortcomings in the Applicant's performance and behavior. She states, and the transcript together with the recording of the meeting available to the Tribunal show, that the Manager was quite uniformly critical of the Applicant, at times

interrupting her, and sometimes using sarcastic language to counter her explanations. The Applicant states that she had not been provided with the materials used by the Manager at that meeting nor permitted to prepare and deliver an adequate response to the criticisms and that this constitutes a denial of due process. The Applicant communicated her concerns about the alleged irregularity of the meeting to the Director, BPMSD, who responded on 6 September 1995, dismissing the Applicant's contentions as unfounded by reference, inter alia, to the statements of the staff members who had been present.

51. The Respondent denies that there was any irregularity in the manner in which the meeting of 27 July 1995 was conducted or that the Manager was hostile or dismissive. It points out that it was not only the right but the duty of the Manager to highlight the shortcomings in the Applicant's performance, in order that there be no misunderstanding about the Managers expectations, either.

52. It appears from the transcript and the recording of the 27 July 1995 meeting that there was a pervasive atmosphere of contention and dispute, and that the Applicant was put under strong pressure by the Manager who conducted the meeting by focusing overwhelmingly on the weak spots in the Applicant's performance, dismissing her defenses, and sometimes interrupting her brusquely in the middle of a sentence. Lack of positive encouragement and the quite inflexibly critical tone of the meeting must have given the Applicant the impression that she would have great difficulty convincing the Manager to change his evaluation of her. In the context of the overall tense atmosphere and the difficulties in communication between the Manager and the Applicant, it must have seemed to the latter that a negative prejudice existed against her that she had no means to overcome.

53. As the Applicant states, one of the most serious accusations made against her at the meeting of 27 July 1995 concerned her allegedly irresponsible use of funds. She was accused of having spent over US\$100,000 on a COSS whose budget had been only US\$22,000. She observes that this accusation is baseless inasmuch as this sum was calculated in accordance with the Bank's normal procedures and drawn down for the second quarter of the year so as to enable departments to make requests for the remainder of the year. The Tribunal finds from the record before it that the gist of the Managers complaint was that the Applicant changed the budget estimated at US\$22,000 to one of more than US\$100,000 because of a realization that several consultants were required to carry out the project. This could have been avoided if there had been proper planning and organization and this lapse had placed the Manager and his superior officers in the awkward situation of having to explain the inadequate planning for this project. The Tribunal notes that notwithstanding the deficiency in planning, the pertinent officers had agreed that financial support be given for the project. The Tribunal finds that on the facts there is no substance to the Applicant's allegation of unreasonableness on the part of the Manager in this respect.

Meeting held on 5 December 1995

54. Similar difficulties were experienced at a meeting on 5 December 1995 at which the Applicant expressed her feelings of insult and injustice and which was ended abruptly due to the strained nature of the discussion between the Applicant and the Manager. Again, the Manager persisted in maintaining a quite inflexibly critical tone in a manner that could not enhance the likelihood of an improved working relationship between himself and the Applicant.

Diversions

55. At a PER meeting on 12 December 1995 the Manager stated that the delays in the Applicant's performance were partly caused by diversions which he felt were not entirely necessary. On 4 March 1996 the Manager cited a number of activities as diversions from her tasks. These included the protracted exchange of correspondence she had had in requesting permission for indoor parking and her involvement in the Asian Development Bank language workshop. The Applicant maintains that these criticisms were unfounded. She asserts that the language workshop involved extracurricular activity and in any case the Manager had no means of knowing how much time she spent on it; the request for indoor parking stemmed from a medical condition which made it important for her to avoid excessive exposure to sunlight. In the pleadings, the Respondent argues that the Applicant was not merely participat[ing] in the language workshop but was its Chairperson and that this must have required additional time requirements but makes no comment on the correspondence regarding the indoor parking space.

