

## ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 64  
(8 August 2003)**

**Patrick Safran  
v.  
Asian Development Bank**

**Robert A. Gorman, President  
Shinya Murase  
Flerida Ruth P. Romero**

1. The Applicant, a Planning and Policy Officer, level 3, in the Strategy and Policy Department ("SPD") of the Respondent Bank, contests the selection by the latter of an Information Systems and Technical Specialist in the Office of Information Systems and Technology ("OIST") for the level 4 position of Information Communications Technology ("ICT") Specialist instead of himself.
2. On 18 January 2002, the Respondent posted a listing for the position of level 4 ICT Specialist in the "anticipated vacancies" of its Human Resources Website. On 24 January 2002, the Respondent informed the professional staff by e-mail about this and other listings. The listings of the ICT Specialist position carried no job descriptions, reporting requirements or selection criteria.
3. On 29 January 2002, the Applicant, with two others belonging likewise to level 3, applied for the ICT Specialist position.
4. A Selection Panel of three met on 15 February 2002 to evaluate the three applicants on the basis of their letters of application, K20 staff profiles and three most recent Performance Evaluation Reports ("PERs"). The Panel laid down the qualifications expected of the ICT Specialist and decided to recommend to Management that the position be advertised externally and internally.
5. Accordingly, on 21 February 2002, the Respondent advertised the position with a description of responsibilities and selection criteria, both externally and internally.
6. The Panel met a second time on 26 April 2002. Acting pursuant to Appendix 1 of Administrative Order ("A.O.") No. 2.03, para. 2(c), which provides that "the selection panel shall first consider the candidates who are in the same level as those of the vacant position", the Panel first examined the application of a new candidate, Ms. M, who was already employed as a level 4 Information Systems and Technology Specialist.
7. On 7 May 2002, the Officer-in-Charge ("OIC"), Human Resources Division ("BPHR") announced that: "The Panel has met and recommended the selection of [Ms. M] to the position of Information and Communication Technology Specialist, Finance and Infrastructure Division ("RSFI"), and the President has concurred with the recommendation."
8. Beginning on 24 May 2002, the Applicant submitted a series of requests for administrative review protesting the decision not to promote him to the ICT Specialist position. These culminated with his 1 August 2002 application to the Director, Budget, Personnel and Management Systems Department ("BPMSD") which was rejected on 28 August 2002.

9. Dissatisfied with the adverse decision, the Applicant appealed to the Appeals Committee which encouraged the parties to utilize conciliation. This procedure having failed, the Committee proceeded to review and examine the case against the relevant Administrative Orders. On 14 January 2003, the Appeals Committee recommended that the President reject all of the Applicant's claims and the relief sought by him as without merit, on the ground that the decision to recommend a particular staff is that of the duly constituted Selection Panel and correct procedures were followed in the selection of Ms. M.

10. After having received the final decision of the President affirming the recommendation of the Appeals Committee on 27 January 2003, the Applicant filed the instant Application with the Tribunal on 11 February 2003.

11. The Applicant asserts that there have been several instances of failure to observe due process. He emphasizes the alleged irregularity in the publication of the advertisement for the ICT Specialist position. More specifically, he claims that the first vacancy listing of 18 January 2002 contained no job description, in violation of Administrative Order No. 2.03, para. 5.3 which states that "Each vacancy posting shall contain a brief description of the responsibilities of the position, reporting requirements and selection criteria." He also claims that the simultaneous external and internal advertisements of 21 February 2002 did not comply with the requirement of Administrative Order No. 2.03, Appendix 1, para. 2(c) that "An external advertisement must be substantially identical with the preceding internal advertisements", implying that there must be a chronological sequence between the two advertisements, thus ruling out simultaneous advertisements. Another alleged failure of due process is the informal advice given to Ms. M by the Manager, BPHR that she should wait for the second advertisement of the position before applying.

12. The Applicant also challenges the merits of the award of the position to Ms. M, citing among other things his several academic degrees.

13. Additionally, the Applicant stresses that he had a legitimate expectancy of being appointed to the subject position in view of the Director, SPD's recommendation to Manager, BPHR on 13 August 2001 "that [the Applicant] continue his assignment in SPD on a super-numerary basis until the effectivity of the reorganizational changes. After, he could be assigned as ICT Coordinator at level 4 on a regular budgeted position." (emphasis supplied). The Applicant contends that, coming from an "important senior staff of the institution...", his recommendation should be reliable and trustworthy." Other factors that led him to expect his appointment to the ICT position were Director, SPD's public announcement to SPD staff on 15 January 2002; the Applicant's most recent (2000 and 2001) SPD PERs; his being the ICT Coordinator for the ADB and the fact that his key skills, background, experience, length of service in ADB and seniority match the selection criteria for the promotion in question.

