ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

DECISION NO. 78
(7 March 2007)

Lilibeth G. Abat
v.
Asian Development Bank

Khaja Samdani
Claude Wantiez
Yuji Iwasawa

1. The Applicant alleges that the Bank abused its discretion in summarily dismissing her from the service, causing her irreparable suffering, injury, losses, and damages. The Applicant asks for compensatory damages in the amount of US$100,000, moral damages in the amount of US$100,000, exemplary damages in the amount of US$100,000, and litigation costs in the amount of US$2,000.

I. THE FACTS

Background

2. The Applicant joined the Bank on 10 September 2001 as an Accounting Assistant at Level 3 in the Controller's Department (CTL) on the basis of a three-year fixed-term appointment, which on 10 September 2004 was converted to a regular appointment based on her good performance. On 15 October 2004, she became a Disbursement Assistant, CTL at Level 4.

3. Prior to joining ADB, the Applicant had worked in various financial auditing roles. After joining ADB, she consistently received high performance ratings and had her work assessed as exceeding the requirements of her position.

4. On 16 March 2005, the Compensation and Benefits Division (BPCB) referred to the Office of the Auditor General (OAGI), concerns by Vanbreda International (ADB's medical insurer, hereinafter "Vanbreda") regarding potential fraudulent medical insurance claims by the Applicant.

Preliminary Investigation

5. On 16 March 2005, the Integrity Division, OAGI conducted a preliminary investigation into allegations regarding fraudulent medical insurance claims by the Applicant between 14 January 2004 and 23 December 2004. In a Memorandum of 18 March 2005, OAGI concluded that there was a reasonable basis to find that the Applicant had falsified documents and collected medical insurance reimbursements for her personal gain. Receipts originally issued by Alpha Polyclinic and Laboratory, Inc. (APLI) were alleged to have been altered and inflated for reimbursement.

6. On 29 March 2005, the OAGI met with the Applicant to seek her initial explanations regarding the APLI receipts. According to the Applicant this was "without prior notice and without the benefit of counsel or such any other accompaniment to afford her proper legal guidance."

7. During that meeting, the Applicant was shown copies of seven receipts which had been altered, together with the original receipts obtained from APLI. According to the minutes of the meeting prepared by OAGI, the Applicant "confirmed that she had tampered [sic] the receipts to cover expenses for medicines that were either not prescribed or for which she had no receipts . . . . [She] confirmed that

she did not tamper [sic] any other receipt than the ones of APLI and that there are no other fraudulently claimed amounts . . . . [She] offered to reimburse the fraudulently claimed amount."

8. On 31 March 2005, the Applicant visited the office of OAGI and provided, in summary, the following explanation. It was her cousin, the babysitter of the Applicant's son, who took the son to the clinic and gave the Applicant the fake receipts. In November 2004 when she went to the clinic herself, she discovered the alterations. She herself tampered with a receipt in November 2004 in order to make it consistent with the other receipts. There may be one more altered receipt in January/February 2005.

9. The Applicant argues that she approached OAGI "not for the purpose of modifying her statements . . . but rather to clarify some matters she mentioned [during the meeting on 29 March] but missed out in the Minutes she received on 31 March." The Applicant explained that during the meeting on 29 March, when she was informed that Vanbreda had found altered receipts under her son's name, "I immediately mentioned to [the Integrity Specialist, OAGI] that I was not the one who's accompanying my son in his check-ups. I was about to tell him that it was my baby sitter . . . who accompanied my son in most of his check-ups and altered the receipts before submitting them to me as proof of her payment. However, I was interrupted by [him] saying that there were also tampered receipts under my name."

10. On 5 April 2004, OAGI submitted its findings to the Director, BPHR, that the Applicant's actions amounted to a violation of ADB's Anticorruption Policy and recommended that BPHR initiate formal disciplinary proceedings in accordance with Administrative Order ("A.O.") No. 2.04.

Formal Disciplinary Proceedings

11. On 4 May 2005, the Director General, Budget, Personnel and Management systems Department (BPMSD) initiated formal disciplinary action against the Applicant in accordance with A.O. No. 2.04, para. 9.2 (a), charging her with fraud and serious misconduct. The Applicant was informed that the charges against her might warrant dismissal from ADB. She was given until 20 May 2005 to respond.

