

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 87
(23 January 2009)**

**Ms. A
v.
Asian Development Bank**

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

1. The Applicant contests the 7 February 2007 Decision of the President, Asian Development Bank (“ADB” or the “Bank”) denying her promotion to the position of Senior Financial Control Specialist, Level 5, Loan Administration Division (CTLA), Controller’s Department (CTL) as being the result of a biased, discriminatory, improperly motivated and procedurally-flawed selection process.

I. THE FACTS

Background

2. The Applicant, who has a B.A. in Business Administration, an M.A. in Economics (with Honors), and a PhD in Commerce, joined the ADB on 15 February 1994 as a Level 4 Economist in the Development Policy Office. On 15 February 1995, her probationary period was extended to 14 August 1995. On 1 June 1995, she was transferred to the CTLA as a

Financial Control Specialist, and after a further extension of her probationary period until 1 February 1996, her appointment was confirmed.

3. From 1996 through 2002, she received “excellent” ratings in her Annual Performance Evaluation Reports (PERs) and Performance and Development Plan (PDP) Reviews for Application of Analytical, Technical and Conceptual Skills, Client Orientation, and Teamwork. Her PER for 1998 signed by the then Assistant Controller (hereinafter referred to as “Mr. Z”) noted: “Her significant contribution to the Division’s disbursement success showed that she can be a distinguished performer when she accumulates more experience.” After Mr. Z was promoted to Controller, he countersigned the Applicant’s PERs as Head of Department from 2001 to 2004 when she received, at a minimum, ratings of “Fully Satisfactory” or “Performance fully meets or exceeds the requirements of the position”.

4. In the Applicant's PER for 2002, in relation to Oral/Written Communication Skills, the Assistant Controller who succeeded Mr. Z wrote: “Fully satisfactory, further strengthening is encouraged.” In that PER, it was also noted: “[The Applicant] wished that she would have an opportunity to work in the other related area, such as [Central Operations Services Office], for wider experience and exposure.”

5. In her PER for 2004, it was noted that she had made efforts to strengthen her communication skills.

6. In September/October 2005, apparently unbeknownst to the Applicant, she was recommended by Mr. Z for the ADB-wide Enhanced Separation Program – Professional Staff, on the grounds that the Applicant “has already reached a plateau in her career and has very slim chance for further career advancement. She has been stagnated in her current Level 4 position for more than 11 years.” The evidence shows that during the preceding five (5) years, she had submitted 35 applications for promotion, all of which had been denied despite performance ratings of “Fully Satisfactory”.

7. On 27 January 2006, the Bank advertised a vacancy in the position of Senior Financial Control Specialist, CTLA, Level 5. The Responsibilities of the position included:

1. leading in reviewing disbursement policies and procedures for loan and the technical assistance (TA) in line with changing operational environment and policies of ADB.
2. liaising with operational departments and resident missions to enhance efficiency of loan and TA disbursements.
3. leading loan disbursement missions to the loan recipient countries and delivering lectures on disbursement operations in the seminars/workshops for the executing agencies (EAs) to facilitate financial administration of projects.
4. participating in operational activities such as Country Portfolio Review Missions, loan inception and review missions, loan negotiations, etc.
5. providing advice and guidance in enhancing the capacity of EA’s in achieving development results of ADB’s projects and monitoring the adequacy of EA’s internal control and accounting capability to design an appropriate loan disbursement mechanism.
6. reviewing project documents such as Report and Recommendations of the President, TA paper, Country Strategy and Program, Project Completion Report and Technical Assistance Completion Report, to provide input to country and project teams.
7. disbursing loans and technical assistance to recipients.
8. disbursing private sector investments and loans, and participating in private sector project meetings.

Selection Criteria for the position were listed as follows:

Specific criteria include

- suitability to undertake the responsibilities mentioned above at the required level.
- a postgraduate degree in finance, accounting or other related fields with good knowledge of computerized accounting and financial information systems, and preferably with professional qualification such as certified public accountant (CPA)/Certified Financial Analyst (CFA) or its equivalent.
- at least 10 years of highly relevant professional experience in accounting firms or financial institutions in the area of project implementation and management.
- international development experience.
- strong team leadership, negotiation and interpersonal skills.
- very strong analytical skills.
- excellent oral and communication skills in English.