14. The Applicant seeks the following reliefs:

- i. Normalization of [his] position level 3 to level 4 effective 1 January 2002 as compensation for personal prejudice and damages;
- ii. A retroactive salary increase of 30% effective 1 January 2002 as equitable compensation for breach to professional ethic and professional and moral injury, a 10% compensation per Doctor degree and skills poorly and unfairly valued; and

- iii. A staff compensation in the sum of \$1 for prejudice and damages to [his] rights and interests...

15. In its Answer, the Respondent asserts that a fair competition was held to fill the ICT Specialist position which, as part of the 2001 major reorganization, was transferred from SPD, the Applicant's Department, to the Regional and Sustainable Development Department ("RSDD"). In choosing a suitable employee for the position, the Selection Panel acted in good faith, and without any abuse of discretion, arbitrariness or discrimination against the Applicant.

16. The Respondent also asserts that the initial listing for the position of level 4 ICT Specialist made on 18 January 2002 – with no job description, reporting requirements or selection criteria – was in accordance with current practice to list a position as soon as it was known that there would be a vacancy, often prior to the preparation of complete terms of reference ("TORs"). Moreover, claims the Respondent, the Applicant could not have been unaware of the basic requirements of the ICT Specialist position because he had been doing much of this work in his capacity as ICT Coordinator and had in fact prepared for SPD an initial draft of the position's TORs. He could not in any event have been prejudiced by the lack of the TORs since these were attached to the 21 February 2002 internal/external advertisement to which he responded.

17. As regards the Applicant's objection to the 21 February 2002 concurrent internal and external advertisements, the Respondent submitted that Administrative Order No. 2.03 does not prohibit such concurrent advertising of vacant positions but only provides for consideration of internal applicants prior to external candidates, which was exactly what happened in the two meetings of the Selection Panel. It was after the concurrent internal and external advertisements were published that Ms. M, a level 4 internal candidate, applied for the post and pursuant to Administrative Order No. 2.03, Appendix 1, para. 2(c) was considered prior to the others and declared suitable for a lateral transfer by the Selection Panel.

18. As regards the Applicant's legitimate expectancy of being appointed to the ICT post because of Director, SPD's recommendation, the Respondent points out that the same could only be one of several factors in a Selection Panel's decision, particularly when the Director, SPD had no conclusive say since the new position would be located in an entirely different Department, RSDD, and the Director General of the Department knew the Applicant and his work, and would have more influence in the decision-making process as a member of the Panel.

19. Moreover, the Manager, BPHR, who was required to be a member of any Selection Panel for a level 4 position, stated that "If the above position is approved at level 4, Mr. Safran cannot be transferred since he is now at level 3. Pursuant to the Bank's Administrative Orders, the position must be advertised internally." This should have been a strong indication to the Applicant that the ICT Specialist position was not a "sure thing" for him and that he would be required to compete for it against other staff members.

20. The Tribunal has held that in such matters as appointments and promotions, its role is a limited one. In Haider, Decision No. 43 [1999], V ADBAT Reports 6, para. 18 it was decided that "the Tribunal may not substitute its discretion for that of the management". Likewise as was stated in Lindsey:

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.

21. The Tribunal rules that as regards the alleged lack of job description and TORs in the initial advertisement, while there is no denying that technically, the advertisements did not comply strictly with the procedural requirements, it does not necessarily follow that there has been a failure of due process. The Applicant was not kept in the dark about the responsibilities for the position, the reporting requirements and the selection criteria to be used. In his application for the position, dated 29 January 2002, he admitted to a knowledge of these matters when he wrote: "In absence of the job description and based on my knowledge and on the TORs for an ICT Specialist that I drafted and sent to Manager, BPMSD upon his request (19/10/02), please consider the following... ." Hence, he cannot be said to have suffered injury to his rights. Moreover, the Tribunal is satisfied with the explanation given by the Respondent for its procedural omissions. Although the Applicant claims there has been a failure of due process because there was an informal suggestion that a suitable employee (Ms. M) apply, the Tribunal concludes that this was not an inappropriate act nor does it provide evidence of bias on the part of the Respondent.

22. With respect to the Applicant's alleged legitimate expectation of promotion to the ICT position, Director, SPD's words that the Applicant "could be assigned as ICT Coordinator at level 4 on a regular budgeted position" are not to be taken as a promise, much less a binding obligation that would serve to commit the Respondent. It should take more than an expression of hope to create a state of mind that the Applicant would land the job, no matter that the one who made the declaration was the Director of the Applicant's Department. It should be borne in mind that the position in question was to be in another Department and under another official. While the Applicant may not be blamed for nourishing his hopes, the elements he counts in his favor have merely created a personal expectancy and not a legitimate expectancy.

23. In choosing another candidate who already held a level 4 position and whom the Selection Panel concluded to be suitable for the advertised position, the Respondent may not be said to have violated the terms and conditions of the Applicant's appointment nor to have prejudged his rights in competing for the ICT Specialist position. Here the individual chosen appears to the Tribunal to have been well qualified so that her selection can by no means be regarded as an abuse of discretion.

## **Decision**

For these reasons, the Tribunal unanimously dismisses the Application.