56. The Tribunal observes that these accusations appear to be irrelevant for the assessment of the Applicant's work performance. They were in part made in undue haste and without consulting the Applicant about their factual background. Such accusations could in no way diminish the Applicant's sense that she was being targeted for criticism and that an atmosphere of prejudice against her existed.

57. The Manager also considered as a diversion a memorandum written by the Applicant on lending issues related to the production of the Lao COSS on 7 July 1995. The Manager argues that too much time was used by the Applicant on this memorandum when she should instead have concentrated on other assignments that had already been delayed. The Manager did not discuss the substance of that paper with her; but at the same time he circulated its contents under his own name to several Directors and other superiors in the Bank, omitting the Applicant from the circulation list of that memorandum.

58. The Tribunal observes that it does not fall within its competence to assess the priorities that particular staff members should assign for particular tasks. Irrespective of the question of priorities, however, the Manager acted indiscreetly by using under his own name a memorandum prepared by the Applicant without discussing the memorandum with her and without even informing her of its circulation. It seems even less proper for the Manager to criticize the Applicant for having prepared such a memorandum. Such behavior on the Managers part would seem inimical to the creation of an atmosphere of solidarity and good teamwork in his Division and creates the impression that the Manager was not prepared to recognize the positive contributions that the Applicant made in the course of her work.

* * * * *

59. The Applicant maintains that the above facts exemplify the presence of a negative prejudice against her on the part of her superiors and that this constitutes a procedural irregularity in the form of discrimination that vitiates the performance evaluations that her superiors carried out in 1994 and 1995. In the view of the Tribunal, the working atmosphere in the Applicant's Division left much to be desired. This applies particularly to the relationship between the Applicant and her Manager. There is no doubt that the Applicant's performance was not without problems, particularly in regard to her inability to produce the required output in time. The Manager had every right and even the duty to call the Applicant's attention to such problems. Nonetheless, the Manager occasionally behaved vis-à-vis the Applicant in a way that could not have been conducive to an improvement in the working relationship between himself and the Applicant. Indeed, it is not unreasonable to infer from the records of their encounters during 1995 and early

1996, including at the meeting of 27 July 1995, that the Applicant might have interpreted the Managers behavior as a manifestation of prejudice against her. This applies particularly to the Managers one-sided focus on criticism and avoidance of positive encouragement, his attention to sometimes irrelevant detail, his failure to consult the Applicant when taking decisions that had an effect on her assignments and his occasionally impatient or sarcastic tone. Nonetheless, the Tribunal holds that those lapses do not amount to a denial of due process sufficient to vitiate the Applicant's performance evaluations and the decision made at the meeting of 13 May 1996.

D. The Treatment of the Applicant in Comparative Terms

60. At the heart of the Applicant's contentions is the claim that she was discriminated against in her performance evaluation. There are two parts to this claim. First, she maintains that she was criticized by her superiors for her excessive use of staff, consultants and other resources when, in fact, her use of consultants and other resources did not differ from that of her colleagues who had prepared similar studies for other countries covered by the Division. Second, she claims that she was also criticized for her use of time and failure to meet agreed schedules when, again, her slippage from agreed time-tables was no greater (but was in fact smaller) than that which had been considered normal in the preparation of other comparable assignments (for instance, she points out that she finalized the COSS for the Lao PDR in a little over 40 weeks when the two other COSS prepared in PW3 namely Vietnam and Cambodia took over 60 weeks each).

61. The principal points of criticism against the Applicant indeed related to her use of resources and her slippage from agreed time-schedules. These charges were repeatedly made in the course of the PER process, particularly at the meetings of 27 July 1995, 12 December 1995 and 21 March 1996. It appears that the principal motivation behind the non-renewal of the Applicant's fixed-term contract with the Bank at the meeting of the Panel of Vice-Presidents had to do with these criticisms. In the Respondent's pleadings, particular emphasis was put on the problems relating to timing while criticisms of the Applicant's use of resources are given a subsidiary position.