12. On 5 May 2005, OAGI forwarded to BPHR further findings. Additional receipts dating back to 2003 were found to have been falsified. In all, the Applicant made fraudulent medical insurance claims on 17 occasions between March 2003 and February 2005. On 15 occasions the Applicant inflated the medical expenses, and on one occasion she misrepresented that a medical treatment occurred when it had not, and on another occasion she altered a receipt to pretend that the medical treatment was for a person covered by the ADB's Group Medical Insurance Plan (GMIP) when the actual treatment was meted out to someone who was not covered by the GMIP, namely her father. Thus, the Applicant submitted falsified receipts to claim medical reimbursements to which she was not entitled over a protracted period of almost two years. OAGI calculated that the total the Applicant had fraudulently claimed was PHP 37,040, of which amount Vanbreda had already paid out PHP 18,264 to the Applicant.

13. On 12 May 2005, BPHR forwarded the additional receipts to the Applicant and requested that she provide her explanations for the additional receipts in her reply. On 18 May 2005, the Applicant submitted a Reply to the Memorandum of 4 May 2005. The Applicant reiterated that it was her cousin who had altered all the medical claims fraudulently submitted prior to November 2004. The Applicant apologized for not reporting the fraudulent receipts the moment she discovered that they had been tampered with and indicated that she intended to return any excess amount unduly paid to her.

14. On 28 June 2005, pursuant to A.O. No. 2.04, para. 9.2 (d), the Applicant met with the Director, BPCB. During the meeting the Applicant confirmed that she contested the charges against her. The Applicant was asked what the possible motivation of her cousin was to falsify the receipts since she would not be the beneficiary of any reimbursement. The Applicant explained that her cousin was responsible for the payment of medical expenses. The Applicant then confirmed that upon her discovery of the falsification she continued the practice and altered receipts herself.

15. In a Memorandum of 5 July 2005, making comments on the minutes of the meeting on 28 June 2005, the Applicant explained that her cousin, who had to present receipts for the use of the household budget, had tampered with the medical receipts in order to get more money from the Applicant. The Applicant also pointed out that in March 2005, before the investigation started, she had submitted an unaltered receipt to Vanbreda.

President's Decision

16. On 13 July 2005, the Director General, BPMSD, recommended to the President that the Applicant be dismissed effective upon receipt of the notice of termination, that the cost of all her fraudulent claims be recovered from her, and that the Applicant be disqualified from exercising the option to continue coverage under the GMIP subsequent to her termination. On 18 July 2005, the President agreed with this recommendation and on 22 July 2005, the Applicant was advised of this decision. The President noted that the Applicant had submitted 17 falsified receipts and that she was improperly reimbursed PHP 18,264. It was noted that when first questioned, the Applicant admitted having made the alterations, but two days later she changed that statement to claim that her cousin had altered most of the receipts. The President did not find the Applicant's claim that the cousin had altered the receipts as credible, in as much as she did not sufficiently explain what motive her cousin had to falsify the receipts.

The President considered that even if her cousin had falsified most of the receipts, there was sufficient basis to find the Applicant guilty of misconduct, given that the Applicant had admitted that she altered receipts and had not notified ADB immediately upon discovering the falsified receipts. The President also noted that the actions had occurred repeatedly over a period of time. The President considered that these facts made the Applicant's conduct more blatant and concluded that it was in ADB's interest to terminate the Applicant's appointment immediately.

Appeals Committee

17. On 18 October 2005, the Applicant appealed the President's decision on the basis that the disciplinary measure taken against her did not meet the basic requirements of proportionality and fairness.

18. In a Report and Recommendation dated 16 January 2006, the Appeals Committee considered that the Applicant's actions constituted a "severe breach of standards of conduct" and found that those actions could reasonably be qualified as blatant misconduct for which summary dismissal could be imposed. It also noted that "an apparently more lenient approach to disciplinary measures practiced by the Respondent ten years ago cannot be used to support the Appellant's contention that the disputed summary dismissal was disproportionate." The Appeals Committee recommended that the President reject all of the Applicant's claims and the relief sought by her.

19. The President adopted this recommendation on 3 February 2006 and this was communicated to the Applicant on 6 February 2006.

Application to the Administrative Tribunal

20. On 8 May 2006, the Applicant submitted to the Administrative Tribunal an Application contesting the decision of the President to dismiss her from the ADB as a disciplinary measure under A.O. No. 2.04 for her misconduct.