Applications from qualified ADB staff will be considered first before external applications. Women staff are encouraged to apply. International experience will be taken into consideration. [Original in bold].

8. The Applicant and two (2) other Level 4 staff members applied for the position. On 21 February 2006, the Applicant sent a memo to Director, Human Resources Division (BPHR) providing material in support of her application, including an 11-page description of her work as related to the above criteria, her *curriculum vitae* listing her three (3) academic degrees and her work experience, and a description of special projects on which she had worked, as well as copies of her prior PERs and PDPs.

9. A Selection Panel convened pursuant to the requirements of Administrative Order (A.O.) 2.03 and the Implementing Guidelines on Selection/Promotion Panel, met on 28 February 2006 to consider the applications.

10. The Applicant claims that during that meeting there were serious breaches of ADB policies and procedures on promotion, that Mr. Z mischaracterized the Applicant's educational qualification by not disclosing her PhD in Commerce or "her professional qualification as a certified financial specialist and certified senior economic specialist" or her "significant achievements in special projects." She claims that "all this was done by [Mr. Z] so as to portray [the alleged favored applicant, hereinafter referred to as "the Appointee"] in a comparatively better position over the Applicant", and that "what was supposed to be a legitimate selection process, became an avenue for [Mr. Z] to marginalize and criticize his 'least favored' of those applying, the Applicant, and unduly laud the accomplishments of the pre-chosen, [the Appointee]."

11. The pertinent portions of the Minutes of the Selection Panel read as follows:

[The Applicant] – She is a 57 year old national of Taipei, China, who has a Masters in Economics. She joined ADB 12 years ago, initially as Development Policy Officer in DPO/SPO. After one year in this position, she joined CTL as a Financial Control Specialist and has since been assigned to CTLA. The Panel noted that she is experienced in disbursement work and has good work experience in CTL. The Panel noted, however, that her communication skills are not as strong as required of the position.

....

... In comparing the candidates, the Panel agreed that [the Appointee] was the most suitable candidate for the position on account of his highly relevant experience, professional qualifications, and strong performance.

....

The Panel agreed to recommend the promotion of [the Appointee] to the position of Senior Financial Control Specialist, Level 5, CTLA

12. On 7 March 2006 the Applicant was advised that the Vice-President for Finance and Administration had approved the Selection Panel's recommendation to promote the Appointee.

13. Thereafter the Applicant met with Mr. Z and engaged in an exchange of e-mails which, according to the Applicant, "seal off not only all doubts concerning [Mr. Z]'s strong bias, prejudice against the Applicant and favoritism toward [the Appointee], but also his improper motivation in this promotion and irregular review process." She then cites the following email excerpts to show strong bias, prejudice, improper motivation, and violation of ADB procedures:

Enough is enough you can go to anywhere to complain. Don't bother me. Please.

Don't bother me anymore. Enough is enough. You can complain to whoever you wants (*sic*).

You are totally wrong by saying "difficult to get promotion at other departments". Many people got promotion from non operational departments to operation departments. You can check with BPHR.

You are welcome to leave CTL anytime if you think we are unfair to you. You can complain to President or Staff Association.

Don't waste your time and my time anymore. You can go to President or whoever can rescue you.

Your entitlement to promotion? Joke!! You may please complain to President and request him to give your entitlement....But don't bother me any more.

Since you have been attending [Secretariat of the Pacific Community] (*sic*) and working with Regional departments, they would have invited you to join them long time ago if you are really great as you have been claiming.

You think I am so powerful that everyone in the panel would agree with me in less than one minute if my proposal is unfair and unreasonable.

The panel decision is unanimous without even any argument.