62. The Respondent makes three points in regard to the Applicant's failure to meet agreed time-tables:

First, assuming that there were delays also in the preparation of other COSS, this offers no excuse for the fact that the Applicant failed not only once, but on several occasions, to respect time limits which either had been established by herself or with her agreement. Second and most important, it does not fall within the competence of the Administrative Tribunal to pronounce itself on the time requirements of a COSS. Third, the circumstances which surrounded the preparation of the COSS for Cambodia and Laos [sic, Vietnam?] were substantially different from those applicable to the Laos COSS; a comparison is not possible for that reason.

63. The main contention of the Respondent, clearly, is that in the evaluation of the Applicant's performance, the Tribunal cannot substitute its own assessment for that of the Bank. However, it is equally axiomatic that the Bank's discretion is not absolute but that the Tribunal has the power to examine that the Bank has exercised its discretion in a non-discriminatory manner. As pointed out by this Tribunal:

Decisions with respect to the evaluation of staff members performance are within the discretion of the Bank (see Tay Sin Yan, ADBAT Decision No. 3 [1994], para. 30). Such

discretion, however, is not unlimited and the Tribunal must ensure that the exercise by the Bank of its discretion is not arbitrary, discriminatory, unreasonable, improperly motivated, or adopted without due process (see Lindsey, ADBAT Decision No. 1 [1992], para. 12). (Behuria (No. 2), Decision No. 11 [1996] II ADBAT Reports 28, para. 3)

64. The Tribunal cannot simply dismiss on a jurisdictional basis all the comparative and factual material on which the Applicant relies so as to prove her claim of having been treated in a discriminatory manner. For discrimination is a relative matter, pertaining to the manner in which a staff member's performance has been assessed by his or her superiors in comparison to the assessment of the performance of other staff members by those same superiors. This does not mean that the Tribunal is competent to assess the resources or time needed for the performance of particular tasks the staff are called upon to carry out. But it does entitle the Tribunal to intervene if facts disclose that staff members have been assessed in manifestly and unjustifiably differing ways for performing essentially comparable tasks.

65. The Applicant was criticized throughout the relevant period - including at the crucial meeting of the Panel of Vice Presidents of 13 May 1996 - of excessive use of resources for consultants. There is, however, an irreconcilable conflict in regard to the facts that the Applicant and the Respondent cite to support their views. The Applicant has argued that the consultant costs for the Laos COSS were US\$79,500 with no additional costs for writing the initiating papers or CSIP while costs for Cambodia and Vietnam were, respectively, US\$73,000 and US\$89,850 plus additional costs for work on CSIP. The Bank, however, argued that the costs of the Lao COSS amounted in fact to US\$110,000 (a difference resulting from how to classify the costs incurred from the work of one consultant) and calculated consultant days allocated for the preparation of the COSS for Cambodia and Vietnam so as to arrive at significantly lower numbers than those of the Applicant.

66. These divergences were already evident during 1996. For instance, at the 21 March 1996 meeting, the Manager claimed that while the Vietnam COSS had involved 80 person days and the Cambodia COSS 93 person days, the Lao COSS had involved altogether 151 person days. By reference to data in the Central Files, however, the Applicant asserted that the correct numbers were in fact 142 days for each of Vietnam and Cambodia (plus 10 days for the preparation of the CSIP) and 117 days for Laos.

67. The Tribunal observes that it is unable to resolve such factual discrepancies that result at least partly from differing assessments about the allocation of the tasks of particular consultants. To make such assessments would require entering into the field of the Bank's professional activities which is not a task that the Tribunal is called upon to perform. Nevertheless, even though it would be improper to seek to reconcile such disagreements about the comparison of resource use of Bank staff members, the Tribunal observes that there is no reason to conclude that the Applicant did not receive adequate material resources from the Bank so as to carry out her assignments in 1995 in a timely manner. The Tribunal is not convinced that, even if it were possible to reconcile the factual differences set out above, it would conclude that the Applicant was discriminated against by the Respondent.

