ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

DECISION NO. 76
(2 August 2006)

Michael M.H. Lim
vs.
Asian Development Bank

Flerida Ruth P. Romero, President
Khaja Samdani, Vice-President
Yuji Iwasawa

I. THE FACTS

1. The Applicant, Mr. Michael M.H. Lim, is a regular employee of the Asian Development Bank (the Bank) at Level 5 holding the position of Senior Structuring Specialist in the Private Sector Operations Department (PSOD). He has been working for the Bank since 16 February 2001 without blemish as asserted by him and not denied by the Bank.

2. In 1994, the Bank along with other lenders advanced a loan to, and made an equity investment in, a project of Primo Oleochemicals (Primo) which was secured against Primo's assets. The project, however, failed and eventually the lenders including the Bank decided to foreclose on Primo extra judicially (out of court).

3. The foreclosure sale was held on 31 March 2003 in Camarines Norte, Philippines, at which the Applicant and "Mr. B", a Senior Project Officer, PSOD, represented the Bank. Primo's properties sold at the sale were divided into five Lots. The Bank bid for and won lots two, three and four. The Applicant then prepared a Back-to-Office Report (BTOR) on 7 April 2003 giving the details of what transpired at the sale. The assets in Lot 4 included two paintings – one by a well-known artist and the other by a lesser-known one. These two paintings did not find mention in the BTOR although Mr. Lim had taken possession of them. The fact that the two paintings went into the custody of Mr. Lim was brought to the notice of the Bank by Mr. B in a rather insinuating manner. Although according to the evidence adduced by the Applicant, Mr. B later apologized for the insinuation, the Bank started an investigation into the conduct of the Applicant on the charge of misappropriation. However, the charge was, on 21 July 2004, reduced to "negligence" of which the Applicant was finally held guilty. Consequently, on 31 January 2005, the President of the Bank approved, on the recommendations of the Review Committee dated 13 December 2004, that the Applicant be suspended from service for 3 weeks without pay. The Applicant was, accordingly, advised on 8 February 2005.

4. The Applicant's appeal to the Appeals Committee failed on 30 September 2005. Hence this application to the Tribunal. It may be stated at the outset that we are not sitting in judgment either on the Review Committee's recommendations or on the Appeal Committee's. Instead, we have to examine the validity of the President's final order dated 31 January 2005 imposing the penalty in question.

II. DISCUSSION

5. In the absence of any disputed facts we find no justification for hearing oral testimony. Only the motives and intentions of Mr. Lim are in dispute which are not palpable but need to be

gathered from the attending circumstances. The request for calling witnesses is, accordingly, turned down.

6. The two paintings admittedly passed into the custody of Mr. Lim at the end of the foreclosure sale, but the Bank having already bid and won Lots 2, 3 and 4, the paintings were the property of the Bank and no longer that of Primo. Therefore, somebody's permission, on behalf of Primo, was meaningless. The so-called transparency of the episode is also not relevant to the issue in question. What is relevant is the fact that neither the paintings were brought to the premises of the Bank nor mentioned in writing in any document submitted to the Bank. Were it not for the information given by Mr. B, the paintings would have remained in the custody of Mr. Lim indefinitely without the knowledge of the owner, i.e. the Bank. It is true that Mr. Lim made a clean breast of himself when the matter was brought to his attention for an explanation. His contention, however, is that he did not intend to misappropriate the paintings but, at Primo's instance, he was, in good faith, trying to sell them for the benefit of the creditors. He also asserts in his Application that Mr. B was inimical to him because he (Mr. Lim) thought Mr. B's performance was poor. Before the application in question was filed the two gentlemen had apparently reconciled, but that cannot change the fact that the paintings remained in the custody of Mr. Lim for full one year and were returned to the Bank only after a probe into his conduct began.

7. One painting, the bigger one, is said to have adorned a wall in the house of Mr. Lim. Even if Mr. Lim was, meanwhile, contacting different art galleries to sell the paintings, he made use of them, albeit temporarily. However, in light of his explanations and the fact that he returned the paintings to the Bank, the rightful owner, the charge of misappropriation was reduced to "negligence", admittedly on the same set of events. He was accordingly penalized by the President of the Bank, as stated earlier.

8. Now Mr. Lim argues that in A.O. 2.04, "negligence" as such is not misconduct; only "gross negligence" is. This appears at first sight to be a point well taken although purely technical in nature. In para. 2.1 of A.O. No. 2.04 only "gross negligence", not simple negligence, in the performance of assigned duties has been cited as constituting unsatisfactory conduct or misconduct. It is obvious from the language of para. 2.1 that the examples given therein of unsatisfactory conduct or misconduct are not exhaustive. What is to be determined by us is whether Mr. Lim's conduct was unsatisfactory. (In the circumstances of the case, we can preclude 'misconduct' altogether.) In our opinion, the way Mr. Lim conducted himself was unsatisfactory, indiscreet, and unbecoming of a responsible officer of a prestigious international Bank. In fact the case in hand is on all fours with the example (d) given in para. 2.1 of A.O. No. 2.04. It reads as follows:

> (d) Abuse of … trust to the detriment of the Bank, or any conduct of such character as may be detrimental to the name of the Bank.