14. On 5 June 2006, the Applicant requested the initiation of compulsory conciliation, which was unsuccessful.

15. Thereafter she requested administrative review, leading to denial of her claims. The dispute was thereafter submitted to the Appeals Committee. She came to the Tribunal on 8 May 2007 contesting the 7 February 2007 decision of the President approving the recommendation of the Appeals Committee to reject the Applicant's claim as being without merit. The Applicant submits that:

a) The selection process was “fatally flawed” as the Selection Panel was “incurably tainted in its composition There is no reasonable evidence showing that a consensus was reached in any deliberative manner; in reaching its Decision, the Selection Panel failed to follow established ADB criteria in a fair and impartial manner; and that the panel served as the mere rubber stamp of the Controller [Mr. Z] in ‘selecting’ his preferred candidate.”

- b) As a result of “gender discrimination, bias, arbitrariness and improper motivation,” the selection process “violated the Applicant’s ‘contract of employment’ and her ‘terms of appointment’.”
- c) She has been subjected to “harassing and humiliating treatment and communication from her supervisors” which constitute indicators of an existing “patent and latent system of reprisal targeting her” because she had requested justification.
- d) The various review and appeal procedures were “flawed in that the Administrative Review process is conducted by a member of the Selection Panel who could hardly be either impartial ... or likely to find fault” with the Panel’s earlier behavior.
- e) She “was denied equal treatment under the policies, procedures, rules and regulations of ADB as well as harassed, humiliated and insulted in violation of the very principles that ADB not only espouses for itself but daily insists upon from all those involved in its development operations Those ... principles as well as basic fairness require that the Applicant be properly and sufficiently compensated for the violations by the ADB of her ‘terms of appointment’ and ‘contract of employment’.”

Relief prayed for

16. The Applicant seeks the following relief:

(i) Rescission and setting aside of the Decision to promote the Appointee and issue an order promoting the Applicant instead to the position of Senior Financial Controller, Level 5, CTLA;

(ii) In the alternative, retroactively order the promotion of the Applicant to Level 5 and at the same time, issue an order directing that the transfer of the Applicant to another department or other suitable position shall not be blocked or impeded, so as to minimize the possibility of reprisals from her supervisors or other senior staff of the Bank;

(iii) Direct the Bank to provide monetary compensation equivalent to three (3) years' salary for the lengthy and tremendous loss of career development (Level 4 to Level 5 and higher position), earnings, severe mental distress, and professional humiliation, serious anxiety, as well as social humiliation suffered by reason of the discriminatory acts of her supervisors, as evidenced by the long overdue promotion and unfair treatment during the past seven (7) years;

(iv) Order that reasonable costs incurred by the Applicant in bringing this action, including professional fees, be borne by the Bank; and

(v) Consider adopting fictitious names in the Tribunal decisions, resolutions, reports or orders.

17. The Tribunal held an Evidentiary Hearing on 11 and 12 August 2008 at which time several witnesses provided testimony for each side. Post-hearing Memoranda were submitted by the parties on 24 October 2008.

II. FINDINGS

Was the promotion decision made in a way that was arbitrary, discriminatory or improperly motivated in the light of the claims of systemic gender bias in the CTL and/or throughout the ADB?

Applicant's Position

18. The Applicant argues that she was deprived of her right to equal treatment due to gender discrimination and prejudice, harassment, humiliation and insults by her supervisors, that the selection decision was controlled by personal bias and prejudice, improper motivation by the inclusion of Mr. Z in the selection process and gender discrimination.

Personal Bias and Prejudice

19. The Applicant asserts that the supervisory style of Mr. Z and the Assistant Controller showed bias and prejudice, particularly favoritism toward the Appointee in work assignment and giving him "undue fulsome praise". She cites the Appointee's assignment to lead a task team for which most of the work had already been accomplished, and asserts that e-mail

exchanges by Mr. Z displayed bias and prejudice and a clear intent to humiliate and belittle the Applicant. She claims that the job responsibilities for the advertised position were written to bolster the opportunities for the pre-selected choice, the Appointee.

20. The Applicant points to the sworn statement of Mr. Z that her work was never commendable, and of the Assistant Controller that she needed improvement. Both charges were contradicted by her excellent PER and PDP ratings some of which came from them. The bias of Mr. Z, she continues, was manifest in his belittling the Applicant's Yale education, and her being the team leader on the LIBOR-based Loan Interim Guidelines. She points to such bias and prejudice as greatly contributing to the low morale among CTLA staff members, the rapid and exceptional turnover among CTLA personnel and that the Bank had failed in its "duty to act in good faith", and in its "duty to respect the dignity of a subordinate."

