

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 43
(7 January 1999)**

**Mohammed I. Haider
v.
Asian Development Bank**

**Robert Gorman, Vice-President
Martti Koskenniemi
Shinya Murase**

1. The Applicant joined the Bank on 16 September 1996 as an Evaluation Specialist (Level 4), in the Evaluation Division East, Post-Evaluation Office (PEO), for a fixed period of three years. The appointment carried a probationary period of one year. At the end of the probationary period, the Respondent decided not to confirm his appointment. The Applicant claims that the decision was an abuse of discretion, i.e., was arbitrary, discriminatory, improperly motivated and in violation of fair and reasonable procedures. Furthermore, he alleges that his Manager was biased against him, and failed to give any warnings regarding the need for improvement in his performance, contrary to the rules of due process. The Applicant thus seeks reinstatement, and claims damages in the sum of US\$500,000 and reimbursement of his legal costs in the sum of US\$3,000. The Respondent denies all the Applicant's contentions and requests the Tribunal to dismiss the Application.

Summary of the Facts

2. Prior to his appointment to the Bank, the Applicant had seventeen years experience as monitoring and evaluation specialist. After the effective date of the Applicant's appointment to the Bank, he began his ten day mission which was conducted prior to commencing work at the Bank's Headquarters in Manila. This was a fact-finding exercise which the Applicant had been asked by the Manager, Post-Evaluation (West) Division (PEWD), and by the Chief, PEO, to undertake and which entailed visiting the staff evaluation offices at the World Bank, the Inter-American Development Bank and the United States Agency for International Development, in order to learn about their monitoring and evaluation processes. Shortly after his arrival at the Bank on 6 October 1996, the Applicant submitted the materials that he had obtained to the Chief, PEO, together with a memorandum detailing the information gathered from the various organizations. The Respondent viewed this report as being of a disappointing quality, but did not so indicate to the Applicant at that time.

3. On 14 October 1996, the Manager, Post-Evaluation (East) Division (PEED), gave the Applicant his work assignments for the remainder of the year, which included, inter alia, assisting the Senior Evaluation Specialist with the preparation of a Project Performance Audit Report (PPAR) for the Philippine National Oil Company (PNOC) Energy Project. The Applicant was also required to process an Advisory Technical Assistance (ADTA) to strengthen the Benefit Monitoring and Evaluation (BME) system of the National Economic Development Authority (NEDA), Philippines (the NEDA TA). On 26 November 1996, the Chief, PEO wrote to the Applicant setting out his work assignments for 1997. These included being actively involved in the operation of the newly proposed Project Performance Management System (PPMS) and serving as the coordinator for all PPMS-related activities. On 2 December 1996, the Manager,

PEED gave the Applicant a memorandum setting forth detailed instructions for the preparation of a Technical Advisory (TA) paper for strengthening post-evaluation capacity in the Philippines.

4. During January and February 1997, the Applicant suffered from severe internal bleeding with stomach cramps and persistent diarrhea. After extensive tests, which ruled out cancer of the colon, the Applicant was diagnosed as having chronic bacterial diarrhea which was successfully treated with antibiotics. The Applicant did not take any sick leave during this time.

Six Months Evaluation

5. After six months, the Applicant was given his Performance Evaluation Report (PER) for the period 16 September 1996 to 16 March 1997 (the first PER). While acknowledging that the Applicant ably assisted in the preparation of the PPAR for the PNOG Energy Project in the Philippines, the Manager, PEED, observed that he had not shown an ability to work independently. Furthermore, in view of the Applicant's previous experience, he would have expected a higher level of output. There were a number of areas where the Applicant's performance could improve, such as planning and organization, and he needed to intensify his efforts to acquaint himself with the Bank's practices and procedures. The Manager, PEED, expressed hope that the Applicant's performance would improve over the next months to an acceptable level. The Applicant expressed disagreement with his evaluation in the PER by writing a letter to the Manager, Human Resources Division (BPHR), on 10 April 1997. Although acknowledging some delay due to illness, he believed he had a good work record for a new staff member. However, the Applicant conceded that it takes time to become familiar with Bank practices and procedures.

