

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 86
(15 August 2008)**

**Anjum Ibrahim
v.
Asian Development Bank**

**Florentino Feliciano, President
Arnold Zack, Vice-President
Khaja Samdani
Claude Wantiez
Yuji Iwasawa**

1. The Applicant seeks a reversal of the decisions of the President to impose an unfavorable rating in her Annual Performance and Development Plan (PDP) Review for 2006, to impose an unfavorable rating in the monitored work program that followed, and to impose the penalty of termination. She seeks rescission of those decisions and reinstatement with the remedies listed below.

I. THE FACTS

Background

2. The Applicant joined the Asian Development Bank (ADB) as a Level 3 Secretariat Officer in the Office of the Secretary (OSEC) on 26 January 2000. On 6 July 2001, she transferred to the Operations Evaluations Department (OED) as Evaluation Specialist where she was promoted to Level 4 on 6 July 2002. On 26 October 2003, the Applicant's fixed-term appointment was converted to a regular appointment and in mid-November 2004, she became Country Programs Specialist (Development Effectiveness) in the South Asia Department (SARD). In May 2006

as a result of the Bank's realignment the Applicant moved to Central and West Asia Department (CWRD).

Performance Reviews 2000 through April 2006

3. In her Performance Evaluation Report (PER) for 2000 as Level 3 Secretariat Officer in OSEC, she was confirmed in her appointment as a regular employee and was found to be "Fully satisfactory" on seven elements, and "Satisfactory" on two with the notation for Quality, Accuracy and Timeliness of Work that she "Would be fully satisfactory but for her editing of the Summary of Proceedings of the 2000 Annual Meeting". The ADB Secretary noted: "[The Applicant] is a good addition to OSEC and as a new staff has done well".

4. Her PER for 1 January to 31 July 2001 showed that for Planning and Organizing Work her supervisor commented "Meets requirements fully", that for Application of Analytical, Technical and Conceptual Skills the comment was: "She picked up analytical and technical skills required to the Bank very fast", that for Quality, Accuracy and Timeliness of Work she was noted for "High Quality of accurate Work. She works very fast" and that for Oral/Written Communication Skills the comment was "High quality oral and written communication".

5. Her PER for 1 August to 31 December 2001 shows that she was "Fully satisfactory" on five elements, that for Application of Analytical, Technical and Conceptual Skills there was "Limited opportunity to assess these skills in review period", that the Quality, Accuracy and Timeliness of Work was "To the extent able to assess, has been satisfactory", that she had been innovative "To the extent able to assess ...", and that she had been "Punctual and diligent".

6. Her Overall Performance Assessment for 2001 was “Performance fully meets or exceeds the requirements of the position” with the following comment:

A good start for [the Applicant] in OED. Based on her contributions to date such as the position papers for two PPARs, I am confident that she will successfully accomplish her challenging work program in 2002.

For the year 2001, she was given a salary increase of 5.29% compared to the average for professionals of 6.1%.

7. In her PER for 1 January to 31 December 2002 she was rated “Fully satisfactory” in six criteria, that for Application of Analytical, Technical and Conceptual Skills was given the comment “Will improve as becomes more familiar with ADB operational procedures and policies”, and that for Oral/Written Communication Skills she was given the comment “Excellent verbal presentation and communication. Needs some attention to structured report writing”. Again she was found “Punctual and diligent”. Her Overall Performance Assessment was “Performance fully meets or exceeds the requirements of the position”.

8. The Head of the Department, Director General (DG), OED, commented:

With three evaluations completed and one brought to an advanced stage, [the Applicant’s] first full year in OED was very productive. She thus exceeded my expectations in terms of output. Regarding report quality, she struggled a bit with the first drafts of the two TPARs, but the PPAR on the post project in Vanuatu was technically sound and well written. I enjoyed working with [the Applicant] given her dependability and pleasant personality.

For 2002, her salary increase was 3.0% compared to the professional staff average of 4.9%.

9. On 26 October 2003, the Applicant's fixed term appointment was converted to a regular appointment. In her PER for the period 1 January 2003 to 31 December 2003 she received five ratings of "Fully satisfactory", in Application of Analytical, Technical and Conceptual Skills she received a rating of "Satisfactory", in Quality, Accuracy and Timeliness of Work she received a rating of "Generally satisfactory; would benefit from attention to detail" and in Oral/Written Communication Skills she received a rating of "Fully satisfactory regarding oral communication; structured report writing needs attention". Director, OED2 noted that:

[The Applicant] is highly productive and a valued OED team member. Her work would nevertheless benefit from a less speedy approach – trading off more time taken in careful thought and preparation for improved quality particularly of first drafts

She was rated "Performance fully meets or exceeds the requirements of the position". Her salary increase for 2003 was 2.71% compared to the professional staff average of 4.1%.

10. Applicant's Performance Appraisal for the period 1 January to 15 November 2004 shows four ratings of "Fully satisfactory", and three ratings of "Satisfactory" for Application of Analytical, Technical and Conceptual Skills; Quality Accuracy and Timeliness of Work; and Innovativeness. The entry for Oral/Written Communication Skills was "Fully satisfactory regarding oral communication; structured report writing continues to need attention". Director, OED2 commented:

While [the Applicant] has been a productive team member of OED, her work would have benefited from a more thoughtful, less speedy approach. This issue has been discussed in previous years; regrettably, 2004 did not see a marked improvement. [The Applicant] interacts well with others, including clients. Nevertheless, her OED work would require improvement in structured report writing

Director, Country Coordination and Regional Cooperation Division (SAOC), SARD, to which the Applicant moved on 16 November 2004, made the following comment:

Since joining SAOC/SARD in November 2004, [the Applicant] has approached her new roles with enthusiasm. However, as she indicates, she is still learning the ropes.

For 2004 her overall performance assessment was “Performance fully meets or exceeds the requirements of the position”. There is an additional comment from DG, OED:

The evaluation related to OED work in 2.2 is supported. As far as the TPAR in Capacity Building to Support Decentralization in Indonesia, it required more analytical work before it met the quality standards necessary for DG OED to sign off on the report

Her salary increase for 2004 was 4.00% compared to the professional average of 4.20%.

