

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 67
(20 January 2005)**

**Ms. L.C.
v.
Asian Development Bank**

**Flerida Ruth P. Romero, President
Khaja Samdani, Vice-President
Claude Wantiez**

1. These are four applications filed by the same Applicant, Ms. L.C., who joined the Asian Development Bank (ADB) on 26 November 2000 as a Private Sector Development Specialist for a fixed-term of three years, the first year of her service being on probation. At the end of her probationary period, i.e. at the end of the first year of her employment, the Bank refused to confirm her and consequently terminated her services as her performance was not found up to the mark.
2. In her first Application, the Applicant challenges her Performance Improvement Plan (PIP) Review Final Evaluation dated 11 December 2001.
3. In her second Application, the Applicant has challenged the Budget, Personnel and Management Systems Department (BPMSD) decision of 6 February 2002 to change her supervisor.
4. In the third Application, she has challenged the decision of BPMSD dated 4 May 2002 denying confirmation to her and the consequent termination of her service.
5. In her fourth Application, her grievance is that some of the important documents have been removed from her personnel record. Therefore, the relief she seeks is restoration of her original file. In this application, she has also requested that the decision to terminate her employment be overturned.
6. In the end of each Application, the Applicant has also asked for compensatory and punitive damages.
7. All the four Applications have been consolidated by an order of the Tribunal dated 1 July 2004. The benefit of the consolidation for either party is that the annexes filed in one case can also be taken into consideration in deciding the other cases. However, since all the four Applications are interrelated, they may all be decided together by one and the same judgment.
8. A few dates pertaining to the Applicant's service with the ADB are significant and must be taken note of at the very outset, which are as follows:
 - a. The Applicant joined service with the ADB on 26 November 2000.
 - b. Her performance having not been found satisfactory in the first six months, she was placed on PIP for the next six months of her probationary period, i.e. from May to November 2001.

- c. She was transferred from Infrastructure, Energy and Financial Sectors Department, West (IWOD) to Energy Division, West (IWEN) in the week commencing 6 June 2001.
- d. Although her probationary period ended on 25 November 2001, since her departmental intra-Bank remedies had not been exhausted, the President of the Bank approved termination of her services only as late as 4 May 2002.
- e. She relinquished the charge of her responsibilities on 17 May 2002.

9. As stated earlier, the Applicant joined the ADB on 26 November 2000 as a Private Sector Development Specialist (Level 4) for a fixed-term of three years. The first year of her service was on probation. Her Performance Evaluation Report (PER) for the first six months was not satisfactory. (It will be discussed in detail later). So she was put under a PIP in June 2001 and transferred from IWOD to IWEN. This transfer was consistent with the Bank's policy to decentralize the Knowledge Specialists. However, at the end of the year it was found that there was some improvement not only in the performance of the Applicant but also in her attitude; but the improvement was not good enough. The final evaluation report dated 11 December 2001 was still very unflattering as a consequence of which she was denied confirmation. But since some intra-Bank remedies had yet to be exhausted by the Applicant, it took the Bank some time to finally terminate her services. The President of the Bank approved the termination on 4 May 2002 and the Applicant relinquished charge of her duties on 17 May 2002. It is obvious that the Applicant's main grievance arose from her first six-month PER, and her final evaluation report at the end of her probationary period. She has, therefore, challenged not only her placement on PIP but also her final evaluation dated 11 December 2001 and the consequent termination of her services.

10. So, what we have to examine is whether there was any failure of due process on the part of the Bank in its decision to do away with the services of the Applicant; and whether the assessment of the Applicant's performance was arbitrary, discriminatory or based on improper motivation. This in fact is the crux of the matter.

11. It needs to be noted that we are barred from substituting our judgment for that of the Applicant's supervisors in the matter of assessment of her performance (Lindsey, Decision No. 1 [1992], I ADBAT Reports). However, no breach of the contract of employment as such has been alleged. At this juncture, it will be appropriate to look at the relevant Administrative Orders (A.O.) and the case law on the subject.