21. The Applicant seeks redress, appropriate compensation, corrective measures and other measures deemed appropriate for the violations of her right to due process and for her unjustified summary termination from the ADB. The Applicant claims that the "grave abuse of discretion committed by the ADB in summarily dismissing Applicant from service caused [her] irreparable suffering, injury, losses, and damages." The Applicant asks for the following relief:

a. compensatory damages in the amount of US$ 100,000.00 for suffering of "economic dislocation resulting from her abrupt and sudden termination from employment;"

b. moral damages in the amount of US$ 100,000.00 for suffering of "mental anguish, serious anxiety, besmirched reputation, wounded feelings, moral shock, and social humiliation as a result of her unjustified termination" from the ADB;

c. exemplary damages in the amount of US$ 100,000.00; and

d. litigation costs in the amount of US$ 2,000.00

The Bank requests the Tribunal to reject the Application in its entirety and concludes that the Applicant's actions amounted to blatant misconduct for which she was properly summarily dismissed.

II. FINDINGS

Provisional Measures

22. The Applicant made the following three requests for provisional measures:

1) a full panel be constituted to hear and decide this Application;

2) the Tribunal subpoena all records pertaining to four other disciplinary cases within the ADB of false claims for medical expenses where the staff member was not dismissed; and

3) the statements of the Applicant when she was deposed "without affording her the right to counsel or accompaniment" be expunged from the records.

Full Panel

23. The Applicant requests that a full panel be constituted to hear this Application. The Applicant maintains that "Applicant wants her case to be heard and ventilated as widely as possible to preclude any doubt in her mind that her case will be decided with the object of discovering the truth and ensuring that truth and justice shall prevail." The Respondent replies that there is no reason for a full panel to be constituted in this case, and requests the Tribunal to reject the Applicant's request.

24. Article V of the Statute of the Tribunal provides as follows:

….

> 4. The Tribunal shall form panels, each consisting of three of its members, for dealing with all cases except for the instances provided in paragraph 5 of this Article. The decisions of such panels shall be deemed to be taken by the Tribunal .
> 5. The Tribunal shall form a panel consisting of all of its members when dealing with (1) certain cases which, in the determination of the Tribunal, warrant a hearing by such a panel; and (2) any cases where any party to such a case makes a written request and gives reasons for the request that the case be heard by such a panel, and where such request is agreed to by the Tribunal.

25. The Tribunal rejects the Applicant's request to constitute a full panel in the present case. The burden is on the Applicant to demonstrate the need for an en banc proceeding. As in *Toivanen*, the Tribunal is of the opinion that there are no circumstances of sufficient novelty, complexity or difficulty to

make it necessary or desirable that this case be considered by a panel consisting of all its Members (see *Toivanen*, Decision No. 51 (2000), V ADBAT Reports 69).

Subpoena of Records

26. The Applicant requests that the Tribunal subpoena all records pertaining to disciplinary proceedings conducted in the 1990s against four unidentified staff members involved in fraudulent medical claims. The Applicant maintains that the conduct of those staff members was similar to or worse than the misconduct for which she was disciplined and yet in those cases the disciplinary action taken by ADB did not include summary dismissal. The Applicant argues that the disciplinary measure imposed on her was disproportionate to her misconduct, especially when compared with the sanctions imposed on those staff members in the 1990s. The Respondent requests the Tribunal to reject the Applicant's request, maintaining that the records regarding the disciplinary proceedings against other staff members conducted more than ten years ago are irrelevant to this case.

27. Even if the alleged records of the Bank's lighter discipline against staff members for fraudulent medical claims in the 1990's were to be subpoenaed, reviewed and found relevant by the Tribunal, and were indeed in support of the Applicant's claim of penalties less than dismissal being imposed for similar offenses in the 1990s, we do not believe that such documentation would be controlling in the case presently before us. As an international development bank in Asia, ADB attached particular importance to combating corruption including fraud and introduced the Anticorruption Policy in 1998. One of the three pillars of that new Policy was "ensuring that ADB projects and staff adhere to the highest ethical standards," and the Policy announced that "staff violations of the ADB's Code of Conduct or other relevant guidelines will be dealt with severely." Thus, ADB expects staff to behave in an exemplary fashion and, according to the Respondent, has since 1998 steadily increased its