11. The Applicant’s PDP for 2005 shows that she was rated Fully Competent for all elements in her year-end evaluation and was given a Performance Appraisal Rating of “Fully satisfactory performance”. Director, SAOC included the following comment:

[The Applicant] provided good support in her country coordinator role, both as principal on Pakistan and as Alternative (and subsequently Principal) on Nepal. Her support to SARD and PRM on the Pakistan Earthquake, a substantial addition to her work, is much appreciated. [The Applicant] writes well and quickly. However, she also needs to give due attention to detail and, as far as possible, bringing issues to a clear solution based on as full an understanding as practical.

With regard to her work on MfDR, while [the Applicant’s] efforts to prepare the draft of the study on appropriate monitoring systems for results-based management across SARD are appreciated, the value added would have been greater if this could have been further revised and developed in light of continuing team discussions.

Her salary increase for 2005 was 2.95% compared to the professional average of 4.3%.

12. The Applicant's PDP for the period from 1 January 2006 until 30 April 2006 when she was a Country Programs Specialist in SAOC shows that she was evaluated as Fully Satisfactory in eight elements and Fully Satisfactory/Generally Satisfactory in Application of Technical Knowledge and Skills.

Her supervisor's comment read as follows:

[The Applicant's] performance during the period prior to her move to CWOD as part of the Realignment was fully satisfactory. Given her skills and capacities, and to enable her to make as full a contribution as possible to the work of the country team, it is desirable that task specific TORs and expected outputs be regularly reviewed and agreed adjustments made.

On 27 July 2006, the Applicant responded:

I fulfilled all my TORs and would be more than willing to undertake additional tasks. The linkage between scoring FS/GS in the Application of Technical Knowledge and Skills while scoring FS under all work plan outputs is not clear.

On July 31, 2006 an interim performance review took place, but in the record thereof there is no indication of any performance issues being discussed.

Protested Performance Review of May – December 2006

13. From May 2006 to December 2006, the period of her next PDP and the first one here protested, the Applicant was a Level 4 Country Program Specialist in Country Coordination and Regional Cooperation Division (CWOC), CWRD. The record shows the Applicant listed the highlights of that period as being part of a two-member team assessing management capacity issues in Afghanistan,

preparing a road map for regional cooperation in Afghanistan, preparing the first draft of the Aide Memoire with a detailed lending and support program for the visit of the country's Deputy Minister (DM) for Finance to ADB, and providing the first draft of the DG's back-to-office report (BTOR) including proposed lending to Pakistan for the next three years.

14. Her year-end evaluation shows the following:

Country programming	Generally Satisfactory
Loan, TA processing and ETWS work	Fully Satisfactory
Portfolio Management Work	Fully Satisfactory
Other Strategy and Operations Work	Generally Satisfactory
Application of Technical Knowledge and Skills	Generally Satisfactory
Client Orientation	Fully Satisfactory
Achieving Results	Generally Satisfactory
Working Together	Fully Satisfactory
Learning and Knowledge Sharing	Generally Satisfactory

15. The Applicant's supervisor offered the following comment on "Results and Behavioral Assessments":

[The Applicant] provided valuable support on operational matters related to Pakistan and Afghanistan. Her efforts include review of various loans and TA papers, preparation of briefing papers and processing of the extension of the waiver of cost sharing limits for Afghanistan. She is also preparing a regional cooperation roadmap to Afghanistan for completion in early 2007. [The Applicant] needs to deepen her knowledge of ADB's policies and procedures and strengthen her attention to detail. We appreciate [the Applicant's] strong responsiveness to client needs and willingness to lend a hand and contribute to urgent tasks that arise.

Director, CWOC discussed his assessment with the Applicant on 29 January 2007.

16. Shortly thereafter in early February 2007 Director General, CWRD, a newly appointed head of the department, signed off on an Overall Assessment Rating of “Unsatisfactory performance”. The portion of the form calling for Comments was left blank. The record shows that the Applicant was one of five CWRD staff members so rated by DG, CWRD out of a total of seven Unsatisfactory (“U”) ratings issued that year throughout the ADB.

17. On 19 February 2007 after the Applicant’s submission of a BTOR following a 6-12 February trip to Kabul, Director, CWOC wrote the following comment on the first page of the report:

“A very productive mission. We need to discuss further how to move forward on the Government’s request for help on their regional cooperation strategy. Thanks.”

18. On 26 February 2007, the Applicant submitted the following comments on her “U” rating:

I am completely surprised and shocked by this end of the year “U” rating as at no time during the performance review period was I informed by my superiors that my performance was not meeting standards required. In fact during July-August, there was recommendation for me to progress to level 5.

It is regretted that due process was not followed. There was no adverse feedback or discussion in the interim review, other than that I was putting in fully satisfactory performance. Further as noted on the earlier pages each measured skill is rated either GS or FG. I therefore fail to understand the methodology employed to arrive at the final “U” rating.

During the post final rating meeting with my Director and DG I was told that I was a hard worker and a good communicator but that I had a skill mix that was not suited to my present job. I am unable to understand the basis of this either, especially as my work in CWOC was similar to the one in SAOC where I was

rated FS. In addition, as affirmed by my Director, I fully delivered on my work plan in CWOC.

In view of the foregoing I seek a review of the “U” rating.

In looking ahead, I affirm my commitment to the work assigned to me in CWOC. I trust that I will have the benefit of regular, candid feedback from my superior so that there is no end of the year surprises.

On 27 February 2007, management confirmed the “U” rating as placing the Applicant on a monitored work program for six months to prove that she could perform at a satisfactory level.

19. On 1 March 2007, Director, CWOC and DG, CWRD met with the Applicant to discuss her performance during 2006 informing her that she needed to improve in the areas of (i) application of technical knowledge and skills, (ii) achieving results, and (iii) knowledge sharing. There was also some discussion of the Applicant possibly seeking a position in another part of the Bank, which would have a better fit with her background.