1997 Performance Evaluation Report

6. In the Applicant's PER at the end of the probationary period on 24 July 1997 (the second PER), the Manager, PEED, noted the Applicant's lack of adequate analytical and technical skills, and his inability to take independent action. He also stated that the Applicant had difficulties in producing acceptable quality work without substantial inputs from others. Overall, it was indicated that the Applicant had not performed to expectations and his performance was unsatisfactory in a number of areas.

7. On 25 July 1997, a performance evaluation meeting (the PER Meeting) was held, attended by the Applicant, the Manager, PEED, and the Chief, PEO, in order to discuss the negative assessment in the PER. The Applicant outlined his achievements and explained that his low productivity was attributable to his illness. Also, being new to the Bank, he had wanted to adopt a cautious approach. However, he concluded that he had done well and his performance had improved. On the other hand, the Manager was concerned that the Applicant took [an] unusually long time to understand and learn the Bank's procedures. After a lengthy debate, the Chief, PEO, suggested that the Applicant's comments should be put in writing in the PER form.

8. At this time, the Applicant also met BPMSD representatives to discuss the Manager, PEED's negative comments in the PER. He reiterated his concern that the assessment of his performance was motivated by the Manager's personal biases. The Applicant requested BPMSD to obtain an independent evaluation of his work from people whom he suggested. While agreeing to this, BPMSD advised that any such evaluation could not substitute for that of the Manager, being his direct supervisor. The interviews concluded on 29 July 1997. Two of the interviewees criticized the Applicant's work performance and noted his lack of analytical skills.

9. The PER for 1997 was finalized on 2 August 1997. The Applicant's performance was evaluated as unsatisfactory and the Manager, PEED, recommended that his appointment not be confirmed. In Section 2.3 (Ratees Comments), the Applicant disagreed with the assessment and alleged that he had ably carried out all the assignments given to him and made a number of good contributions during his first ten months. However, he had found himself in a situation of conflict with the Manager, PEED, which led to displays of short temperedness and intimidatory shouting by the latter. He expressed his hope that the Bank would identify another suitable position for him. Responding to the Applicant's comments in the PER, the Manager, PEED, on 12 August 1997, reiterated that his assessment was done on an objective basis and without any personal bias. While acknowledging that he had been short-tempered in the PER Meeting, he confirmed that this was an isolated incident and he had apologized for it. Replying to the Managers letter the following day, the Applicant said that he was puzzled by the continued efforts to discredit him and his work, all of which appears revengeful and personal and that he had tolerated [the Managers] angers and intimidations on numerous occasions.

10. On 8 August 1997, the Applicant met the Deputy Director (Personnel), BPMSD, and asked her to arrange for an independent evaluation of his work. The documents provided by the Applicant were given to the Manager, Training and Development Division (BPTD), who had been actively engaged in the development of PPMS. After reviewing the assessment by the Manager, BPTD, which confirmed the concerns expressed in the PER, the Deputy Director (Personnel), BPMSD, informed the Applicant that she could not find compelling reasons to give him another chance to prove himself.

11. On 15 August 1997, the Applicant was informed that his appointment would not be confirmed and that he would be separated from the Bank on 16 September 1997. The Bank noted that the Applicant had been given ample notice of the performance areas that required improvement, and the opportunity to comment on the criticisms.

12. During the next few weeks, the Applicant repeatedly requested BPMSD to reconsider the decision not to confirm his appointment, and asked for a transfer to another Division. These requests were denied.

13. On 16 September 1997, the Applicant filed his formal grievance on the non-confirmation of his appointment. He brought his initial claim to the Manager, BPHR. On 26 September 1997, the Officer-in-Charge, BPMSD, rejected the grievance. Meanwhile, on 25 September 1997, the Applicant also submitted a grievance to the Manager, PEED, alleging that biased information had been collected from PEO staff about his work performance and that the PER Meeting had been improperly conducted. This grievance was also denied by the Manager, PEED, on 15 October 1997.