9. He undoubtedly performed the assigned duties in an improper and reckless manner which constitutes unsatisfactory conduct on his part within the meaning of para. 2.1 of A.O. No. 2.04 which deals with disciplinary measures and procedures. In paragraph 34.3 of the Application, the Applicant asserts that the Bank's rules (under the Bank's Project Administration Instruction (PAI) No. 6.03 revised in November 2002 section II on BTOR submissions) specifically provided for oral reporting of events. According to the Applicant, having reported orally to his bosses about the custody of the paintings, he was no longer required to mention this fact also in the written reports. The relevant instructions on BTOR submissions given in section II are as follows:

> The mission leader reports to the director, sector division or country director, RM on important issues orally immediately upon return. The director or country director may, in turn report orally on these issues to the deputy director general ….

It is clear from these instructions that the oral reporting is necessary where the issues are urgent and important, immediately on the return from the mission. However, these instructions do not absolve the mission leader from reporting those issues also in his BTOR in writing. The issue of the custody of the paintings was neither important nor urgent. It did not have to be reported to the Applicant's higher authority orally. Even if the oral reporting was made, that fact also had to be mentioned in the BTOR from which there was no escape. Therefore, there is no substance in the Applicant's defense that he had reported the matter orally to his higher authority. He was still responsible for the omission in the BTOR. It is to be noted that according to para. 2.1 of A.O. No. 2.04, malice or guilty purpose need not be proved in order to prove unsatisfactory conduct.

10. As a matter of fact, the Applicant has advanced two main arguments against the disciplinary measure in question:

a. The arbitrary changing of the charges against Applicant was procedurally improper and violated his right to due process.

b. The decision on the charge and the penalty imposed constitute abuse of discretion, arbitrariness, discriminatory practice, violation of fair and reasonable procedure and may even involve improper motivation.

11. As to (a), the charge was not, in the first place, changed arbitrarily. It was done after taking into consideration the explanation offered by the Applicant. This was neither procedurally incorrect nor in violation of the principle of due process. Secondly, the reduction of the charge was to the benefit of the Applicant.

12. The Applicant wrongly asserts that under para. 9.2(f), the Bank had only three options. In fact the Bank had four. The very first option was to nominate a Review Officer or Review Committee to investigate the charges against the Applicant; and this course was duly adopted. The Review Committee was not seized of the charge of misappropriation but only of "negligence." It is an admitted fact that the Applicant was afforded an opportunity to defend himself which he duly availed of. The second charge of negligence, being based also on the same set of events as admitted by the Applicant, no evidentiary hearing was needed. Therefore, no procedural impropriety was involved in the process; and the Applicant having defended himself throughout and availed of all the intra Bank remedies prescribed under the rules, there was no failure of due process, either. The Applicant further argues that "reputation risk" was an altogether new charge which he was not given an opportunity to defend against. The Bank's reputation risk was not in fact a charge. It was mentioned only as a consequence of "negligence" on the part of the Applicant. Whether the kind of unsatisfactory conduct involved in this case entailed a risk to the Bank's reputation was so adjudged by the management of the Bank and we agree therewith. The disciplinary proceedings were held against the Applicant not on the charge of 'reputation risk' but on that of "negligence."

13. The Applicant argues that the international labor laws have been violated inasmuch as the charge was vague and the foreclosure procedure was not irregular. But the Tribunal disagrees.

The charge was not vague. The Applicant knew exactly what was being alleged against him. He in fact admitted the facts which proved the allegations. As to the regularity or irregularity of the foreclosure procedure, it is true that the Bank calls the procedure irregular. As a matter of fact, according to Annex 5 to the Application, it was not. The charge relates to something done by the Applicant after the foreclosure procedure was over. Then the matter was between the Bank and the Applicant, not between the debtors and the creditors. But the fact remains that the Applicant admitted having retained the paintings in his possession for one year without informing the Bank in writing. This is the crux of the charge, not the regularity or irregularity of the foreclosure procedure. It is, therefore, wrong to say that the charge was vague.

14. The reliance placed on the ILOAT judgments in the cases of Limage, ILOAT Judgment No. 1639 (10 July 1997), and Wadie, ILOAT Judgment No. 1384 (1 February 1995), by the Applicant is inapt. In these cases there was a clear violation of the principle contained in audi alteram partem. In the case in hand, the principle was assiduously adhered to.

15. The Applicant further argues that the charge could not be changed. It could only be annulled under A.O. 2.04. This is not true. Another alternative was to refer the matter to the Review Committee (as stated earlier) to which the Bank resorted. The ILOAT judgment in International Telecom Union, ILOAT Judgment No. 2414 (2 February 2005), has no bearing on any of the issues involved in the present case. Similarly, the cases Durand-Smet (No. 2), ILOAT Judgment No. 1832 (29 January 1999), and Giordimaina, ILOAT Judgment No. 2116 (30 January 2002), referred to by the Applicant, are irrelevant.