efforts to combat corruption and "is making every effort to institute a zero tolerance policy on fraud and corruption, including fraud committed by ADB staff members." The Tribunal considers such a tightening of the Bank's stance toward corruption as reasonable and an appropriate exercise of its fiduciary responsibility, as long as the disciplinary measure is proportionate to the misconduct. The Tribunal does not find it unfair for the Bank to impose more severe disciplinary measures for fraud now than prior to the adoption of the Anticorruption Policy in 1998, in as much as the Bank provided due notice to employees of its new stricter norms. "It is true that officials enjoy the protection, among other things, of the rule of equality as between officials within the same category, but this rule does not apply to officials against whom disciplinary action has been or may be taken for different reasons and in different circumstances." (*Khelifati*, ILOAT Judgment No. 207 (14 May 1973)).

28. Under the circumstances, the Tribunal agrees that the disciplinary penalties imposed more than ten years ago, even if proven to have occurred in circumstances similar to those of the Applicant, are not controlling in the case of the Applicant. Accordingly, the Tribunal rejects the Applicant's request that it subpoena the records pertaining to disciplinary proceedings against four other staff members occurring prior to the adoption of the Anticorruption Policy in 1998.

Expunging Statements of the Applicant

29. The Applicant requests that the statements of the Applicant when she was deposed "without affording her the right to counsel or accompaniment" be expunged from the records. In response, the Respondent argues: disciplinary proceedings in the ADB are governed by its rules and regulations; the applicable rules envisage that a staff member may be assisted by another staff member once formal disciplinary proceedings are initiated; during the preliminary inquiry no such right attaches as the inquiry is of an administrative and not criminal in nature; thus, the Applicant's interviews fully

complied with ADB's rules and regulations, and there is no reason to expunge her statements from the records.

30. The Applicant apparently wants to expunge from the records the statements she made during the preliminary investigation, for which the applicable rules do not envisage that a staff member may be assisted by another staff member or counsel. That the staff member is not accompanied by another staff member or counsel at that stage is not necessarily a denial of due process. Whatever information an employee submits to the Bank in that preliminary investigation may be deemed to have been provided willingly and of her own volition. Moreover, the Applicant did not, at the time of preliminary investigation, ask to be accompanied by another staff member or counsel. Thus, the demand for the presence of counsel in this case, was not, in any event, seasonably made.

31. Accordingly, the Tribunal denies the Applicant's request that the statements she made during the preliminary investigation be expunged from the records.

Standards of Review

32. In *Zaidi*, quoting the World Bank Administrative Tribunal in *Carew*, WBAT Decision No. 142 (1995), para. 32, this Tribunal stated as follows:

> In [disciplinary] cases the Tribunal examines (i) the existence of the facts, (ii) whether they legally amount to misconduct, (iii) whether the sanction imposed is provided for in the law of the Bank, (iv) whether the sanction is not significantly disproportionate to the offence and (v) whether the requirements of due process were observed. (*Zaidi*, Decision No. 17 (1996) II ADBAT Reports 92, para 10.)

There are three principal issues before this Tribunal: (1) whether there is sufficient proof of the Applicant's misconduct; (2) whether the procedures utilized by the Bank were in accordance with due

process; and (3) whether the sanction imposed was proportionate to the misconduct. We will consider these issues in turn.

Misconduct of the Applicant

33. As held by the United Nations Administrative Tribunal, "once a *prima facie* case of misconduct is established, the staff member must provide satisfactory evidence to justify the conduct in question." (see *Ogalle v. Secretary-General of the United Nations*, UNAT Judgment No. 1050 (2002), p. 8, para V.).

34. The Applicant pleads that prior to November 2004 her cousin, the babysitter, had altered the receipts. She argues that after that date she was "moved by fear and panic" to a lapse in judgment, admitting that she tampered with the receipts "in order to cover some medical expenses which are either unreceipted [sic] or for which I have no prescriptions and also to cover the inconsistency" which Vanbreda might discover. The Applicant observes that whilst the standard by which any breach of conduct is measured against is the Code of Conduct, no breach of the Code of Conduct as may be found in A.O. No. 2.02, section 4 was ever mentioned or discussed.