20. On March 9, 2007 Director, CWOC prepared a Note-to-File on the Applicant’s 2006 performance based on that discussion. In the three cited areas, the Applicant had been rated Generally Satisfactory. The specific incidents cited are as follows:

a) On 14-15 August 2006 at the time of a visit to ADB Headquarters of a delegation from Afghanistan, the Applicant was asked to prepare an Aide Memoire of the visit. According to the Note-to-File, the draft of the Aide Memoire “was not well prepared and had to be rewritten by the Director General”. The Applicant’s response was that “drafts by their very nature are temporary and always interim documents”, that she had not attended all sessions and “was not privy to discussions especially between the DM and

CWRD senior management”, and that she “was not advised by either DG or the OIC, CWOC of her unsatisfactory performance at that time as is required under BPMSD Guidelines”.

b) After having been a member of a Regional Management Team Mission to Pakistan from 3-8 September 2006, the Applicant was asked to prepare a first draft of a BTOR. In the Note-to-File Director, CWOC notes that “the draft BTOR contained factual errors, did not meet ADB standards, and had to be revised significantly”. The Applicant’s response was that she “prepared the matrix of lending pipeline after consultations with the Sector Directors”, that the DG “requested the Sector Directors to change the lending pipeline ... so the final draft of the BTOR did not completely conform to the draft prepared by” her. She denied that she committed a factual error. She reiterated her statement that she had not been advised by DG or Officer-in-Charge (OIC), CWOC at the time of her unsatisfactory performance as required by the Budget, Personnel and Management Systems Department (BPMSD) Performance Management Implementing Guidelines.

c) In November 2006 the Applicant was asked to prepare a briefing folder for the ADB delegation to the 2006 conference on regional cooperation. Director, CWOC noted in the Note-to-File “There were delays and difficulties in the preparation of the material because of her failure to anticipate the requirements of the mission and to plan and manage her time accordingly”. Her response was that the March 1 post PDP meeting with DG, CWRD, Director, CWOC, and BPMSD was the “first time this issue was raised”. Regarding the charges of delay and difficulties, the Applicant stated that “she was waiting for [Central Asia Regional Economic Cooperation] unit’s inputs to complete the

folder and therefore the delay, if any, was not from her end”. She claims she had the information available and provided it on time.

d) In December 2006, the DG, CWRD asked the Applicant to process a Board paper for the extension of the waiver of cost sharing limits for Afghanistan. According to the Note-to-File, “The processing of the paper was delayed in part due to the Applicant’s lack of familiarity with some of ADB’s operational procedures and processes The Board document required major corrections or revisions as some of the facts were incorrect or deserved elaboration”. The Applicant’s response was that “the draft went through the normal procedure The DG has the prerogative to change the document even after this process, however any criticism of the draft at this final stage must include other departments as well as CWRD management.” She states that her “being responsible for the delays is inaccurate and unwarranted”, claims that there was an embargo on signing papers and notes that the Director, CWOC acknowledged that the delay was due to the holiday season. She claims she consulted at every step with relevant department and that “the charge of lack of familiarity with ADB’s procedures and processes is factually invalid”.

At the conclusion of the Note-to-File, Director, CWOC added:

These are but a few incidents that show that [the Applicant] needs to upgrade her written communication skills, improve her understanding of ADB’s operational policies and procedures, and enhance her attention to detail and quality.

21. The Applicant responded to that comment that her background as an editorial writer and her earlier ADB work “earned her a reputation of being timely and succinct” (citing her 2001 PER). She

claims that Director, CWOC was complimentary on her last major output, and that the associate BTOR stated that it was a “very productive mission and the regional cooperation strategy was in good shape”. She also cited the mission leader of a Kabul mission as stating that the Applicant “provided invaluable support to him”. She also mentioned that she was surprised by the “U” rating, that there was no indication or feedback of poor performance, that the Performance Management Implementing Guidelines require a Note-to-File being filed for staff whose performance is deemed unsatisfactory.

22. Director, CWOC noted that he met with the Applicant to discuss her 2006 performance and to highlight areas for improvement, and that the discussion underscored the need for her to improve her familiarity with ADB’s operational policies and procedures, to work with greater attention to detail, and possibly develop a sectoral or thematic specialization. The Applicant asked for a replacement of her assistant. Director, CWOC concluded that “the meeting highlighted the fact that there was evidently a lack of fit between the Applicant’s background and the skill requirements (of) the Country Coordination and Regional Cooperation Division”. To this point the Applicant responded that “a U rating has to be prospective and not retrospective”, that she was given a “U” rating “without due process and in violation of BPMSD Guidelines”, that “her U rating is flawed procedurally and hence invalid”, and that the charges leveled against her “are factually incorrect”.

23. On 26 March 2007, the Applicant requested Compulsory Conciliation regarding her unsatisfactory performance rating. The conciliation was unsuccessful, and the Applicant on 30 April 2007 submitted a request for Administrative Review which was answered on 15 May 2007 by DG, BPMSD stating that he found no merit in her allegations and denied her claim for relief.

24. On 30 May 2007, the Applicant filed her appeal asserting that the unsatisfactory 2006 performance rating was an abuse of managerial discretion and process and that the proper procedures

were not followed. The Appeals Committee found that the ADB's relevant staff regulations, administrative orders, and other related policies and procedures had not been correctly applied, and that the performance concerns were not documented in the prescribed Note-to-File format to the Applicant during the year. It found no abuse of discretion in the DG giving the award that he did, but noted that Staff Regulations Administrative Orders (A.O.s) and policies and procedures had not been applied completely, and that her performance concerns had not been documented in the prescribed format.

Six-Month Monitoring and Termination

25. On 15 April 2007 as a consequence of her "U" rating, the Applicant commenced her six-month monitoring period during which she was expected to produce three major outputs: (i) Afghanistan Regional Cooperation Strategy, (ii) Social Protection Paper, and (iii) AFG: Program Completion Report for Emergency Multi-sector Program Loan. All reviews of the Applicant's output over those six months gave her positive feedback on all three outputs, but Director, CWOC, gave her a "U" rating on all three counts. Accordingly, on 29 October 2007, he recommended to BPMSD that the Applicant be terminated for unsatisfactory performance. DG, BPMSD agreed.