14. The Applicant filed an appeal with the Appeals Committee on 8 October 1997, against the decision of the Officer-in-Charge, BPMSD on 26 September 1997 to deny the Applicant's grievance and to affirm the decision not to confirm his appointment. The Respondent filed a Challenge to Jurisdiction on 13 October 1997, which the Appeals Committee upheld on 10 December 1997. The Committee noted that the six-months performance evaluation had indicated that the Applicant needed to improve his work performance. Furthermore, the Bank had acted upon the Applicant's request for an independent opinion on the quality of his work and there was unanimity by the staff members as to the inadequacies of the Applicant's reports. The Committee therefore concluded that the decision not to confirm the Applicant's appointment was not a breach of due process, nor was there any violation of fair and reasonable procedures in the performance evaluation process.

15. On 5 March 1998, the Applicant filed this Application with the Tribunal, and the usual exchange of pleadings followed. The Applicant requested, in his Application, production of documents in order to prove that he discharged higher responsibilities as de facto mission leader. The Bank produced the documents in its Answer. The Applicant reiterated the request in his Reply, but the Bank stated in its Rejoinder that it had already produced all the relevant documents. The Tribunal considered that the Bank had sufficiently disposed of the Applicant's request and that no further action needed to be taken by the Tribunal on the request.

Consideration of the Merits of the Case

16. The Applicant claims that the Respondent's decision not to confirm his appointment at the end of the probationary period was an abuse of discretion; was arbitrary, discriminatory, improperly motivated and in violation of fair and reasonable procedures. In particular, he alleges that his Manager was biased against him, and failed to give any warnings regarding the need for improvement in his performance, contrary to the rules of due process. The Respondent, on the other hand, asserts that the decision was a matter for its discretion, and that such discretion was properly exercised.

I. Abuse of Discretion and Arbitrariness

17. The main objective of probation is to enable the organization to find out whether the probationer is suitable for the employment. It is clear in this context that the Respondent has the discretion to decide whether or not to confirm a probationary appointment. As was stated in the case of Salle, WBAT Reports 1982, Decision No. 10, para. 27:

It is of the essence of probation that the organization be vested with the power both to define its own needs, requirements and interests, and to decide whether, judging by the staff members performance during the probationary period, he does or does not qualify for permanent Bank employment. These determinations necessarily lie within the responsibility and discretion of the Respondent

Conversely, however, the probationers interest in being definitively employed should not be ignored nor deprived arbitrarily, if he has satisfied the obligations and standards required of him. Thus, for example, his duties must be well-defined, and he should be given a fair chance to demonstrate his suitability with adequate guidance and supervision in order to qualify for employment.

18. In previous decisions, the Tribunal has consistently 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 the management (Lindsey, Decision No. 1 [1992] I ADBAT Reports 5 para. 12). 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 fairly weighed. It should be noted that the discretionary power of the managerial authority in probationary cases is generally broader than usual as a result of the very nature of probation. Thus, for instance, the Administrative Tribunal of the International Labor Organization stated that:

[i]n the case of the probationer the organization must indeed be granted the broadest possible measure of discretion ... and its decision will be upheld unless some particularly

serious or glaring flaw can be shown. (In re Verlaeken-Engels, ILOAT Judgment No. 1127 [1991], para. 30)

Applicant's Work Performance

19. The Respondent submits that the decision not to confirm the Applicant's appointment is fully substantiated by the overwhelming evidence of the Applicant's failure to perform satisfactorily, and cites a number of examples, where the Applicant's work performance did not meet the requirements.

(a) Mission to gather information on BME

20. The first instance cited was the Applicant's fact-finding mission, visiting the staff of evaluation offices of the various organizations, which he had conducted before commencing his work in Manila. According to the Respondent, the report produced by the Applicant was of disappointing quality and provided a clear indication that the Applicant lacked the analytical skills for the job. The Deputy Director, BPMSSD, supported this view when she reviewed the document at the Applicant's request. The Applicant argues that there is no basis for the Respondent to judge the Applicant's work solely on the basis of the report, since it was never intended to be a concept paper, but merely to gather information. The Applicant further contends that he did not receive any comment on his report at the time of its submission, nor in the first PER. In his view, the Respondent's remarks merely serve to indicate its bad faith towards, and its arbitrary treatment of, the Applicant, since they imply that the Respondent was already considering his non-confirmation on the basis of one element of his work.