16. The Applicant further argues that he was subjected to double jeopardy by the change in the charge. The Applicant was not proceeded against a second time on the same set of facts. Instead, a lighter penalty was awarded to him on a lesser charge. On the charge of misappropriation, the penalty was dismissal, while on the present charge, he has been only suspended for 3 weeks without pay.

17. Now a word about the charge of ‘negligence.’ If “gross negligence” can be cited as an example of ‘misconduct’ (under para. 9.2(f) of A.O. 2.04), ‘negligence’ certainly falls within the meaning of the expression, “unsatisfactory conduct.” But it would be neater if the Bank used the term, “unsatisfactory conduct”, as the charge instead of ‘negligence.’ It may be noted that the President of the Bank himself never used the term ‘negligence.’ He always considered the fault on the part of the Applicant to be “unsatisfactory conduct”, never named it as ‘negligence’. A.O. No. 2.04 deals with only misconduct and unsatisfactory conduct. However, we are of the view that no prejudice has been caused to the Applicant inasmuch as the facts leading to the charge were clearly known to him, which he duly answered in his defense.

18. The Applicant cited a number of judgments from the ILOAT (see World Health Organization, ILOAT Judgment No. 2475 (6 July 2005); World Trade Organization, ILOAT Judgment No. 2254 (16 July 2003)) and a few also from this Tribunal (see Mesch & Siy (No. 4), Decision No. 35 [1997], III ADBAT Reports 71; Haider, Decision No. 43 [1999]), V ADBAT Reports 1) to show that the Bank failed to conduct itself appropriately in this case in accordance with precedent. But we find that none of those judgments is attracted to the facts of this case. It is, therefore, no use discussing those judgments in detail. The first of the two arguments advanced by the Applicant, is, therefore, rejected.

19. The second argument of the Applicant is that:

> The decision on the charge and the penalty imposed constitute abuse of discretion, arbitrariness, discriminatory practice, violation of fair and reasonable procedure and may even involve improper motivation.

20. We find it sufficient to reproduce, verbatim, the relevant part of the order of the Bank's President as a complete answer to the allegations contained in the Applicant's arguments viz:

> (a) abuse of discretion, (b) arbitrariness, (c) discriminatory practice and (d) improper motivation.

It is as follows:

> In view of the foregoing, I conclude that Mr. Lim committed unsatisfactory conduct under AO 2.04. In determining the appropriate penalty for Mr. Lim's unsatisfactory conduct, I have taken note of all circumstances listed in paragraph 6 of AO No. 2.04. I note that Mr. Lim had no prior disciplinary record of misconduct and that his action did not cause actual adverse consequence to ADB. I also note that Mr. Lim sufficiently established that he did not gain any financial or other benefit from his action, and that he told his supervisor that he had taken the paintings to his home. However, it bears emphasis that Mr. Lim's official position involves responsibility for valuable ADB assets and he was directly responsible for matters to which his unsatisfactory conduct related. In this regard, I note that he acted without any apparent concern for the issues raised by his removal of the paintings and taking them to his home without any documented accounting of his actions. Although there was no damage caused to ADB by his unsatisfactory conduct and the creditors who knew of his action did not object to it, he certainly placed ADB's reputation at risk because there could have been adverse consequences if it became publicly known that the foreclosure process had been irregular. Taking into account all these factors, I have decided to impose the penalty of three week's suspension without pay, which will immediately take effect upon notice to him. (emphasis added)

This clearly shows that there was no abuse of discretion, arbitrariness, discriminatory practice or improper motivation.

21. Further the review indicates that there has been no violation of fair and reasonable procedure either. Again the precedents cited in this behalf from the ILO tribunal and our own have no relevance to the facts and circumstances of this case.

22. The Applicant has also invoked the rule of contra preferentem to assert that the alleged ambiguity in A.O. No. 2.04 should have been resolved in his favor. In this behalf, he relied on one of our own judgments, Galang, Decision No. 55 (8 August 2002) and an ILOAT judgment, European Patent Organisation, ILOAT Judgment No. 2290 (4 February 2004); but there is no ambiguity in A.O. No. 2.04. The question whether "simple negligence" is punishable under the rules has already been dealt with earlier in this judgment and the conclusion in effect is that the kind of "negligence" the Applicant committed did amount to unsatisfactory conduct.

23. In short, A.O. No. 2.04 has been properly invoked and applied in this case. The disciplinary proceedings were initiated rightly by the Director, BPMSD, under paras. 12 and 4.2 against the Applicant as he was found to have performed the duties assigned to him in an improper and reckless manner which amounted to an abuse of trust to the detriment of the Bank's name within the meaning of para. 2.1(b) and (d). The penalty awarded to him is provided in para.

4.2(d). Under para. 6.1, however, the disciplinary measure needs to be proportionate to the seriousness of the unsatisfactory conduct. In assessing the seriousness, the criteria given in para. 6.2 have been kept in view. In the matter of procedure, the provisions of para. 9 have been meticulously followed. The Applicant, therefore, has no reason to complain.

24. After taking into consideration the fact that the President exercised his discretion judiciously, we find no reason to alter it.

DECISION

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