(a) A.O. No. 2.02 (2.14):

ADB 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. It will provide appropriate termination payments having regard to the reasons for separation, length of service and other relevant factors.

(b) A.O. No. 2.02 (2.1):

ADB requires for its operations highly qualified, dedicated and motivated complement staff with various skills. To meet its needs, ADB recruits such staff from amongst its member countries. In order to attract, recruit and motivate and retain such staff, ADB seeks to provide competitive terms and conditions of employment and is guided by fair,

impartial and transparent personnel policies and practices in the management of all its staff.

The Administrative Order relating particularly to probationary period is in paragraph 11 of A.O. No. 2.01 which is as follows:

11.1. The purpose of the probationary period is to determine whether the probationer is suitable for service in ADB. Such determination is generally made by ADB on the basis of the staff member's first 12 months of service.

Paragraphs 11.2 to 11.5 also deal with probationers. This Tribunal has, in the past, dealt with several cases pertaining to service matters. Some of them, which are relevant to the issues in question, have been referred to below:

(a) Haider, Decision No. 43 [1999], V ADBAT Reports 1, 5, para. 17:

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

It is of the essence of the 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 member's performance during the probationary period, he does or does not qualify for permanent Bank employment. This determination necessarily lies within the responsibility and discretion of the Respondent [the Bank]....

Conversely, however, the probationer's 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.

(b) Lindsey, Decision No. 1 [1992], I ADBAT Reports 1, 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 it cannot have been reasonably 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.

(c) Salle, WBAT Reports 1982, Decision No. 10, para. 50:

The Tribunal deems it necessary to emphasize the importance of the requirements, some times subsumed under the phrase "due process of law" the very discretion granted to the Respondent [the Bank] in reaching its decision at the end of probation makes all the more imperative that the procedural guarantees ensuring the staff member of fair treatment be respected.

(d) Behuria (No. 2), Decision No. 11 [1996], II, ADBAT Reports 27, 28, 30, paras. 3 and 11:

Decisions with respect to the evaluation of staff member's 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).

It is true, as the Applicant says, that the prejudice is usually concealed and its existence has to be established by inference, yet in the view of the Tribunal the allegations of the applicant are not sufficient to establish bias or lack of responsibility on the part of his manager or the director with respect to the three items of PER. The applicant has basically asserted his disagreement with several of Respondent's assessments of his performance; but this cannot take the place of proof of discrimination or bias, which the Tribunal finds to be absent from the record.

12. In the Lindsey case it has been clearly stated that the matter of evaluating the performance of the Applicant is a matter for the 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 fairly weighed'. Similarly in the Alexander case the Tribunal held that the onus of proving abuse of discretion is on the Applicant. See Alexander, Decision No. 40 [1998], IV ADBAT Reports, para. 38.

13. Since the Applicant's grievances have mainly arisen from her PER for the first six months and the final evaluation report given by her supervisors at the end of the first year of her employment, therefore, it is necessary that we examine those two reports first, before we can draw any meaningful conclusions.

14. The first six month PER is attached to Ms. L.C.'s Application No. 3. Some of the remarks recorded against her are as follows:

- a. "No substantial application of her skill in IWD's Private Sector Department (PSD) Project Components".
- b. "No substantial application of skills on PSD network".
- c. "No substantial application of skills on Private Sector Assessments (PSAS)".
- d. "No substantial application of skills on Score Cards for PSD Intensification".
- e. "No substantial application of skills on PSD Checklists".
- f. "Her comments on BTORs are sweeping and of low quality; she may diagnose issues but rarely proposes solutions".
- g. "Managers declared that follow up and support have not been provided; she has not gained confidence of mission leaders".