26. On 13 December 2007, the Applicant challenged the bad faith of management in refusing to grant her home leave after 18 months and its alleged bias in imposing the unsatisfactory ratings.

27. In a Note-to-File after a 21 December 2007 meeting with the Applicant, DG, CWRD, and DG, BPMSD, confirmed their view that her performance during the six-month period had not significantly improved to a satisfactory level.

28. On 21 January 2008, a review panel convened pursuant to A.O. 2.05 Section 10.6 approved the recommendation for termination. The notice of termination was issued on 5 February 2008, effective 6 March 2008.

Challenge to the Six Month Monitoring and Termination

29. On 12 October 2007, the Applicant requested Compulsory Conciliation for her unsatisfactory rating following her performance during the monitored work program. That conciliation was unsuccessful, and on 20 December she requested Administrative Review on her performance for that period. On 4 January 2008, she was advised that BPMSD found no merit to her charge that the decision of Director, CWOC was guilty of abuse of managerial discretion or abuse of process when his unsatisfactory rating contradicted the view of other raters who found her work fully satisfactory during that period. On 7 January 2008, the Applicant appealed the foregoing decision to the Appeals Committee which on 17 April 2008 denied her claims.

30. On 18 February 2008, the Applicant filed with the Administrative Tribunal an Application contesting (i) her 9 February 2007 “U” rating, (ii) her April 15 placement on a six-month monitored work program and presumably the “U” rating which followed it, (iii) the decision of the Appeals Committee communicated to her on 24 January 2008, and (iv) the 5 February 2008 notice of termination. She alleges the ADB Guidelines for handling a “U” rating were not followed constituting an abuse of process and procedure and an abuse of discretion in the decisions involved. Although she asserts that all internal remedies were exhausted upon termination of employment, the record shows that as of 18 February 2008 the Appeals Committee had not yet ruled on her charges concerning the six-month monitored work program or on the termination which followed it. Her assertion that the ADB had agreed with her that the decision to terminate did not require conciliation, administrative review or appeal, was

disputed by the Respondent in its Answer and Rejoinder where it argued that the Applicant needs to bring a separate application for the monitoring program “U” rating and the termination decision.

31. On 22 February 2008, the Applicant provided a supplement to her Application asserting that she could not file for wrongful dismissal in the Tribunal without also challenging the illegal “U” that followed the six-month monitored work program.

32. On 12 March 2008, the Bank submitted a written comment to the Tribunal on the foregoing arguing that the 12 February Application was limited solely to the initial unsatisfactory rating in 2006 and that separate applications were required for her other complaints after which she could apply for consolidation.

33. In its 22 April 2008 Answer, the Bank asserts that the Applicant’s Work Plan should not be subject to the Tribunal’s review because the Applicant had not submitted a proper separate application to do so.

34. In her 20 May 2008 Reply, the Applicant argues that “termination, by logic must preclude the need for external conciliation, reliance on an administrative review ... and the Appeals Committee”. She claims that the Tribunal needs to consider all decisions that lead to the Applicant’s illegal dismissal to render an informed judgment and that inasmuch as the first “U” was illegal so too was placing her on the six-month monitoring program and the termination which followed.

35. In its 18 June 2008 Rejoinder, the Bank asserts that accepting the Applicant’s proposed combined handling of the monitoring program and termination would be highly prejudicial by denying it full opportunity to respond fully to her claims through an Answer and a Rejoinder.

Relief Prayed For

36. The Applicant seeks the following relief:
- (i) The decision giving the Applicant a final “U” rating for the 2006 PDP exercise be expunged from her record;
 - (ii) The decision giving the Applicant a final “U” rating for the monitored work program be expunged from her record and the issue of a certificate of employment which reflects her fully satisfactory performance up to 5 March 2008;
 - (iii) The Applicant’s reinstatement on a promotion from the date of the effective termination of her employment in such a manner as to show uninterrupted service in the institution;
 - (iv) The award of the appropriate payment of due merit increase for 2007 and 2008 and associated salary adjustments be applied retroactively for the period covered;
 - (v) Compensation and moral damages in the amount of \$1,000,000 for mental suffering, humiliation during the six month monitored work program and termination in 2008, and being deprived of being selected for promotions and other positions within ADB throughout 2007;
 - (vi) An official reprimand for DG, CWRD, DG, BPMSD, Director, CWOC, and Director, BPHR, to serve as a deterrent for ADB to commit the same “*mala fide*” act through abuse of process, procedure and discretion on other staff. In addition, an exemplary damage in the amount of \$100,000 in order to serve as a deterrent for ADB to commit the same acts on other staff members;
 - (vii) \$10,000 for costs;

(viii) The addition of a clause similar to A.O. 2.07 Article IV.4 as it pertains to the Administrative Tribunal, “any member [of the Tribunal] who has an actual or potential conflict of interest in a case shall recuse himself or herself” to the workings of the panel to consider termination of staff members such that the concerned staff can represent themselves in the interest of transparency and good governance.

(ix) As the Applicant was dismissed before she became eligible for group medical insurance at retirement ADB must provide the Applicant with the same health insurance benefits as other staff members who retire in the normal course of events. In addition, her declared dependent, her mother’s medical insurance, be also covered by the ADB;

(x) Reversal of the financial loss suffered by the Applicant as her termination and one month notice period disabled her from taking her accrued leave (67 days as computed by BPHR) as well as home leave beyond 6 March 2008.

(xi) All benefits that did not accrue to the Applicant because of her termination be paid to her in full, such as the resettlement allowance.

37. In her Reply, the Applicant requests an additional \$200,000 for injuries on account of the Bank getting her former DGs, Directors and Level 6 staff who had never been involved in the Applicant’s rating to reevaluate her with respect to not only her performance but also her character and attitude causing a serious and complete breach of confidentiality.