35. The Respondent argues that the Applicant's alterations of the receipts amounted to fraud and therefore amounted to misconduct. A.O. No. 2.04, para 2.1 (f) describes as an example of misconduct: "the making of knowingly false statements or misrepresentations or fraud pertaining to official matters." The Bank points out that the Applicant changed her story after the meeting on 29 March 2005 where she had admitted having made the alterations on the seven receipts shown to her, to saying that her cousin had altered most of them. The Bank argues that the claim that her cousin had made the alterations on most of the receipts is not credible in the absence of supporting evidence. On

one occasion when a receipt for medical expenses was issued for her son, the Applicant herself had taken him to the clinic on a day on which she had taken annual leave. The Bank also refers to inconsistencies in the Applicant's explanations – including between that contained in her Memorandum dated 18 May 2005 ("she [her cousin] had already left our house at that time [when the Applicant found out about the alterations]") and her Reply dated 4 September 2006 ("The cousin had already confessed to it [making the alterations] and had been asked to leave"). Moreover, even if the Applicant's cousin had falsified the receipts, the Bank argues, the Applicant had an absolute and non-transferable responsibility to ensure that her claims were truthful and not improperly inflated.

36. The evidence clearly establishes that the Applicant made fraudulent medical insurance claims on 17 occasions for a protracted period of almost two years. The Applicant claims that on 14 occasions prior to November 2004 it was her cousin who altered the receipts. The Tribunal finds this claim of the Applicant not credible. At the meeting on 29 March 2005, the Applicant was shown copies of seven receipts which had been altered, and she admitted that she had tampered with those receipts. Two days later, the Applicant claimed that it was her cousin who had altered the receipts. If that was indeed the case, the Applicant should have provided such crucial information during the meeting on 29 March 2005. The Tribunal cannot but characterize the change of her story as modification of the story rather than "clarification" as the Applicant maintains. The Applicant was not able to provide any evidence supporting her claim that she had a cousin who was responsible for her household administration and that her cousin altered the receipts. In this connection, the Tribunal takes special note of the inconsistencies in the Applicant's explanations as pointed out by the Bank.

37. Even if the fraud had been initiated by her cousin, there is no question that the Applicant did endorse it and sought to benefit from it. It was the Applicant herself who made medical insurance claims using the GMIP Claim Forms, which state that "I certify that the information provided by me in

support of this claim is, to the best of my knowledge and belief, complete, correct and true. I understand that providing incomplete, inaccurate, false or misleading information or claims may subject me to disciplinary action (including termination of employment) pursuant to Administrative Order 2.04." As this Tribunal stated in *Bristol*, "[a] staff member who signs a false certification … cannot shift [responsibility for having done so] to the Organisation or to others." (see *Bristol*, Decision No. 75 (11 January 2006), para. 29).

38. Moreover, the Applicant admits that she herself had tampered with the receipts after November 2005 on at least three occasions. The Applicant admitted that she had done so "in order to cover some medical expenses which are either unreceipted [sic] or for which I have no prescriptions" as well as to make the receipts consistent with the previous ones. These acts alone amount to misconduct under A.O. No. 2.04, section 2. As soon as the Applicant discovered the falsification of the receipts by her cousin, she should have notified the Bank rather than covering up and continuing the fraudulent practice.

39. Accordingly, the Tribunal finds that the Applicant's fraudulent alterations of the receipts are properly regarded as misconduct according to A.O. No. 2.04, section 2 (*Examples of Unsatisfactory Conduct or Misconduct*). The fact that A.O. No. 2.02, section 4 (*Duties and Responsibilities of Staff Members*) was not discussed by the Bank does not help the Applicant's case in as much as A.O. No. 2.02 is incorporated in A.O. No. 2.04, para. 2.1 (a).

Due Process

40. The Applicant argues that there was lack of due process because she was unable to bring counsel or other legal representation to the interview with the Integrity Specialist, OAGI on 29 March 2005.

41. The Respondent submits that all due process rights provided for in ADB's rules and regulations governing the investigation and disciplinary proceedings were duly accorded to the Applicant. The right to be assisted by another staff member arises when formal disciplinary proceedings are initiated against a staff member in accordance with A.O. No. 2.04, para. 9.2 (a). On 29 March 2005 the Applicant was interviewed by OAGI in the course of a preliminary inquiry under A.O. No. 2.04, section 8, during which no legal assistance is contemplated by those rules.