Improper Motivation and Arbitrariness

21. The Applicant challenges the predisposition of Mr. Z and the Assistant Controller toward the promotion of the Appointee as making the selection process a farce and rubber stamp in violation of ADB procedures and policies. She cites the Assistant Controller's suggestion of the promotion as a way of dissuading the Appointee from transferring to another department, and the holding open of the Level 5 position until he met the two-year employment threshold. She points to her placement on the Enhanced Separation Program, without notice to her or opportunity for comment, as showing intent as early as 2003 to get rid of the Applicant.

Gender Discrimination

22. The Applicant asserts that she has been the victim of gender discrimination which is present in the ADB and in particular within the CTL and which was specifically noted at paragraph 27 in the Report of the Appeals Committee. She cites the Bank's Gender Action Plan (GAP) III which concluded that despite some improvement having been made in the representation of female professional staff members, further gender intervention is needed in the ADB noting the decrease in appointment rates and lack of improvement in entrance levels of female Professional Staff.

23. The Applicant points out that over a seven (7) year period not a single female staff member had been promoted to a senior position in CTLA, when during that same period, promotions had been awarded to ten (10) male staff members and seven (7) women had left the Department. She refers to the Bank's 16.7% professional female staff members in CTL (having fallen from 47% in 2001) as being well below the 28% in the Office of Cofinancing Operations Group and 30% that is the ADB's average. Additionally, the Applicant contends that Mr. Z viewed gender issues as unimportant, and of little or no practical relevance for him, that he deprived female department members of opportunities for advancement by downgrading positions when incumbents of Level 5 positions retired. She argues that female staff members have been relegated to second class status for the past six years, while Mr. Z promoted ten (10) male professional staff members and no female professional staff to senior positions, recruited females at Level 3 while bringing in males at Level 4, and caused many females to leave the Department for lack of promotional opportunities or prospects.

Respondent's Position

24. The Bank asserts that the selection in this case was not based on improper motivation or discrimination against the Applicant.

Alleged Personal Bias and Prejudice

25. The Bank argues that there is no evidence to support the allegations of bias and favoritism, that the Appointee was chosen fairly in accordance with appropriate procedures and without bias, discrimination or improper motive, and that there is no basis to the Applicant's claim that the terms and conditions of her contract of employment have been violated. The Bank further notes that the e-mail exchange relied upon by the Applicant contains e-mails from her that in the Bank's view, are "insulting, inflammatory, defamatory and, it is suggested, designed to obtain an infuriated response," while the Controller's responses, even if they show a strained relationship, are entirely irrelevant to the issues before this Tribunal, and indeed postdate the deliberations of the selection panel. The Appointee testified that he had no personal relationship with Mr. Z or the Assistant Controller and that he knew of no personal relationships between any of the male staff of CTL and the supervisors.

Improper motivation

26. The Bank asserts that “it is reasonable in the circumstances that the responsibilities of the Senior Financial Control Specialist position pertain only to tasks unique to CTLA3 since the position is within CTLA3” which is hardly a valid basis for the Applicant’s claim that the competition had been somehow rigged in favor of the Appointee.

Gender Bias

27. The Bank argues that its commitment to gender equity is amply supported by its Gender Action Program and its open Internet tracking data on appointment and promotion by gender and level. It notes that while there is still work to be done in the gender equity field, female professional staff were promoted at a higher rate per capita than men for four (4) of the five (5) years from 2002-2006, and that from 2003-2006 the percentage of total promotion of women from Levels 5 to 6 averaged higher than the proportion of their representation in the Professional Staff population. The Bank argues that there is no evidence that Bank-wide gender discrimination was a factor in the Applicant’s failure to advance beyond Level 4 and that the allegations of gender discrimination were merely “garden variety gripes” over allocation of work and assignment of credit and complaints by those like themselves because they did not receive promotions.