- h. "IWOD would review her priority and amend or endorse them. Her work has not been useful".
- i. "Two most promising projects overlooked".
- j. "She failed to contribute effectively to PSD network; no value added".
- k. "Did not produce knowledgeable seminars".
- l. "She worked contrary to the priorities and guidelines of Director".
- m. "Her own Back-to-Office-Reports (BTORs) took a long time to prepare and had to undergo several substantial substance corrections".
- n. "Cannot prioritize her work and delivers beyond deadlines; inability to prioritize according to deadlines".
- o. "Repeatedly failed to finalize and submit important papers such as PSD Intensification and PSO potential in private sectors matrix assigned over two months ago".
- p. "No "final" formal output has been produced in six months with the exception of two BTORs".
- q. "Detected a negative attitude to our assignments and priorities".
- r. "She has preconceived notions on what she would prefer to do".
- s. "Does not follow our guidance and instructions".
- t. "When department tasks are assigned, she indicates commitment to network but network tasks have not been completed".
- u. "Inability to listen carefully".
- v. "She is impatient with support staff whom she perceives will do all her routine jobs on computer".

15. The report speaks for itself. In the explanation column, it is true she tried to explain away the adverse observations. But it appears, her explanations could not change the mind of her supervisors nor affect the subsequent assessment of her performance.

16. Further, the process remained incomplete inasmuch as Part 2.3 of the PER which the Applicant was bound to complete was not completed. This failure on the part of the Applicant also betrays her propensity for non-cooperation with her superiors. There are also other instances of intransigence on the part of the Applicant. In his memorandum dated 12 July 2001 to the Manager, IWEN, the Senior Financial Specialist of IWEN observed as follows:

There are certain reservations with the manner in which [the Applicant] is interacting with her colleagues during individual meetings and during division meetings. Her attitude about ADB and its policies and procedures is noticeably negative and sarcastic comments about the institution are often delivered unsolicited. My assessment is that

this negative attitude would be difficult to change and is becoming an issue of serious concern as it affects other staff in the Division, in particular all the young newly recruited staff.

17. Similarly in August 2001, the Manager, IWEN, in his concluding comments, observed about the Applicant as follows:

[The Applicant] in interacting with her colleagues and during meetings had shown noticeably negative, sarcastic and cynical attitude towards ADB and its policies.

18. In his assessment given to the Manager, IWEN, the opinion of the Senior Project Engineer, IWEN, who was supervising the Applicant's work in his capacity as Mission Leader, was not very encouraging either. It is reproduced below:

Seems to have broad knowledge of programming aspects of privatization. However, does not seem to have much transactional knowledge on specific privatization, at least in the infrastructure area.... Has difficulties in logical and concisely expressing her thoughts on papers.

19. According to this officer even the Applicant's English writing ability was not very good.

20. At another place, Manager, IWEN, stated on 20 December 2001 in his note-to-file of a meeting that "in both the cases she has declined to offer comments when I had discussed the review with her". His note in fact reveals that instead of commenting on her own performance of which an opportunity had been given to her, she commented mostly on the abilities of the managers. This further shows not only her intransigence but also her lack of cooperation and respect for her superiors who in fact tried to help her improve her performance.

21. In her final PER relating to the period from June to November 2001, Part 2.1, her two immediate supervisors observed:

- a. "Has difficulty prioritizing work".
- b. "Application of her knowledge/experience to the work does not reflect her years of experience. Does not meet requirements".
- c. "Needs to improve her writing ability to express her thoughts in a logical and concise manner".
- d. "Applies herself to the work. However, productivity suffers because of difficulty in conceptualizing the issue and accepting guidance".
- e. "Innovativeness: limited."

22. As a matter of fact, the PIP required a bi-monthly performance evaluation of the officer placed on the PIP. Thus there were three such reports before the second half of the probationary period of the Applicant came to an end. The first PIP review meeting was held on 15 August 2001 with Manager, IWEN, and Senior Financial Specialist who both discussed the Applicant's performance with her. The Manager, IWEN, noted that the Applicant's performance was lower than expected and encouraged her to put forward her views. The Applicant made excuses. However, all three signed this first bi-monthly PIP Report.