42. As noted earlier we find no violation of due process in the Bank's handling of the preliminary investigation. Statements made by the Applicant in that proceeding, even if damaging to her case and later regretted, we find, were made of her own free will. A.O. No. 2.04, sections 8 to 10 set out the procedures to be followed in a disciplinary case and the rights afforded to a staff member suspected of having engaged in unsatisfactory conduct or misconduct, including the right to be informed in writing of the charges, the opportunity to provide explanations in response to those charges, and so forth. The Bank may, in the exercise of an employer's administrative control and supervision over its employees, conduct a preliminary investigation about a staff member's misconduct and meet with him or her to seek information. In this case, the Tribunal does not find it violative of due process that in the preliminary investigation the staff member was not accompanied by another staff member or counsel. The Bank may properly use the information the staff member provided of his or her own will during the preliminary investigation, subsequently in formal disciplinary proceedings against the member. The

Applicant did not request counsel either at the time of the preliminary investigation or at the formal disciplinary proceedings and has not demonstrated that her rights to due process were violated at either stage. Thus, the Applicant's claim for deprivation of due process has no merit.

Was the Disciplinary Measure Disproportionate to the Misconduct?

43. A.O. No. 2.04, para. 6.1 provides that "[t]he disciplinary measure should be proportionate to the seriousness of the unsatisfactory conduct." As the President has discretion to determine a sanction in disciplinary proceedings, the test to be adopted by this Tribunal before it can interfere with the President's discretion is whether that sanction is disproportionate to the staff member's offense. (see *Zaidi*, Decision No. 17 (1996) II ADBAT Reports 89). The International Labour Organisation Administrative Tribunal similarly ruled that "the Tribunal cannot substitute its assessment for that of the Director General, unless it notes a clear disproportion between the gravity of the offence committed and the severity of the resulting penalty." (see *Khelifati*, ILOAT Judgment No. 207 (14 May 1973)).

44. A.O. No. 2.04, para. 6.2 sets out the standards for assessing the seriousness of the unsatisfactory conduct as follows:

> 6.2 In assessing the seriousness of the unsatisfactory conduct, the following criteria should be taken into consideration:
>
> (a) the degree to which the standard of conduct has been breached by the staff member;
> (b) the gravity of the adverse consequences and damage caused to the Bank, its staff or any third party;
> (c) the recurrence of unsatisfactory conduct by the staff member, particularly when there is a repetition of unsatisfactory conduct of a similar nature;
> (d) the official position held by the staff member and the extent to which the staff member was entrusted with responsibilities in matters to which the unsatisfactory conduct relates;
> (e) collusion with other staff members in the act of unsatisfactory conduct;
> (f) whether the unsatisfactory conduct was a deliberate act;
> (g) the situation of the staff member and the staff member's length of satisfactory service; and

> (h) the staff member's admission of the unsatisfactory conduct prior to the date the unsatisfactory conduct is discovered and any action taken by the staff member to mitigate any adverse consequences resulting from his/her unsatisfactory conduct.

45. The Applicant maintains that the summary dismissal is "extremely disproportionate to the lapses in judgment," arguing that the criteria as set forth in A.O. No. 2.04, para. 6.2 were "not meticulously followed or altogether disregarded."

46. The Respondent maintains that it properly considered all the circumstances of Applicant's case and the factors cited in A.O. No. 2.04, para. 6.2 before imposing the disciplinary measure on the Applicant, and that the summary dismissal was proportionate to the Applicant's blatant misconduct.

47. With regard to para. 6.2 (b), the Applicant stresses that the actual pecuniary damage was very limited, amounting to roughly US$350. The Respondent, whilst acknowledging that this was indeed the actual damage to Vanbreda (PHP18,264), points out that the Applicant's fraudulent inflation of receipts amounted from 200% to 5000% and that the total amount attempted to be defrauded was PHP37,040. In this regard, the Tribunal concurs with the World Bank Administrative Tribunal's statement that "fraud is always a most serious matter. This is particularly true where, even if the amounts improperly claimed as compensation are not large, the conduct consists of repeated acts of unethical behavior." (see *Carew*, Decision No. 142, WBAT Reports (1995) para. 43.).

48. With regard to para. 6.2 (d), the Applicant argues that "there is no specific and peculiar responsibility associated with Applicant's unsatisfactory conduct that would qualify to aggravate the offense." The Respondent points out that she was responsible for accounting duties "to ensure the implementation of sound accounting/internal controls and complete, accurate and timely financial

records/reports," as stated in her job description as a Disbursement Assistant. The Tribunal finds that, in view of the position held by the Applicant coupled with her repeated and deliberate alteration of medical receipts submitted to the Bank, it was not arbitrary for the President to have found that the interests of the Bank required the immediate separation of the Applicant.