38. The Bank requests the Tribunal to reject the Application in its entirety for lack of merit and that relief sought should not be granted.

Preliminary measures

39. The Applicant in her Application refers to documents that purportedly led to the Appeals Committee to logically come to the conclusion that the Applicant was informed of performance issues, such as any documents referred to BPHR that preceded the “U” rating given to the Applicant and, noting that any such documents were never provided to her either during her request for external arbitration, internal administrative review, or the appeals process, requests if there are such documents that they be provided forthwith to the Applicant so she can prepare a response.

II. FINDINGS

Does the Tribunal have jurisdiction to hear all three aspects of the Applicant’s complaint?

Applicant’s Position

40. The Applicant argues that three decisions are properly before the Tribunal for review: the 2006 PDP “U” rating, the “U” rating which followed the six-month monitored work plan, and the termination. She asserts that although her initial Application focused on her 2006 PDP “U” rating, and although she had not received the Appeals Committee decision on her second “U”, she provided adequate proof, in her 22 February 2008 Supplement, of her “Supervisor’s *mala fide* intent during the six-month monitored work program, the second pillar of the evaluation process that led to her dismissal”. The Applicant states that the Appeals Committee decision had “been intimidated” to her and that “taken in the context of the illegal rating for 2006 it becomes illegal too and clearly shows that due procedure was not followed. ADB violated the procedures and by trying to isolate the case into its component parts ADB is attempting to ensure that the Tribunal does not have the macro picture and therefore is unable to take an

informed decision”. The Applicant therefore strongly contends that “in order to render an informed judgment the entire series of illegal actions taken by ADB that led to the Applicant’s illegal dismissal be looked at in one Tribunal case As the first U was illegal so was placing the Applicant on a six-month monitored work program. Therefore the decision to terminate was illegal”. Addressing that termination she adds that “termination, by logic must preclude the need for external conciliation ... administrative review by BPHR, the Department that issues the letter of termination and the Appeals Committee The dismissal is not part of the “supplement” but is part of the original Tribunal submission”.

Respondent’s Position

41. The Bank argues that the monitored work program and the “U” which followed, is not subject to review by the Tribunal because the Applicant failed to submit the required separate application for such review. It challenges the Applicant’s assertion that she and the ADB agreed that the 5 February 2008 decision to terminate does not require external conciliation, administrative review or appeal, and asserts that if she wishes to challenge that decision to terminate “she will be required to follow the procedures of A.O. 2.06”. Since she failed to do so, the Bank argues that the Bank’s decision to rate her performance on her six-month program as not satisfactory is not properly before the Tribunal. Proceeding as she proposes would be highly prejudicial to the Bank, it asserts.

Finding

42. The evidence shows that the Applicant’s challenge to her 2006 PDP “U” rating was timely filed and appealed in compliance with the requirements of Article II.3 of the Statute of the ADB Administrative Tribunal. It is properly before the Tribunal.

43. That Application was filed prior to the Appeal Committee's rendition of its decision on the issuance of the second "U" rating which followed the six-month monitoring period. That second "U" decision as well as the decision to terminate were separate actions which the Applicant had the option of accepting or challenging at the requisite steps of appeal to the Tribunal. Article II para. 3 limits the Tribunal's authority to hear disputes as follows:

No application shall be admissible, except upon exceptional circumstances as decided by the Tribunal unless (a) the applicant has exhausted all other remedies available within the Bank, except if the applicant and the President of the Bank have agreed to submit the application directly to the Tribunal and (b) the application is filed within 90 days after the latest of the following: (i) the occurrence of the event giving rise to the application, (ii) receipt of notice after the application has exhausted all other remedies available within the Bank, that the relief asked for or recommended will not be granted, or (iii) receipt of notice that the relief asked for or recommended will be granted if such relief shall not have been granted within 30 days after receipt of such notice.

44. The Applicant claims that the submission of her 22 February 2008 Supplement demonstrated the interrelationship of the three decisions involving the first "U", the second "U" and the termination, and that to segment the Bank's action into separate claims dilutes the cogency of her overall protest of bad faith. The Tribunal understands her concern, but as she acknowledges the first "U", the second "U" and the termination are separate events and each, if protested, requires exhaustion of internal remedies before the Tribunal is able to assert jurisdiction over such actions. The Applicant failed to comply with that requirement and the Tribunal is not persuaded by her assertion that such compliance was by logic, not needed. She obviously was aware of the requisite procedures by having successfully appealed the first "U" to this stage, The Tribunal finds no exceptional circumstances to excuse a departure from the procedures of which she was obviously aware and by which she was obviously bound. Her claim of the three actions being covered by her initial Application does not justify her unilateral assumption that they are better processed as one. The law calls for adherence to the prescribed rules for each claim, with potential consolidation of related claims or direct application to the Tribunal occurring only as a result of

agreement with the President of the Bank. The evidence shows that she timely filed an application on the second “U” but there is no evidence of a separate application having been filed on the termination decision. We are mindful of the Bank’s agreement to consolidation of the challenges on the first and second “U” ratings but have determined to proceed with the present Application which has been fully processed through the available internal remedies: the challenge to the 2006 PDP and the “U” rating included therein. The International Labour Organization Administrative Tribunal (ILOAT) in *Glorioso (No. 2)*, ILOAT Judgment No. 550 (1983) in consideration 1, which involved a similar request for joinder with subsequent applications, likewise decided that the Tribunal “will deliver a separate judgment on the present case, which raises distinct and quite separate issues ...”.

Was the Performance Appraisal for 2006 made in a way that was not arbitrary, discriminatory or improperly motivated?