23. As to the second bi-monthly PIP Report, it may be pointed out that the Manager, IWEN, set out on 24 September 2001 in a memorandum, the main assignments to be completed by the Applicant by 22 November 2001. The assignments included work on the Bangladesh Power Sector Technical Assistance (TA) and preparation of a report on the feasibility of market-based rural electrification. The Applicant objected to this work plan on 27 September 2001 because it did not mention the Pakistan Gas Sector restructuring TA and had added the report on rural electrification. The Manager responded on 3 October 2001 by offering a revised work plan that included the Pakistan Gas Sector TA and narrowing the scope of rural electrification report and also extended the deadline for submission of the Applicant's report. Now the Applicant alleges in her application that at the end of September 2001 Manager, IWEN, told her that Director, IWD, had requested her to return to work in IWOD to organize a conference to be held in 2002 and that if she refused, she would not be confirmed in her position. However, the Manager denied this. The Bank has also denied that there was such a request. However, on 8 October 2001, the Senior Project Engineer, IWEN, who was supervising the Applicant's work in his capacity as Mission Leader for the Bangladesh TA, gave the Manager, IWEN, a poor assessment of her performance and suggested that the Applicant should not have entered as a "Knowledge" Expert as this was an "over-rating of her abilities". Similarly on 17 October 2001, the Senior Finance Specialist, IWEN, who was supervising the Applicant's work in his capacity as Mission Leader for the Pakistan TA, conveyed to the Manager that "her in-depth knowledge in the area of privatization has not been evident in performed tasks".

24. On the basis of the above, the Manager, IWEN, prepared the Applicant's bi-monthly PIP Report on 17 October 2001. It was endorsed by Director, IWD, and Deputy Director, IWD, and signed by the Applicant. The Applicant questions the above mentioned reports on the ground that she had had "a long record of being an adviser at the highest level of government on private sector issues for many years". She wants her PIP be disregarded on the ground that "it seems to me that the review of my performance is untrue and is not based on any evidence and reveals a lack of understanding of my job."

25. The third and final PIP Report dated 11 December 2001 given to her by the Manager, IWEN, was negative throughout covering her performance on all the three projects. The Applicant, however, disagreed with this report as well. On 19 December 2001 the Manager, IWEN, met with the Applicant to discuss her concerns about the final PIP review.

26. According to the Applicant the Deputy Director, IWD, did not have a right to validate her various tasks because he was unfamiliar with them. She admits that although she wrote comments on her PER, she refused to sign it.

27. The observations of the five supervisors, who had to make a critical appreciation of the Applicant's work, may be summarized as follows:

- a. "Her analytical side was weak".
- b. "[The Applicant] has strong qualifications and the CV that should enable her to make a significant contribution to the ADB's private sector development project but it did not come through in her work either in the form of practical suggestions to address ground realities or as constructive criticism."
- c. "She is not able to apply experience to the issues at hand."

- d. "Her ability to provide practical leadership to ADB staff on private sector development or to hold constructive and fruitful dialogue with the Developing Member Countries (DMC) government is doubtful."
- e. "Her productivity is lower than the normal expected of a Level 4 professional staff after 12 months in the ADB."
- f. "[The Applicant] is not suitable for the position of a PSD Specialist."