68. As regards timing and slippage, the Applicant has argued that the time she used for the Lao COSS was not excessive in comparison to the time used for the preparation of other COSS in the Department. She observes that the preparation of COSS for Cambodia, Thailand, Vietnam, China and Maldives had taken between 14 and 16 months while the COSS for Laos took only 10.5 months. She also makes the point that slippage - while not desirable - is nevertheless a

normal occurrence in the preparation of COSS and that slippage in regard to Laos (4.5 months) was even less than in regard to Vietnam (7 months) or Cambodia (5 months). The Applicant claims, thus, that the timing expectation of the Manager was unrealistic and that, as she was criticized constantly for failing to meet deadlines, the original (and unrealistic) time schedules were improperly used as reference points and not the revised schedules which, nonetheless, had been accepted by her superiors.

69. The Respondent claims that there were special extenuating circumstances that justified the delays in regard to those other countries while no such circumstances existed in regard to the Lao COSS. It points out that the COSS for Vietnam and Cambodia were the first ones for those countries while the Lao COSS was the second for that country and that this meant that substantially less time and resources were needed for its preparation. On the other hand, the finalization of the COSS for Thailand was delayed by the Board of Directors express decision to that effect. Moreover, with respect to Vietnam and Cambodia, the Bank claims that the persons responsible for preparing the COSS were expected to handle other substantial assignments. The Applicant responds by stating that she too had other assignments at the time and that the Bank instructions make no difference between first and subsequent COSS and that were this otherwise, the COSS for every country apart from new members would take little time and this is not the case.

70. The Tribunal cannot pronounce itself on the issue of what timing is appropriate for particular Bank projects. Again, it must only satisfy itself that there has been no discriminatory or arbitrary treatment in the setting of time-tables and in the assessment of outcomes by staff. There is no doubt that the Applicant failed to meet the deadlines of the Lao COSS as well as other deadlines to which she had agreed. Among these was the Applicant's failure to produce any of the Back-to-Office Reports (BTORs) of her Laos and Thailand Missions in 1995 within the required period of 10 days. In fact, it took several months for her to produce these and her delay had been the subject of criticism by one of the Bank's Vice-Presidents. Another fact of some significance is that from 1994, the Applicant's performance evaluation refers to slippage, and she was so assessed by both her previous Manager and the Manager, and co-workers in the course of interviews conducted by BPMSD in mid-1995. Nor does the Applicant deny such slippage in regard to the fulfillment of her work plan in 1995, though she claims that some of these problems resulted from decisions that were taken by the management and for which she could not be held responsible, and some from the fact that she was in fact overburdened by requests for minor work put to her by the Manager.

71. The record suggests that in quantitative terms, the Applicant's failure to meet deadlines for the Lao COSS in 1995 and 1996 did not significantly differ from slippage in regard to the preparation of other COSS in her Department but that the overall time for the preparation of the former was shorter than for any of the latter. On the other hand, the Bank has explained that the justifications that were present in regard to the delays in the other cases - inter alia that they were the first ones made for those countries - were not applicable to the preparation of the Lao COSS.

72. The Tribunal concludes that it has not been proved that the Bank's acts disclose a pattern of discrimination against the Applicant.

E. Gender Discrimination

73. The Applicant claims that her evaluation was tainted with gender-based discrimination. Such discrimination, she argues, is particularly evident in the form of her managers accepting only stereotyped behavior from women. She states that:

It is regrettable that acknowledged assertiveness in women is criticized while it is applauded in men, and that the demand on us to meet the expectations of men who hold traditional views is not made reciprocally.

The Applicant claims that gender bias is evident in her evaluation especially in two ways. First, she asserts that her outspokenness, independence and critical mind are held as defects in her character because of such stereotyping. She was expected to act in a more modest fashion so as to correspond to traditional expectations. When she did not do so, she was charged with problems in teamwork - despite the statements of a number of colleagues that they had experienced no teamwork problems with her. Second, she asserts that all the criticisms she made in the course of the evaluation process were understood to manifest in one way or another a claim that she was being subjected to discrimination on the basis of her gender. This, she contends, made it possible for the Manager and other superiors to avoid conducting serious investigations into her substantive complaints; they were all interpreted as merely aspects of the claim of gender bias.