21. Although the Applicant challenges the Bank's failure to promptly communicate to him its alleged criticisms of his performance on his initial fact-finding mission, the Tribunal concludes that the Bank's withholding of any negative comments was not unreasonable in light of its desire to mute any criticism at the very earliest stage of the Applicant's review. On the other hand, the Tribunal also believes that even if the Applicant's report resulting from that mission might have been found by the Bank to have fallen below its expected standards, this could well have been attributable at least in part to the vagueness of the instructions given to the Applicant at the outset of his assignment. Even so, this observation is properly to be given only negligible weight in view of the substantial subsequent record of performance shortcomings by the Applicant, and warnings and counseling provided by the Bank.

(b) PEO Coordinator for PPMS-related activities

22. In line with the Applicant's previous experience prior to joining the Bank, he was expected to serve as PEOs coordinator for all PPMS-related activities. However, the Bank in its pleadings explained that its assignment of the Applicant to a supporting role in February 1997 was attributable to the Applicant's limited grasp of the Bank's procedures and the limited benefit obtained from his mission in September 1996. The Respondent submits that it is difficult to interpret this reassignment as being anything other than critical of the Applicant. In response, the Applicant alleges that there is no basis to the Respondent's claim that he was moved to a supporting role due to his inability to take responsibility for the assignment and he was never told explicitly that this was the reason. If this change in role was attributed to his unsatisfactory performance, the Applicant claims that it was the Respondent's duty to inform him of that. The Tribunal observes that it is difficult to accept the Applicant's contention that he was relegated to a supporting role for reasons other than his performance shortcomings. The first PER explicitly states that the purpose of the relegation is to enable the Applicant to focus on fewer

assignments while learning about Bank's operational policies and procedures..., while the same PER urges that the Applicant needs to intensify his efforts to speed up his learning process of the Bank's operational policies, guidelines and procedures.... This is a sufficiently clear indication that the Applicant's relegation was because of his failure to come up to the Bank's expectations for the high-level work for which he had originally been employed.

(c) Processing and administration of the NEDA TA

23. One of the examples of the Applicant's unsatisfactory performance cited by the Respondent was the processing and administration of the NEDA TA, which was the Applicant's first major assignment. The Respondent asserts that, in spite of clear written instructions and detailed guidance from the Manager, PEED, the Applicant made procedural errors and furthermore, substantial inputs were required by other officers, in order to improve the quality of the TA paper to an acceptable standard. The Respondent further points out that the Applicant's preparation of the TA paper was unduly delayed, and attributes this to his inability to prioritize his work, which was created by his own shortcomings, and not by the unreasonable instructions of the Manager, PEED, as alleged by the Applicant. The Tribunal is not in a position to pass judgment on the appropriateness of specific instructions. It observes nonetheless that they do not appear to have fallen below a reasonable standard so as to constitute an abuse of discretion. The Tribunal also concludes that apparently the revision of the TA was not possible without substantial input from other people.

(d) Highland Agriculture Development PPAR

24. The Respondent alleges that the draft PPAR on the Highland Agriculture Development (draft PPAR) is an indication of the Applicant's inability to prioritize and failure to perform to the required standard. The Manager, PEED, claims to have clearly indicated to the Applicant that if he completed a satisfactory draft PPAR, his appointment would be confirmed, notwithstanding his previous unsatisfactory performance. He also advised the Applicant that if he wished to take leave in July 1997 (to which he was not entitled during the probationary period), he must first submit the draft PPAR. In the event, the Respondent contends that the draft PPAR was of substandard quality, and required improvement of analytical content and presentation, as the Manager, PEED, provided in his detailed comments and revisions in his memorandum of 15 July 1997. The criticisms were shared by the Applicant's colleagues. The Applicant maintains that there were no conditions attached to his leave, but claims that the draft document submitted prior to his leave was an initial draft, and that in fact he had been given the deadline of 26 September 1997 within which to complete it. He submits that there is no evidence on the record to support the Respondent's allegation that the initial draft PPAR would be used as the basis of non-confirmation of his appointment, and that, had he known this, he would have deferred his leave.