28. As to the claim of gender bias within the CTL, the Bank argues that the Applicant has provided no specific evidence that gender discrimination rather than performance

considerations determined the decision not to award her this promotion, and argues that the level increases for Mr. Z in 2003 and the two (2) Assistant Controllers in 2001 and 2003 were basically automatic rather than traditional promotions as that term is generally used, diluting the Applicant's claim by showing that only five (5) men were promoted to Level 5 or higher during the tenure of Mr. Z. It asserts that there were never any formal or informal complaints on gender grounds from any CTL staff, that Mr. Z testified that the great majority in his staff are women and that he worked very well with women, his only problems being with those whose work did not impress him. It notes that the women who left the Department did so for reasons other than gender discrimination including lateral transfer, promotion to other departments, leaving because of husband's deployment outside the Philippines, and leaving ADB under early retirement. The Bank argues that the decline in the percentage of female professional staff in CTL does not say anything concerning gender bias without evidence of qualified female applicants not being hired, and may be attributable to the more recent requirement of a professional accounting qualification.

Findings of the Tribunal

29. The jurisdiction of the Tribunal is governed by Article II of the Statute of the ADB Administrative Tribunal which specifies that:

1. The Tribunal shall hear and pass judgment upon any application by which an individual member of the staff of the Bank alleges nonobservance of the contract of employment or terms of appointment of such staff member. The expressions "contract of employment" and "terms of employment" include all pertinent regulations and rules in force

at the time of alleged nonobservance including the provisions of the Staff Retirement Plan and the benefit plans provided by the Bank to the staff.

2. For the purpose of the statute, the expression “member of the staff” means any current or former member of the staff of the Bank who holds or has held a regular appointment or a fixed term appointment of two years or more, any person who is entitled to claim a right of a member of the staff as a personal representative or by reason of the staff member's death, and any person designated or otherwise entitled to receive a payment under any provision of the staff retirement plan or any staff benefit plan provided by the Bank, et seq.

The majority of the Tribunal hold that the present Application is properly before us; first, because there was no jurisdictional objection raised by the Bank, and second, because we believe there is a question of whether the Applicant's contract was violated in the light of the pertinent regulations and rules in force at the time.

30. Turning to the merits of the Applicant's claim, it is well established that appointment and promotion decisions are matters within the discretion of the Bank pursuant to A.O. 2.03, paragraph 1.5, and that the Tribunal may not substitute its discretion for that of the Bank (*Guioguo*, Decision No. 59 [2003], VI ADBAT Reports, para. 11) or undertake its own examination of the record or assessment of the qualifications of the staff member. If the employer fails to choose the most suitable candidate, it is the loss of the employer as well as of the employee or candidate. As noted in *D'Aoust (No. 2)*, IMFAT Judgment 2007-3 (22 May 2007), p. 28, in quoting the Statutory Commentary:

... determination of the adequacy of professional qualifications is a managerial, and not a judicial, responsibility.

31. The judicial role is properly confined to determining whether the Bank's determination was made in compliance with the applicable rules, regulations and procedures it established for handling such matters. In this case, the Bank has also committed itself in A.O. 2.02, par. 2.1, to be "guided by fair, impartial and transparent personnel policies and practices ...", and in paragraph 2.4, to make "the employment, promotion and assignment of staff ... without discrimination on the basis of sex, race or gender." In paragraph 2.5, the Bank further commits itself as follows:

ADB will take affirmative action to increase the representation of women on the professional staff at all levels.

It is therefore appropriate that the Bank's action in denying the Applicant's promotion be judged in the light of those commitments.

32. This Tribunal has noted the difficulty of proving discrimination which often requires "circumstantial proof, most obviously by a demonstration that the woman staff member has been treated less favorably with respect to such matters as performance evaluation rating, salary increase or reappointment than are men of essentially equivalent abilities." (*Alexander*, Decision No. 40 [1998], IV ADBAT Reports 41, para. 74). Normally the Applicant has the burden of proving gender discrimination. Despite the efforts of the Bank to overcome its acknowledged problems of gender discrimination, the Tribunal finds that the Applicant had a reasonable perception that she was the victim of gender discrimination within CTL. That perception was based in part on her seniority and the fact that despite performance ratings of

“Fully satisfactory” she had not been promoted although she had applied for such 35 times. Taking into consideration this convergence of events, the Tribunal finds it reasonable that the Bank should show that the Applicant had not been denied the promotion on the basis of gender.