74. The rules of the Bank make it clear that gender discrimination by supervisors against staff members is altogether improper and a violation of the terms of employment. Administrative Order No. 2.02, paragraph 2.4, provides: The employment, promotion and assignment of staff shall be made without discrimination on the basis of sex, race or creed. Essentially identical language appears in Section 9 of the Staff Regulations issued by the President of the Bank. The Tribunal has consistently stated that it may review discretionary Bank decisions to determine whether they are discriminatory and therefore an abuse of discretion. Obvious examples of such discrimination are decisions to terminate an appointment, or not to make an appointment permanent, because of the staff members nationality, religion or gender, for such decisions can have no tenable connection to legitimate performance-related standards. Proof of discrimination, including gender discrimination as claimed in this case, is often difficult, for it turns upon motives and attitudes which are not always apparent on the surface of behavior. It is almost uniformly necessary to prove the illicit subjective state of mind by recourse to elements of circumstantial proof, most obviously by a demonstration that the woman staff member has been treated less favorably, with respect to such matters as performance evaluation rating, salary increase or reappointment, than are men of essentially equivalent abilities.

75. As evidence for gender bias, the Applicant cites, among other things, statistical information about the number and position of women in the staff of the Respondent since 1992, a report of the Inter-Departmental Advisory Committee for Women Professionals of 1992 as well as articles, reports and statements by the Professional Womens Committee (PWC) and Bank employees about the position of women in the Bank. She also cites Bank policy of improving the position of women in the Bank, observing that in encouraging her to be active and outspoken, policy became a trap.

76. In regard to such general evidence presented by the Applicant in aid of her claim of gender discrimination, the Tribunal finds that although it may provide useful background for such a claim, particularly in the way it manifests the overall atmosphere within the Bank, it does not by itself suffice to prove such a claim. Moreover, such evidence has been countered by the Bank,

which has announced a policy of promoting the recruitment and retention of women staff members; there is no evidence that the Bank has been less than serious in its adoption or implementation. Special responsibility in promoting these objectives falls upon managerial personnel, whose attitudes and performance significantly determine the character of the working relationships between men and women in their units. Among these responsibilities is the avoidance of gender stereotyping.

77. The Applicant goes beyond general committee reports and statistics in seeking to buttress her claim of gender discrimination, and points to a number of specific circumstances in the treatment accorded her by the Manager, and indeed by management representatives more generally. Perhaps most significantly, the Applicant claims that she was victimized by gender stereotyping. She thus contends that she was expected to show the kind of submissiveness or deference to her colleagues often associated with female behavior while in fact she was vocal and assertive in her opinions and behavior; she also claims that her assertiveness - a quality applauded in men - was taken as a form of insubordination that affected negatively her performance evaluation, particularly the assessment of her teamwork abilities.

78. To this effect she cites a number of items as evidence, only the principal ones being set forth here. First, there is the Managers general attitude, particularly his occasionally sarcastic tone at the meeting of 27 July 1995 and his statements to the effect that the Applicant had a reputation of being difficult, a tendency to question what is being asked, or that she engaged in aggressive behaviour. Second, there is the Managers allegedly excessively critical attitude towards the gender consultant whom the Applicant had engaged to draft a report on the situation of women in Laos. Third, there are e-mail messages by the Deputy Director (Personnel), BPMSD of October and December 1995 to the Applicant, criticizing her outspokenness within the PWC and in support of improving the security of women within the Bank's premises. These were not criticisms against those activities as such but against the manner in which the Applicant behaved and presented her arguments. They are said by the Applicant to manifest a particularly narrow view of how much assertiveness and questioning a woman is permitted. Fourth, the Applicant claims that there has been no serious examination by Bank Management of her charges relative to gender discrimination.