Procedural Issue

Applicant’s Position

45. The Applicant contends that the Bank violated the 2006 PDP Implementing Guidelines Section III 1 and 2 by failing to provide her with any requisite warning documented with a Note-to-File. She argues that there is no countersigned documentation to show that she was ever informed through a Note-to-File of any performance issues prior to the PDP when she received the “U” rating, and that the Appeals Committee concluded that “during the PDP Review period, the procedures were not followed strictly, in that a Note-to-File did not appear to be prepared and issued”. She notes that the Appeals Committee found that “ADB’s relevant Staff Regulations A.O.s and policies and procedures have not

been applied completely, specifically that the performance concerns were not documented in the prescribed format to the Applicant”.

Respondent’s Position

46. The Bank contends that the requirements of procedural fairness and due process were fully met, and that there is no requirement under ADB rules that an unsatisfactory performance rating must be preceded by a Note-to-File recording a warning of a possible unsatisfactory performance rating. It argues that the PDP Implementing Guidelines are intended to ensure staff members are warned about their performance shortcomings and given an opportunity to improve before any decision to terminate their employment and that that was done in this case through provision of work planning, interim review and year-end review. It argues that the Applicant’s supervisor at the time of her interim review on 31 July 2006 raised no questions of performance since there were none of which she was then aware, the most significant problems in performance that led to the Applicant’s unsatisfactory performance rating occurring after 31 July 2006, and only coming to the attention of the DG, CWRD, in mid-December 2006.

47. The Bank argues that despite the absence of any Note-to-File to verify that discussions had taken place about the Applicant’s performance, it met the basic procedural requirements for the 2006 PDP process of showing the need to improve performance by the issuance of the “U” rating. It asserts that the DG, CWRD had not concluded the Applicant’s performance was unsatisfactory until mid-December 2006 when she performed poorly in preparing a draft Board paper on extension of waiver of Afghanistan cost sharing limits, at the time when the PDP review process was about to begin, and that she knew her performance had been substandard because of his revising and rewriting of her earlier submissions. Further the Director, CWOC had not been aware of her earlier shortcomings in her August 2006

Afghanistan Aide Memoire, her September 2006 Pakistan BTOR or her December 2006 Board paper until the meetings to discuss her results and behavioral assessment for all of their staff.

48. The Bank further asserts that its 2006 “U” rating provided the Applicant with the desired “warning” while offering ample opportunity to engage in a monitored work plan to improve her performance. It claims that there is nothing in the Guidelines or law of international agencies requiring a warning that an employee may be about to get a warning in the form of an unsatisfactory performance rating, and that despite the lack of pre-warnings, she was well aware from prior discussions with her supervisors from critical comments in earlier PDPs, and from her below average salary increases, of her performance shortcomings.

Finding on the Procedural Issue

49. Under 2006 PDP Implementing Guidelines:

I. ... The performance goal setting and assessment process provides an opportunity for the supervisor and the staff member to discuss matters affecting or flowing from events and accomplishments throughout the performance cycle. Discussions about individual strengths, weaknesses, future development plans and feedback all have a place in the assessment process The formal assessment exercise takes place in July and January to evaluate the performance of all staff members but feedback is a continuous process throughout the cycle.

....

III. Ongoing Review

1. To develop an environment of continuing dialogue and continuous developments supervisors should hold, as appropriate, regular informal progress discussions with the staff members to provide feedback where relevant
2. Supervisors should prepare a Note-to-File to document discussions of significant or ongoing and persistent performance concerns

IV. Interim Review

A. Timing

Review takes place in early July covering the period 1 January to 30 June. Interim PDP discussions are expected to be completed no later than 31 July

50. The evidence shows that for the period from the Applicant's entry into CWOC until her interim review discussion on 31 July 2006 there was no record of any informal discussions or Notes-to-File concerning her performance. Although the Applicant had copied her supervisor regarding comments on the Applicant's assignments and although her supervisor had reviewed those comments to check their validity or accuracy, her supervisor did not communicate any concerns to the Applicant about her performance in their 31 July 2006 interim review.

51. From that date until the end of 2006, the Applicant was involved in four projects including an August Aide Memoire concerning a visit of an Afghanistan team to ADB headquarters, a September Regional Management Mission to Pakistan, a November briefing paper and a December Board paper on Afghanistan. Although management wrote up Notes-to-File on these incidents, it failed to do so until after the issuance of the end-of-year Appraisal containing the "U" rating and it was not a part of her file at the time of the performance review. The "U" rating itself is more than a warning that the performance level of a staff member may be declining. It partakes of the nature of a penalty for a performance level that has already crashed. There is no evidence of any discussion or complaint as to her performance at the time of, or immediately after, those four projects took place. The Bank has established a useful procedure for providing timely discussion of "matters affecting or flowing from events and accomplishments throughout the performance cycle" before the formal assessment exercise. In this case the Bank ignored the goals of the Guidelines by delaying the issuance of the Note-to-File until the 2006 assessment exercise had been completed and the "U" rating imposed. It is difficult to characterize such after-the-fact discussion and imposition of a "U" rating as being helpful feedback to help the Applicant in

her performance when the Note-to-File is not provided until that performance period had already closed. Rather, it appears to be an effort to buttress the Bank's position at a time when the employee was past opportunity for benefiting therefrom. Although it is obviously beneficial for an employee to be alerted to performance problems in a timely fashion, the Tribunal finds nothing in the governing law or then applicable Guidelines which mandates such discussion of performance or issuance of a Note-to-File at the time a performance concern arises. They are clearly merely "guidelines". Although encouraged, Notes-to-File were not required. Judged by the then governing Guidelines, there was no managerial impropriety in the manner in which the Applicant's case was processed prior to the 2006 end-of-year PDP.

The Year-End Review

Applicant's Position

52. The Applicant argues abuse of discretion in that DG, CWRD was motivated by *mala fides*. She argues that the imposition of the "U" rating was arbitrary given that the individual ratings in the 2006 PDP given by Director, CWOC were supportive and encouraging and not consistent with a "U" rating. She claims the record shows that DG, CWRD was alone in his assessment and not supported by the OIC or Director, CWOC and thus acted contrary to Question 11 of the Frequently Asked Questions (FAQ) in the Implementing Guidelines which indicates that "Directors should consult with their head of department's office before discussing performance with their staff at interim and year-end reviews". She also challenges the Bank's contention that the final rating is made against a benchmark of "other staff members at Level 4 in CWRD" by noting that such benchmarks or average has not been identified.