49. With regard to para. 6.2 (g), the Applicant emphasizes that her performance has consistently been assessed as having exceeded the requirements of her position. The Bank points out, however, that the Applicant commenced her fraudulent activities relatively soon after joining. The Tribunal notes that the Applicant joined ADB in September 2001 and that the first altered receipt was submitted in March 2003 after she had been given a fixed-term appointment.

50. With regard to para. 6.2 (h), the Respondent stresses that the Applicant concealed fraudulent activities from ADB. On 29 March 2005 when she was asked whether, apart from the seven receipts, there were other receipts that she had altered, she responded no. The Applicant modified her statement two days later and indicated that there might be one more altered receipt from January or February 2005. One month later, ten more receipts dating back to early 2003 (including one dated February 2005) were discovered. Even if it were true that the Applicant's cousin had tampered with the receipts without the Applicant's knowledge until November 2005, the Tribunal finds that the Bank was not arbitrary in questioning the honesty of the Applicant in her reply at the meeting on 29 March 2005.

51. The Applicant argues that "there was a sincere offer of restitution." However, to the contrary, the Tribunal notes that the Applicant took no action to reimburse the excess amount she had received at any time during the protracted proceedings and that the Bank had to deduct the amount from her final pay.

52. Equally, the Tribunal rejects all the other arguments the Applicant makes under A.O. No. 2.04, para. 6.2 as inadequate to overcome what has been established to be a clear case of fraud.

53. A.O. No. 2.04, para. 5.2 provides that "a staff member may be suspended without pay pending investigation if there are charges of misconduct against the staff member which, if proven, may justify the staff member's dismissal or summary dismissal." The Applicant argues that if her transgression was bad enough she would have deserved to have been temporarily transferred to other duties, but that no interim measure was taken against her. However, the Tribunal points out that the Bank has discretion as to whether or not to take interim measures "pending investigation" even when the misconduct, if proven, may justify the staff member's dismissal.

54. Accordingly, the Tribunal finds that the disciplinary measure of summary dismissal satisfies the requirement in A.O. No. 2.04, para. 6.1 that "[t]he disciplinary measure should be proportionate to the seriousness of the unsatisfactory conduct."

Comparison with Other Disciplinary Cases

55. Even if as alleged, there was leniency in the four previous instances, that policy has been replaced by the Bank's adoption of the more stringent Anticorruption Policy in 1998. The Applicant also refers to previous cases of this Tribunal, namely: *Powell,* Decision No. 50 (2000) V ADBAT Reports, 59; *de Alwis*, Decision No. 57 (8 August 2003); *Chaudry*, Decision No. 23 (1996), II ADBAT Reports, 171; and *Zaidi* Decision No. 17 (1996), II ADBAT Reports 89, as cases where the conduct of those Applicants fell short of the integrity and judgment expected of ADB staff members and yet no summary dismissal was involved.

56. The Respondent emphasizes that the President has discretion to determine the disciplinary measure to be imposed regarding different staff members and that each case is ultimately determined by its particular facts and circumstances as envisaged by A.O. No. 2.04, para 4.1 which states that "disciplinary measures imposed by the bank on a staff member shall be determined on a case-by-case basis …."

57. The Tribunal reiterates its conclusion that the penalty imposed in this case is consistent with the ADB's stricter stance toward corruption, and that it is not unfair for the President to impose a more severe penalty for fraud than was the case prior to the pronouncement and publication of the Anticorruption Policy in 1998. The Applicant's reliance on *Powell, de Alwis, Chaudry*, and *Zaidi* is misplaced. *Chaudry* and *Zaidi* involved sanctions imposed prior to 1998. *Powell* and *de Alwis* involved sanctions less than dismissal imposed after 1998, but in the present case receipts were altered on repeated occasions and the Applicant's actions may be qualified as blatant misconduct.

DECISION

For all the foregoing reasons, the Tribunal unanimously dismisses the Application.

Lilibeth G. Abat

Khaja Samdani

/s/
Member

Claude Wantiez

/s/
Member

Yuji Iwasawa

/s/
Member

Simeon V. Marcelo

/s/
Executive Secretary

At Manila, 7 March 2007.