25. In the view of the Tribunal, it is inconceivable from the record that the Applicant was unaware of the significance of the draft PPAR, which was his last major assignment prior to confirmation of his appointment. The Tribunal further observes that, whether it was an initial draft or not, the draft PPAR, once submitted, was properly used as a basis of judgment by the Respondent within its discretion and responsibility, in view of the limited time frame for the decision to be made as to the confirmation of the Applicant's appointment. Nor was it an abuse of discretion for the Respondent to conclude that the Applicant's work was below the required standard, in light of the comments by the Manager, PEED, and the assessments of the Applicant's colleagues, particularly those identified by the Applicant himself as having knowledge of his work.

II. Improper Motivation and Bias

26. The Applicant contends that the performance evaluation process was improperly motivated and biased. He says that he was first made aware of the biased view of the Manager, PEED, when he was given the first PER, which listed his alleged shortcomings but failed to mention the favorable responses by other departments to the draft TA prepared by the Applicant. In light of the Tribunal's conclusions stated in paragraph 23 above, the Applicant's contention on this point is hardly acceptable.

27. According to the Applicant, the evidence shows that he was verbally abused by the Manager, PEED, on more than one occasion. At the meeting held on 25 July 1997 to discuss the Applicant's second PER, the Manager, PEED, refused to listen to the Applicant's presentation of his work accomplishments, instead becoming angry and shouting at the Applicant. The Applicant alleges that such shouting and intimidation was a continuous conduct by the Manager, PEED, which had contributed to a difficult situation in the department, leading to his request to BPHR for a transfer from PEO. The Respondent submits that there is not a scintilla of evidence to support the Applicant's claims of improper motivation or bias. In fact, the Manager, PEED, expended substantial time and energy in helping the Applicant to improve the level of his performance, but was impatient with the lack of receptivity and progress. The Tribunal observes that the fact the Manager, PEED, raised his voice at the above meeting was not in any way desirable or justifiable. The Manager, PEED, did however duly apologize to the Applicant about the incident. The Tribunal finds that although the relations between the Applicant and his Manager were occasionally strained, there is no evidence to support the view that this fact materially affected the latter's impartiality and objectivity in his evaluation of the Applicant's performance.

28. The Applicant also claims that statements made by his colleagues about the standard of his work and capability were biased and were made only as a result of their subordinate positions vis-à-vis the Manager, PEED. Furthermore, he alleges that pressure was applied to one of his colleagues by the Manager, PEED, to bias his view of the draft PPAR against the Applicant. This allegation is denied by the Respondent. Moreover, the colleague has also submitted a statement denying that he was pressured into biasing his view against anyone; rather, he was requested by the Manager, PEED, to conduct a thorough review of the draft PPAR, in view of its importance in determining the Applicant's future. The Tribunal finds that the allegations of the Applicant are speculative.

29. Thus, the Tribunal is unable to accept the Applicant's assertion that the non-confirmation of his probationary appointment was based on improper motivation and bias. Rather, the Respondent, taking into account the Applicant's illness and assignments, validly exercised its discretion not to confirm his appointment, since the Applicant's work performance was of an inadequate standard. This action was fully consistent with Section 2.6 of Administrative Order No. 2.02, which provides, inter alia, that the Bank will provide staff with security of tenure, consistent with the terms of their appointment, their satisfactory performance and conduct (emphasis supplied)

III. Denial of Due Process

30. The Tribunal has repeatedly emphasized the importance of the respect for due process in cases in which the Bank exercises its discretion in terminating a staff members employment. This is also true in reaching a decision not to confirm an appointment at the end of a

probationary period. The right to due process of staff members is expressly guaranteed by the Bank in the Personnel Policy Statement for Professional Staff adopted by the Board of Directors in April 1991:

(xiii) The Bank will observe due process in all areas of personnel administration, in particular, in initiating and deciding on the involuntary or premature separation of staff from service.

This provision is incorporated as part of Administrative Order No. 2.02, Section 2.14, entitled Personnel Policy Statement and Duties, Obligations and Rights of Staff Members (issued 1 April 1991 and revised on 1 November 1993 and 28 May 1998).