33. In the *Alexander* case as in this, the Applicant provided extensive statistical information about the number and position of women in the staff of the Bank. The Tribunal in that case held that such evidence:

... may provide useful background for such a claim, particularly in the way it manifests the overall atmosphere within the Bank, [however,] it does not by itself suffice to prove such a claim. (Brackets supplied)

34. Despite the Applicant’s claim that the Bank has been lax in undertaking measures to reduce gender discrimination, the evidence shows that the Bank has made substantial progress in its effort to reduce gender inequity in its professional staff particularly in senior positions. The Bank's efforts in placement of women in higher positions, while still open to further improvement, has shown significant success.

35. The evidence shows that in the period since the *Alexander* Decision, the Bank has intensified its efforts to combat the problems of gender discrimination. In that year, 1998, it initiated its first GAP which by its termination in 2002 had increased total representation of women to 26.1%, the highest number to date in both absolute and percentage terms. In the GAP II from 2003 to 2005, women’s representation increased from 27.5 % at the beginning of 2003 to 29.6 % by 30 June 30 2006, while women in the pipeline levels (Levels 5 to 6) increased from

19.6% in 2002 to 29% by mid 2006, and in the senior levels (Levels 7 to 10) more than doubled from 6.2% in 2002 to 12.6% by mid 2006. Women professional staff, Bank-wide, were promoted at a higher rate than men for four of the five years from 2003 to 2006.

36. Since the Applicant has joined the ADB, the representation of women has increased from 12% to 29%, an increase of 144%, the number of women occupying Level 5 positions has gone up from 12.7% to 32%, and the number of women occupying Level 6 positions has risen from 1% in 1998 to 25% in 2007.

37. Likewise, in coping with problems of gender equity within the CTL, the Bank has demonstrated that it has undertaken to provide equal opportunity for qualified female employees to move into senior professional positions in that Department. Women in CTL in three of the past five years have been promoted at a higher rate per capita than men in the department. It notes that several women instead of remaining within the Department to compete for the higher level professional openings, transferred, took promotions to other departments, or left the Department for personal reasons not related to gender discrimination. We are not persuaded that the Applicant has demonstrated that her failure to fill the disputed vacant position was a consequence of systematic gender discrimination either within the Bank or the CTL. There is no question that the Bank has recognized the adverse statistical reflection of its earlier Bank wide gender equity problem and that it has sought to rectify it. Nor is there any question that the Bank has faced particular problems in seeking qualified staff for its most senior positions in CTL. We are sensitive to the perception of the Applicant that her failure to advance after 35 denied bids for promotion was due to systemic gender discrimination within the Bank, and that her failed bid in

this case was due to gender discrimination within CTL. In this case the Bank has been able to show that the Applicant did not possess the required qualifications pertaining to knowledge in accounting and that the Applicant was not a victim of gender discrimination.

38. As to the Applicant's claim of bias, improper motivation and prejudice, the evidence shows that she had been at Level 4 for six (6) years before Mr. Z became Controller without having been recommended for promotion. While this Tribunal recognizes that there were e-mail exchanges following the selection which reflect a very strained relationship between Mr. Z and the Applicant, we do not conclude from such evidence or from the fact that Mr. Z had requested her to report to her immediate supervisor, or the determination to make certain assignments to the Appointee rather than to the Applicant, or having recommended her for the Enhanced Separation Program without notifying or consulting her, or indeed from the comments as to the need to improve her communication skills, that such placement or comments constitute adequate proof of improper motivation or prejudice to sustain the Applicant's claim.

Was this promotion decision reached by proper processes including whether ADB violated its selection procedures when it excluded consideration of her PhD?

