

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 46
(19 December 1999)**

**Roman A. Alcartado
v.
Asian Development Bank
(No. 2)**

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

1. In Alcartado, Decision No. 41 [1998], IV ADBAT Reports 69 ("Decision No. 41"), the Applicant – in an Application filed in January 1998 – challenged the Bank's decision in 1993 not to select him for the position of Technical Assistant (Communications), Level 8, in the Communications Section of the Facilities Management Division, and the decision to hire an external candidate for the position. The Applicant claimed that those decisions by the Respondent were arbitrary, an abuse of discretion, improperly motivated and in violation of fair and reasonable procedures, and that the Respondent violated the procedure for promotions laid down in the pertinent administrative order.

2. The Tribunal dismissed the Application for non-exhaustion of internal remedies as required by Article II, Section 3(a) of the Statute of the Tribunal. The Tribunal held that an "essential element of the exhaustion of available remedies is that they be invoked in a timely manner", and in particular that a grievance must be filed within six months from "the date the staff member is notified of the decision" contested, as required by Administrative Order ("A.O") No. 2.06, Section 4.1 as then written. The Tribunal found that the Applicant's grievance was time-barred by measuring from any of three possible "notification" dates: 16 August 1993, when the Applicant was orally advised that another person had been selected for the post; 23 February 1994, when written "regrets" were sent to unsuccessful candidates; and again at approximately the latter date, when the successful job applicant began serving as the Applicant's supervisor.

3. In the course of its judgment, the Tribunal noted that the earlier decision of the Appeals Committee – which had found the Applicant's appeal to be timely but had ruled against him on the merits – was not in the former respect binding upon the Tribunal:

The Appeals Committee is not meant to be a formal adjudicatory body but rather a recommendatory body (A.O. No. 2.06, Grievance and Appeals Procedures, paras. 9.2 and 15), albeit a most important one, that assists the Bank in the adjustment of grievances... . (Decision No. 41, para.18)

4. On 29 January 1999, the Applicant requested that the Tribunal revise its judgment. His central reason was that the Tribunal – as evidenced by its citation (quoted just above) to A.O. No. 2.06 in its amended form of 1998 – had failed to take account of the powers of the Appeals Committee as set forth in the 1994 version of A.O. No. 2.06, which was in effect at the time of his initial Application to the Tribunal. The Applicant pointed out that the 1994 version gave to the Appeals Committee the express authority to hear appeals from Bank decisions "influenced by administrative irregularity or abnormality," but that this language was deleted in the 1998

amendment. He claims that this anachronism justifies the revision of the Tribunal's judgment in Decision No. 41.

5. The relevant provisions of the Statute of the Tribunal that explain the force of a Tribunal judgment are twofold:

Article IX, para. 1: All decisions of the Tribunal shall be taken by majority vote and its judgments in each case shall be final and binding.

Article XI, para. 1: A party to a case in which a judgment has been delivered may, in the event of the discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal and which at the time the judgment was delivered was unknown both to the Tribunal and to that party, request the Tribunal, within a period of six months after that party acquired knowledge of such fact, to revise the judgment.

The Applicant asserts that the alteration of the Administrative Order that details the powers of the Appeals Committee is a "fact" which was not known to him or to the Tribunal and which "by its nature might have had a decisive influence on the judgment of the Tribunal."

6. This contention must be rejected. Even if it were to be concluded that the difference between the 1994 and 1998 versions of the Administrative Order relating to the grievance procedure was a "fact", it was not a fact that was unknown both to the Tribunal and to the Applicant at the time the judgment was delivered, and it was certainly not a fact which had an influence – let alone "a decisive influence" – on the judgment of the Tribunal.

7. The Tribunal, throughout the dispositive sections of its analysis in Decision No. 41, referred to the 1994 version of A.O. No. 2.06, which was indeed - as the Applicant asserts - the version in effect at the time he presented his grievance to his supervisors and ultimately his Application to the Tribunal. See paragraphs 7, 13 and 16 of Decision No. 41, and particularly the references therein to Section 4.1 of the 1994 Administrative Order, which provided: "A grievance must be formally submitted within six (6) months from the date the staff member is notified of the decision giving rise to the grievance." Thus, the Tribunal was fully aware of the earlier version on which the Applicant relies.

8. More significantly, there is no language whatever in A.O. No. 2.06 – whether in the 1994 or the 1998 version – with respect to the authority of the Appeals Committee to review Bank decisions that could have a "decisive influence" on the Tribunal's determination that the Applicant's Application was barred for failure to exhaust internal remedies. As the Tribunal has noted time and again, including in Decision No. 41, it does not sit to review the determinations or recommendations of the Appeals Committee. Rather, it has jurisdiction to hear claims that decisions of officials acting on behalf of the Bank have violated a staff member's contract of employment or terms of appointment. Nothing stated in Decision No. 41 passed judgment upon the reviewing authority of the Appeals Committee. The Tribunal's reference, mentioned in para.3 above, to paragraphs 9.2 and 15 of the 1998 version of A.O. No. 2.06 were meant simply to support a dictum about which there is no dispute, i.e., that "The Appeals Committee is not meant to be a formal adjudicatory body but rather a recommendatory body."

9. Finally, although the Applicant makes other assertions about Decision No. 41 that he believes to warrant revision, these "contentions are based clearly upon pleadings and facts that were before the Tribunal when it considered and rendered its judgment in his case." (Wilkinson (No.

2), Decision No. 34 [1997], III ADBAT Reports 68, para. 5). Therefore, the claims do not satisfy the requirements of Article XI, para. 1, of the Statute of the Tribunal.

Decision:

10. For the above reasons, the Tribunal decides to refuse the Applicant's request for revision of its judgment in Alcartado, Decision No. 41 [1998], IV ADBAT Reports 69.