79. The Respondent states that there is no basis for an accusation of gender bias. The Respondent observes that the Applicant, throughout her employment in the Bank, has had a tendency to deflect substantive criticism about her work by alleging discrimination. Moreover, the Bank points out that it has conducted investigations into her charges, but that no evidence of gender discrimination was found; the clearest example are the interviews conducted at the request of the Deputy Director (Personnel), BPMSD, in August 1995 among several staff colleagues identified by the Applicant, a number of whom testified to the Applicant's disorganization in getting her work done and to difficulties in teamwork. As a matter of fact, the Bank continues, [w]hat the Applicant calls assertiveness, stood for a rude and occasionally offensive behavior, which characterized the Applicant's performance in particular during her first three years of service. Finally, the Respondent points out that the Applicant's allegations regarding the attitude of the Programs Manager vis-à-vis women are mere suppositions without any factual basis.

80. As has already been discussed above, the record in this case leaves little doubt that the interpersonal relationship between the Applicant and her Manager was quite strained throughout 1995 and early 1996, and that during that period the Manager had strongly felt concerns and reached negative assessments about certain elements of her performance that he regarded as of utmost importance. Nor is there any doubt that part of the Applicant's

assignment in the Bank was to deal with issues relating to Women in Development, that she was a member of the PWC, and that she was an active and outspoken representative of women on Bank-related issues focusing on gender, particularly the treatment and advancement of women staff members.

81. There is, however, no evidence that the Managers attitude toward or assessment of the Applicant, however negative, was caused by or even related to the Applicant's gender or to her position on gender-related issues within the Bank. The Applicant's perception may genuinely have been to the contrary; from her very first PER covering her first months with the Bank beginning in late 1992, the Applicant responded to criticisms, particularly with respect to teamwork, as a product of gender stereotyping, such that she assumed that her Manager would tolerate (if not indeed value) in male staff members traits that he condemned in her. But such beliefs and assertions on the part of the Applicant were, so far as the record in this case shows, altogether based upon speculation and without a specific factual basis. Neither in her PERs nor in her pleadings before the Tribunal, for example, has the Applicant identified male staff members who had exhibited similar traits of personality and character (e.g., assertive, resistant to criticism) but who had been evaluated at a higher level on such performance elements as teamwork. More pertinently, it should be noted that the teamwork element assumed less importance in the Applicant's evaluations as the 1995-96 period progresses, and the decisions to evaluate her at less than satisfactory and ultimately not to regularize her appointment were based much more significantly on matters of organization, productivity and timeliness. The Applicant has not offered any proof that male staff members having similar performance qualities were treated any more leniently by the Bank by virtue of their gender. The Tribunal notes that concerns about her organization, productivity and timeliness were expressed from her earliest days of employment with the Bank; were expressed not simply by her Manager in the crucial 1995-96 period but also by her previous Manager, by other Bank officials (including the recently employed Deputy Director (Personnel), BPMSD), and even by co-workers (identified by the Applicant herself as knowledgeable about her and her work situation), not all of whom could have been motivated by gender bias; and, by women as well as men.

82. In conclusion, the Tribunal reiterates the Bank's policy of improving the recruitment, retention and work environment for women professionals, which among other things requires the extinguishing of gender stereotypes. It finds, however, that the Applicant has failed to prove that her 1995 PER or the 1996 decision not to regularize her fixed-term appointment was motivated by gender discrimination.

F. Other Procedural Irregularity

83. Finally, the Applicant claims that the whole evaluation and grievance procedure was tainted with formal procedural irregularity: [t]he Bank has relied exclusively on the testimony of those whose conduct is in question. Thus, she notes that several persons who had been involved in the earlier phases of her performance evaluation and had fixed opinions on her participated in the meeting of the Panel of Vice-Presidents of 13 May 1996. These included the Director, BPMSD, the Deputy Director (Personnel), BPMSD, the Director, PWD, the Manager, and the Officer-in-Charge, BPHR, while she herself was not permitted to attend. As the record shows, the Panel thus heard only the views of the Management and she was afforded no possibility to respond to the criticisms.