28. Apart from the unsubstantiated allegations against the Bank authorities, duly denied by them, criticism of the Bank's policies, and the frivolous suspicions that her computer was tampered with and her personal files "broken into", the main grievances of the Applicant are that a wrong person (Deputy Director, IWD) was involved in her performance evaluation and that some critical files were removed from her personnel record which in fact according to her, resulted in her non-confirmation and the consequent termination of her service. In this regard, it needs to be pointed out that in the "Initial Work Programme" provided to the Applicant it had been specified under the heading "Reporting Arrangements" that she was to "report to Director, IWD, concurrently Head, PSG, and the Deputy Director, IWD". Simultaneously, she was also given a complete work programme. This shows that the Deputy Director, IWD, was undoubtedly competent to comment on her performance and there were no doubts about what she was required to perform. At any rate, there were four other persons, as has been noted above, who commented adversely on her performance. And then at every stage her performance reports were discussed and she was told what in fact was required of her. It cannot, therefore, be said that the principle of 'audi alteram partem' was overlooked. It is also evident from the record that the Applicant's attitude towards her work and colleagues was respectively negative and non-congenial. In expressing her disagreement with the observations of her supervisors, the Applicant has made several complaints against them. But those "complaints are not sufficient to characterize the observations in question as being the result of bias or prejudice." As could be seen from the nature of the remarks reproduced above, they all fall within the domain of the supervisory discretion. There is nothing on the record to suggest that in reaching their conclusions, the supervisors abused their discretion.

29. As to her complaint, in application No. 4, that some of the critical documents are missing from her personnel record, it is sufficient to point out that even according to her, she found those documents to be missing only on 7 May 2002. Even if this allegation be taken as correct on its face value, there is nothing on the record to show that when the Bank authorities recommended termination of her services before 4 May 2002 (the date on which the President accorded his approval) those documents were not on the record. The Respondent asserts that these allegations are false and that the President made his decision not to confirm her in her appointment on the basis of full and complete information and the contents of her personnel file fully complied with the requirements of A.O. No. 2.08 with regard to the communications to and from Human Resources Division (BPHR). The onus of proving this allegation was on the Applicant which she failed altogether to discharge.

30. The fact of the matter is that the Bank administration had to get a job done through its staff including the specialists at work. If the supervisors of the Applicant thought that the quality of her work was not up to the mark, the Tribunal cannot impose her on the administration if she is unable to work to her supervisors' satisfaction. Further, it seems the Bank administration has been helpful to her. In fact the change of her supervisors, though for a different reason, reduced the possibility of prejudice.

31. In view of what has been said above, the Tribunal finds that in the Applicant's case there was neither a failure of due process nor was the assessment tainted with arbitrariness, discrimination of any kind, improper motivation or abuse of discretion.

32. It should be understood that a staff member on probation is under close scrutiny, on the basis of which his or her supervisors are to decide whether he or she should be retained in service for the remainder of the contract. Normally a staff member on probation has no inherent right to be confirmed under all circumstances. The probationary period does involve a risk. It is, however, true that the Bank has provided safeguards in the form of A.O.s to protect a probationer from victimization by the supervisory staff. The Bank has further provided safeguards in the form of intra-Bank procedures like appeals and reviews and has also established an Administrative Tribunal which consists of members from outside the Bank to bring an unbiased scrutiny to bear upon the Bank employees' grievances. All this, however, does not mean that a probationer stands on a par with the confirmed employees of the Bank. The confirmation of an employee does in the ultimate analysis depend upon the assessment of his or her performance, the quality of which is to be judged by the supervisors alone and not by the members of the Tribunal. At any rate the Tribunal has examined the Applicant's case in the light of the A.O.s applicable to her at the relevant time and the case law on the basis of which the Tribunal has found that there was no trace of any wrong doing involved in her case.

33. On 6 February 2002, BPMSD decided to change the Applicant's supervisor. Since she was still in service till 17 May 2002, she made a grievance of this change in her Application No. 2. But the fact remains that the Applicant was found unfit by December 2001 to continue in the service of the Bank. Therefore, the change of her supervisor in February 2002, which was subsequent to December 2001, gave her no cause of action. However, if her non-confirmation and termination of service had been overturned by the Tribunal, this grievance arising from a decision dated 6 February 2002 could have given her a cause of action. It has, in the present circumstances, become infructuous.

Decision

For these reasons, the Tribunal unanimously decides to dismiss all four Applications.