Applicant's Position

39. The Applicant asserts that the selection process was fatally flawed and biased, that the Decision of the Selection Panel was not in conformity with and made a mockery of established ADB policies, procedures rules and regulations, and that the process can not be

competitive pursuant to A.O. 2.03, paragraph 1.5, when the results are predetermined and known to the key decision maker of the Selection Panel even before the position was advertised. She points to the ADB's professed ideals in A.O.s 2.01, para. 2.4, and 2.02, para. 2.1, of "full and fair opportunities for eligible existing staff to compete for promotion" pursuant to "fair impartial and transparent personnel policies and practices", and notes that the action of Mr. Z belittling the Applicant and characterizing her chances at promotion as a "joke" makes it clear that the Bank's supervisory officers were dealing with her in complete absence of good faith.

40. Because of the obvious discrimination, partiality, improper motivation, and conduct of the Department's representatives, the Applicant claims the selection process was fatally flawed, that Mr. Z's inclusion on the Selection Panel tainted the process, that no questions were asked and no discussion took place at the very brief panel session so that no weighing of the merits of the candidates or good faith or fair consideration occurred. The Applicant asserts that the Selection Panel did not base its decision on the respective qualifications and merits of the Applicant's vis-à-vis the Selection Criteria, and thereby violated paragraph 6.3 of A.O. 2.03, and deprived the Applicant of the promotion which would have resulted from a fair and thorough review of the qualifications of both candidates. She asserts that the selection procedures and standards of fairness were in violation of the basic requirements of international agencies.

41. The Applicant also asserts that the selection was not based on the specified criteria listed in the advertisement and the relative merits of all of the applicants were not properly considered, that unlike the Appointee, the Applicant has completed eleven (11) special projects in improving loan and TA disbursement during her ten (10) years of highly relevant

professional experience in accounting and financial institutions, that the Appointee's private sector experience was unrelated to the requirement of experience in "disbursing loans and technical assistance to recipients" where he had one year and nine months' experience against the Applicant's three (3) years, that the Applicant had numerous significant mission leadership, and that the Applicant's PhD in commerce, Master's degree, part-time study in computer programming, and government specialist certifications and departmental accomplishments clearly demonstrate strong analytical, leadership, communication, and interpersonal skills and qualifications.

42. The Applicant points to the Bank's omission of any reference to her receipt of a PhD in the panel minutes even though Mr. Z knew she was the holder of a PhD, was a co-alumnus, and had been a Professor of the Applicant in her Doctorate Program and failed to disclose this matter to other members of the Selection Panel. Additionally, her possession of two (2) post-graduate degrees was both germane to the duties and value for the position.

43. The Applicant also notes the complete ignoring of her 12-year length of service contrasted to that of the Appointee, who, she notes, has only a Bachelor's Degree in Mechanical Engineering and does not hold a PhD. The Applicant asserts that the Appointee lacked the requisite international experience. She was cited in her PERs for having strong team leadership, negotiation and interpersonal skills, very strong analytical skills, as well as a high level of communication skills in English. The Applicant asserts she clearly had the greater suitability to undertake the specific responsibilities mentioned in the advertisement

44. The Applicant challenges the Bank's adherence to its results-oriented approach in promotion as well as the accuracy and honesty of the proceedings in suppressing mention of Applicant's PhD, and concludes that her salary decision for 2006 was inconsistent with the Bank's salary policies and was issued with grave abuse of discretion.

Respondent's Position

45. The Bank asserts that it selected the stronger candidate on the merits in conformity with the selection criteria for and responsibilities of the position. It noted that the Appointee possesses a Master's Degree in Management Sciences from University of Manchester, and a Post-graduate Diploma in Corporate Finance from the London Business School, is a Chartered Management Accountant, and a fellow of the Chartered Institute of Management Accountants in the United Kingdom, has had 14 years of professional experience including six (6) years in increasingly more responsible management positions of Project Controller, Financial/Contracts Controller, and Project Financing Management for Schlumberger, and has extensive worldwide experience in advising clients on project finance and project development. The Applicant, it continues, has had 10 years of experience doing disbursement work, with acceptable academic credentials, but has had no proper accounting expertise. The Bank acknowledges the clerical omission of reference to her PhD on the Profile Form, but notes that the selection panel was aware of it and that it is not related to Accounting.