84. Moreover, the Applicant states that neither the response to her grievance by Deputy Director (Personnel), BPMSD, of 22 November 1996 nor that by the Director, BPMSD, was substantial or motivated in a way that would dispel doubt about the impartial character of the grievance

procedure. The five-paragraph letter written by the Deputy Director (Personnel), BPMSD, observed that the Applicant's grievance had been full of statements which are unsubstantiated, misleading or simply wrong. Then followed a reference to the Bank's policy of non-discrimination and an affirmation that her accusations in this respect had been given due attention by the Bank. No evidence of discrimination, bias or prejudice had been disclosed. The letter recounts the results of the PERs and states that applicable procedures were complied with and you were given at all stages of the evaluation process ample opportunity to state your case. The Director, BPMSD, stated that the circumstances of the case had once again been carefully reviewed and that informal investigation[s] had shown that there was no basis to her claim: At every stage you were given full opportunity to state your case. The Applicant claims that nothing of this correspondence shows that her substantive views or the responses she had given to the various criticisms were heard or taken into account. Lack of substantial treatment of her views, she claims, constitutes a denial of due process.

85. The Respondent contends that the Applicant was throughout provided with ample opportunity to be heard by her superiors both individually and collectively - and in fact exercised this opportunity on a number of occasions. The Respondent draws attention, for example, to the series of interviews conducted in August 1995 at the initiative of the Deputy Director (Personnel), BPMSD, among the Applicant's colleagues so as to find out whether she was being discriminated against. The Respondent does not deal with the Applicant's above contentions in more detail, however.

86. The Tribunal observes that the mere brevity of the various communications received by the Applicant in the course of the grievance procedure does not demonstrate lack of substantial or serious treatment of her claims. In fact, her situation was repeatedly dealt with by quite a large number of Bank officials. On the other hand, it is true that many of the persons that the Applicant claims felt negatively about her participated at the various stages of the examination of her grievances. This applies particularly to the presence of the Manager at the crucial meeting of 13 May 1996. It has not, however, been demonstrated that the other officials present at that or other relevant meetings were negatively prejudiced against her. Finally, the Tribunal holds that the Applicant had no right, based on the Bank's personnel regulations, to be present at the meeting of 13 May 1996, and therefore, her exclusion from that meeting did not constitute a denial of due process.

Conclusion

87. In conclusion, the Tribunal observes that the Applicant has failed to prove her claim that the decision not to make her appointment permanent was characterized by procedural unfairness and lack of due process because of prejudice against her, or because she was discriminated against. The Tribunal is likewise unable to find any other evidence of the existence of a procedural flaw in her personnel evaluation that would have vitiated the decision of the Panel of Vice-Presidents of 13 May 1996 not to make her appointment permanent.

88. Although the Tribunal has been unable to find evidence of prejudice against the Applicant that would have amounted to a failure of due process, the Tribunal notes nonetheless that the Managers attitude did contribute to the strained relationship she had with him. As the Tribunal has concluded in paragraph 59, this applies particularly to the Managers one-sided focus on criticism and avoidance of positive encouragement, his attention to sometimes irrelevant detail, his failure to consult the Applicant when taking decisions that had an effect on her assignments and his occasionally impatient or sarcastic tone. Although these faults in his managerial style did not materially affect the validity of the Applicant's PER of 1995, they did cause some

intangible injury to her for which the Tribunal deems it appropriate that the Bank provide compensation.

Decision:

For these reasons the Tribunal unanimously decides that:

- a. the Bank shall pay the Applicant the equitable compensation in a sum of US\$5,000.00;
- b. the Bank shall pay the Applicant a sum of US\$3,000.00 as costs;
- c. in all other respects, the Application is dismissed.