(a) No prior warning of unsatisfactory performance

31. The Applicant submits that, contrary to the rules of due process, the Respondent failed to give him a clear and unmistakable warning that his alleged unsatisfactory work performance would result in non-confirmation of his probationary appointment. He contends that the comments made by the Manager, PEED, in the first PER were merely exhorting him to improve his performance, and that they did not constitute a formal warning. In reply, the Respondent submits that the Applicant was given a clear warning in the first PER that his employment was in jeopardy, claiming that he was fully aware of his precarious position, since he wrote to BPHR in April 1997 to defend his performance while expressing his appreciation of the Managers concern in wanting highly productive staff. Given the nature of the probationary period and the scrutiny expected for the performance of a staff member being considered for a permanent position, the Tribunal observes that the Applicant should have reasonably interpreted the criticisms in his PER as a warning that his appointment was in jeopardy would he not improve his performance. For example, particular attention should have been given to the Managers, PEED, explicitly pointing out in the first PER that the Applicant needed to improve his ability in several areas essential for his work at PEO.

(b) Consultation with other staff concerning evaluation of the Applicant

32. The Applicant contends that it was improper for the Respondent to rely on the adverse comments made by his colleagues, without giving him the chance to respond to the criticisms. To support his contention, he cites the case of Lindsey, supra, in which the Tribunal stated:

[i]ndividual complaints or adverse comments by one staff member of the conduct of another should not be taken into account unless first brought to the attention of the latter, to whom an opportunity of replying should have been given.... (para. 9)

In reply, the Respondent alleges that Lindsey is distinguishable from this case, since the Applicant was given every opportunity to respond to his PERs, which took into account the comments made by his colleagues on the draft PPAR. Furthermore, the Respondent acceded to the request made by the Applicant to have four persons who were familiar with his work comment on its quality. The Tribunal is satisfied that, as long as the substance was set forth in the PER and the Applicant had the opportunity to rebut the appraisals, the Applicant's right is not deemed to have been infringed. Thus, the Applicant's claim that he was denied due process in this respect is without merit.

(c) Guidance and supervision

33. The Applicant claims that he was given major work assignments but without any guidance or training by the Bank, and that he was immediately required to take on the role of de facto mission leader for a project. A staff member should normally be given an opportunity to familiarize himself with the Bank's procedures before commencing such work. Citing the case of Rossini (WBAT Reports 1987, Decision No. 31), the Applicant asserts that every employee has a basic right to receive adequate guidance, training and feedback, but the Bank has failed to provide even a modicum of such. The Respondent submits, however, that the Applicant's claim of inadequate guidance and supervision is without justification, more especially since the Applicant had 17 years of extensive experience, recalling that the Administrative Tribunal of the International Labor Organization held that an applicant who had 15 years of experience consequently did not need any special training (Crapon de Caprona, ILOAT Judgment No. 112 [1967] (WHO)). According to the Respondent, such a claim is at odds with the Applicant's assertion that he acted as Mission Leader, and yet required supervision. The Respondent submits that specific written instructions were in fact given to the Applicant, and that the Manager, PEED gave careful supervision.

34. The issue here involves two questions; first, whether the Applicant really took on the role of de facto mission leader for the Highland Agriculture Development project, and secondly, whether he received adequate guidance. With regard to the first question, the Tribunal observes that the Applicant's self-perception and self-characterization as de facto mission leader were unwarranted. The record clearly shows that he was assigned to be and in fact acted as assistant to the mission leader. With regard to the second question, the Tribunal cannot pass judgment on the details of the guidance and supervision required, and therefore it will not regard the probationary staff members conditions of employment as violated, unless the guidance and supervision offered have been kept below a reasonable standard and have been manifestly insufficient (Salle, supra, para. 37). Given the fact that appropriate instructions were given to the Applicant on several occasions, both orally and in writing, the Tribunal is satisfied that this is not the case in the present instance.

Conclusion

35. Thus, the Tribunal concludes that the Applicant has failed to establish that the Respondent's decision not to confirm his appointment was made by abuse of discretion, arbitrariness, improper motivation and bias, or lack of due process.

Decision:

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