53. The Applicant further challenges the capriciousness of DG, CWRD's rating considering that he had worked with the Applicant for less than one month as well as the suggestion of a quota system

as not being just noting that there were no “U” ratings in the subsequent year. She asserts that DG, CRWD only labeled her product as unsatisfactory after the Applicant had begun the review process that post dated the “U” rating and claims that rating must be held to have been arbitrary, improperly motivated, capricious and failing to meet due process requirements, in as much as when the “U” rating was issued as her final rating there had been no comments on the record.

54. The Applicant argues that a promised promotion in the third quarter of 2006, and its later denial was “renowned” of DG, CWRD and was reflected in the record number of staff leaving the department or resigning, and that Director, CWOC in his Note-to-File of the 9 March 2007 meeting reference to an option of the Applicant seeking a “better fit” position in another part of the Bank together with her subsequent termination clearly drove the *mala fides* intent of the Bank. That intent, she continues, is also shown by Director, CWOC’s support for the illegal “U” rating given by DG, CWRD in contrast to the satisfactory rating given by other reviewers of her fall 2006 activities, as well as by the arbitrary and capricious denial of her request for home leave.

Respondent’s Position

55. The Bank argues that there was no *mala fides*, that the DG, CWRD properly exercised his discretion and that the evidence of “Generally Satisfactory” rather than “Fully Satisfactory” ratings on the results and behavioral assessments by Director, CWOC as well as the comparison of her work with other Level 4 staff clearly shows that her overall unsatisfactory rating was not motivated by *mala fides*. It argues that DG, CWRD worked closely with the Applicant for four months commencing May 2006 and took into account the deficiencies he observed in the Applicant’s performance in the Afghanistan Aide Memoire, the Pakistan BTOR and the December 2006 Board paper on Afghanistan which showed that her initial drafts were of poor quality requiring overhauling and significant revision.

56. The Bank argues that the Applicant's "Fully Satisfactory" performance ratings prior to 2006 do not constitute evidence that the Applicant had no significant performance problems during the time and that overall pay increases rather than PDP Review ratings are a more reliable basis for determining overall performance. The Bank denies that any quota was in force or used and that an overall unsatisfactory performance rating in the absence of unsatisfactory individual ratings does not constitute an abuse of discretion, arguing that a head of department's overall rating for a staff member's performance is not subject to a mechanical formula based on individual ratings given by division directors.

57. The Bank denies that the DG, CWRD at any time promised the Applicant a promotion and that any effort to find her a position in a different department was evidence of good faith rather than *male fides*.

Finding on the Unsatisfactory Rating

58. The Bank's records show that its supervisory personnel evaluated the Applicant as having performed acceptably throughout her career prior to her May 2006 change of assignment. Her supervisors throughout her career with the Bank assessed her performance as being predominantly in the "Fully Satisfactory" category. Although the evidence shows that she routinely was given salary increases below the professional averages, there is no showing that those lower than average wage increases were ever reflected in any of the comments made by management as to her performance nor do they appear to be reflected in, or to be a consequence of, her annual performance ratings. Nor is there any question that from May through 31 July 2006 when she underwent her interim review there was no evidence of any dissatisfaction with her performance. The Bank presented no evidence of the relationship between the annual salary increases and the performance ratings of the Applicant. The standards employed by the

Bank in granting salary increases to staff apparently also remained undisclosed to the Applicant and the Tribunal. Although she was involved in several projects after her 31 July 2006 review discussion and although once she challenged her “U” rating her supervisors wrote up a Note-to-File criticizing her performance in four projects, there is no evidence in the record of any timely discussion with her prior to her “U” rating of poor or inadequate performance in any of those tasks. Indeed in her submission of various drafts for subsequent review and revision there is no evidence that she was ever told at the time of submission or revision of the drafts that her work was unsatisfactory or that her having to respond to recommended correction of drafts constituted evidence of poor workmanship.

59. In her year-end assessment the Applicant was given ratings of two “Fully Satisfactory” and two “Generally Satisfactory” in her Results Assessments and ratings of two “Fully Satisfactory” and three “Generally Satisfactory” in her Behavior Assessments. Her supervisor, as noted earlier, commented favorably on her support of operational matters related to Afghanistan and Pakistan. His sole criticisms were her need to “deepen her knowledge of ADB’s policies and procedures” and to “strengthen her attention to detail”. It was not until 9 March 2007 that the Note-to-File covering her performance from September through December 2006 was entered into the record. Thus, as of 29 January 2007 there is no evidence that the Applicant had been alerted to any performance issues serious enough to label her performance as Unsatisfactory. The Performance Appraisal Rating of Unsatisfactory issued on 16 February 2007 has no accompanying comment, and there is no indication of the basis for that assessment. It is certainly unsupported by the totality of her record.

60. As this Tribunal held in *Mariam Pal*, Decision No. 52 (2001), para. 32:

The function of the Tribunal is one of review and it does not intervene in the area of management discretion which is the prerogative of management. However it will intervene if there is arbitrariness or an abuse of discretion.

61. In the present case there is a significant and unexplained discrepancy between the Applicant's record with the endorsement thereof in ratings of Fully and Generally Satisfactory provided by her supervisors and the "U" rating which is the subject of this Appeal. For a system such as the PDP to function effectively it should, in timely fashion, inform those involved, and those reviewing such actions as to the reasoning for actions taken. That was done in all stages up to the issuance of the final "U" rating by the DG, CWRD who apparently had had only four months' supervision of the Applicant. That short exposure made it even more important that he provide some explanatory comments to support a decision at such odds with the rest of the then available record.

62. As the Tribunal noted in its initial decision *Carl Gene Lindsey* Decision No. 1 (1992), para. 38:

... (I)f the risk of arbitrariness is to be avoided, performance evaluations should be recorded in written form after an exchange of views between those concerned It is this absence of record which makes it so difficult to understand how the quality of the Applicant's performance in his first year of service could be deemed to have so seriously declined thereafter.

63. In this case the period of putative decline in quality of performance is much shorter and the decline much starker, at the best from her 31 July 2006 interim review, at the worst from the few weeks following her supervisor's ratings in the same review. In the absence of any entry by the DG, CWRD setting forth a view that differs from the record we have no explanation for the discrepancy.

64. The Bank places great reliance on the Applicant's performance during the period August to December 2006. It asserts that the revisions to her draft of the Afghanistan Aide Memoire and to the Pakistan BTOR "should have adequately put the Applicant on notice that her outputs did not meet the minimum requires (sic) standards" and that the revisions and corrections on the drafts "constituted adequate notice to the Applicant regarding the poor quality of her work".

65. Section III 2 of the then governing Performance Management Implementing Guidelines provides that:

Supervisors should prepare a Note-to-File to document discussions of significant or ongoing and persistent performance concerns. The Note-to-File should be signed by both the supervisor and the staff member. The Note-to-File should be normally referred to during the interim or year-end assessment exercises.

66. Despite the Bank's contention that the Applicant should have realized from supervisory editing and revising of her submissions that her work did not meet minimum standards, or that it was a poor quality of work, the Bank failed to conform to the recommended Guidelines to advise the employee of her shortcomings or to provide the written documentation in timely fashion. Such timely notification, even though not then a mandated requirement, must be viewed as a reasonable prerequisite to any improvement in employee performance if an employee is to benefit from such criticism, particularly to avoid negative evaluations. The September and October 2006 criticisms occurred only a month or two after her interim review which lacked any evidence of criticism, and more than four or five months before her annual review. A timely discussion and written Note-to-File would have alerted the Applicant to any alleged shortcoming in adequate time for her to improve her performance. Yet nothing was done to record in timely fashion these alleged failings, and the record is bereft of any written criticism, let alone signed acknowledgment of such discussion. The concept of a discussion and Note-to-File with signed acknowledgment is aimed specifically to avoid the uncertainty of adequate notice presented in this case.

67. There is no written record to establish that any of the alleged failures of which her supervisor's were supposedly aware of after 31 July 2006 were ever communicated to the Applicant prior to her review. The introduction of critical comments in tardy fashion as here, when the 2006 assessment period had closed, does not guide the employee to improved performance. Rather than as a constructive

vehicle for encouraging performance improvement, it appears instead to be a self serving device for management to attempt to erase years of PDPs which supervisors had written up and endorsed as evidence of superior workplace performance in order to support an unexplained and apparently random decision by the DG, CWRD, to rate her as unsatisfactory. Furthermore, from the absence of any “Comment” on the form, there is no evidence that the DG, CWRD was aware of those alleged failings at the time he rendered the “U” rating. On its face the conflict between the written record including her favorable ratings on the Results and Behavior Assessments in the 2006 Review and the “U” rating in the same document without comment compels a conclusion that the latter was arbitrary and unfounded. That doubt is underscored by the manner in which the Bank apparently undertook to create and bolster the record after 26 February 2007 when the Applicant registered her surprise and sought review of the “U” rating. The actions of the Bank which followed the “U” rating, raises questions of the *mala fides* and indeed the motivation of its action.

68. On 4 March 2007, the Bank solicited a number of the Applicant’s prior supervisors noting that “A weakness in our case is that [the Applicant] received fully satisfactory ratings from 2000 to 2005” and requesting reply emails commenting on her performance beyond and presumably at odds with those introduced in her annual evaluation forms. Nearly a dozen of the Annexes attached to the Bank’s Answer are devoted to some 40 single spaced pages of such after-the-fact statements. The Bank developed and promulgated a set of Guidelines to provide timely discussion of employee performance with provision for written Notes-to-File countersigned by the affected employees precisely to avoid what the Bank has done in this case: attempting to provide adverse evidence from as far back as her 1999 application for employment to which the Applicant has had no opportunity for response or rebuttal. Such a course of action deprived itself of an opportunity to create and develop a record system which both the Bank and staff can rely on to accurately assess performance during the period covered by the PDP. The whole purpose of the Note-to-File procedure is to assure that the determining officers have all pertinent

information vetted by the employee when making their assessments of performance. Having promulgated such procedures, the Bank is obliged to use them and such *ex post facto* entries have been excluded from our consideration. If the Bank believes the annual assessments fail to provide an accurate assessment of an employee's weaknesses or shortcomings, the appropriate remedy is to require its supervisors to be more transparent and critically honest in evaluating employees in their charge in a timely fashion.

69. In addition, in soliciting the comments of the supervisor who conducted the 31 July 2006 review, the Bank inserted into the record its proposed recitation of that interview totally ignoring the supervisor's efforts to correct the accuracy thereof.

70. Given that record of after-the-fact efforts to alter or modify the record that was before the rating officials, and the total absence of any explanation for the "U" rating by DG, CWRD and Director, CWOC, it is difficult to find any justification for the disparity in view represented by the imposition of the "U" rating in the light of the then available record. Accordingly, the Tribunal finds the "U" rating in the light of the entire written record at the time to have been arbitrary and without any justification or explanation.

DECISION

For the above reasons, the Tribunal unanimously decides that:

1. The "U" rating is overruled and rescinded and this judgment be made part of the Applicant's record. It therefore follows that the pre-condition required for issuance of the second "U" rating and all consequences eventually flowing therefrom were not met and are moot.

2. The Applicant shall be reinstated to her former Level 4 position and be made whole for all earnings and benefits lost with restitution of her benefits and entitlements to the level they would have been but for the Bank's actions.
3. Should the President of the Bank decide that the Applicant shall be compensated without further action being taken in the case, pursuant to Article X paragraph 1 of the Statute of the Tribunal, the Tribunal fixes the amount of additional compensation to be paid to the Applicant at three years' basic salary.
3. The several remedies proposed by the Applicant that go beyond her reinstatement and reimbursement for lost wages and benefits are denied, as is her request for preliminary measures.