46. The Bank cited the testimony of Mr. Z and the Assistant Controller that they had not been satisfied with her handling of the process while working on special projects, were

dissatisfied with delays, her inability to finalize the project and the need for them to review and substantially revise her memoranda. In contrast, they noted, the Appointee had performed very strongly in his first year and nine months in the position, had demonstrated his capabilities in higher level more analytical work, substantive review of private sector projects from a risk management perspective, that he had been selected as leader on a number of initiatives because of his strong communication skills, and his high quality substantive comments on documents submitted, and was viewed as a well-spoken, intelligent and earnest staff member. The Bank noted it had opportunity to view the work of both and determined that he was more suitable for undertaking the responsibilities of the position, and that the Applicant's longer experience in the position did not overcome the Appointee's demonstrated ability to produce the outputs required of the position. It noted in particular his superior communication skills and the fact that her team leadership, negotiation and interpersonal and analytical skills were not as strong as the Appointee's.

Findings of the Tribunal

47. The Applicant has failed to prove her claims of bias and prejudice on the part of Mr. Z in allegedly pushing through his pre-selected candidate in a very short meeting without mentioning her PhD and 12 years of seniority. The evidence shows that the Bank adhered to the requisite proper procedures in processing the applications for the disputed opening. The Selection Panel consisted not only of those whom the Applicant believes were biased, but also an independent staff person selected by the President and one selected by the Staff Association.

This underscores the transparency and equitable composition of the Panel in making their unanimous recommendation to deny the position to the Applicant.

48. There is no evidence that the members of the Selection Panel violated their obligation to provide a fair and independent assessment of the candidates. They all had the internal applications (which included the Applicant's *curriculum vitae* noting her PhD), and relevant documentation well in advance of the session. This Tribunal is persuaded that despite the asserted brevity of the session, the selection process met the requirements of A.O. 2.03 in being competitive, based on specific criteria, and that the relative merits of the candidates were considered by the Selection Panel. The minutes noted the Applicant's 12 years of service. Any error in omitting reference to her PhD in Commerce from her K20 Staff Profile we find may well have been inadvertent. Mr. Z was clearly aware of it and it was included in her application materials. Furthermore, a doctoral degree was not a requirement of the position which required only "a postgraduate degree in finance, accounting or other related fields with a good knowledge of computerized accounting and financial information system and preferably with professional qualification such as Certified Public Accountant (CPA)/Certified Financial Analyst (CFA) or its equivalent." Additionally, it is clear that seniority, while a relevant qualification does not by itself necessarily create any entitlement to promotion.

49. As noted, selection for promotion is a right and discretion of the Bank, but that discretion is not without limitation. However, careful review of the relative standing of the Applicant and the Appointee fails to support her claim that because of bias, prejudice, or improper motivation she was improperly denied the opening. Even if she had made a *prima facie*

case of gender discrimination, the evidence shows that the Appointee had at least equal qualifications. The evidence shows that while she had performed adequately, she lacked the requisite capabilities in higher level more analytical work that the Appointee possessed from his prior private sector work and which he demonstrated in the missions to which he had been appointed during his relatively brief time at the Bank. His very strong communication skills and suitability for undertaking the various responsibilities of the new position do not support the views of the Applicant that his choice was based on improper motivation rather than on merit and qualifications. The record is not bereft of basis for the conclusion reached by the Selection Panel that the Appointee was the more qualified candidate.

50. Here, as in *Alexander*, Decision No. 40, [1998], IV ADBAT Reports 41, para. 88, “although the Tribunal has been unable to find evidence of prejudice against the Applicant that would have amounted to a failure of due process, the Tribunal notes nevertheless that the manager's attitude did contribute to the strained relationship she had with him.” See also *Malekpour v. IBRD*, WBAT Decision No. 322 (2004). Accordingly, the Tribunal decides to award a sum of US\$5,000 to the Applicant.

Minority View

51. One member of the Tribunal does not agree with the majority view although he concurs in the conclusions drawn by the majority. His opinion is as follows:

52. “It is clear from Article II of the Tribunal's Statute that unless it is alleged in the Application that the contract of employment of a staff member (the Applicant) or a term of his or her appointment has not been observed (or has been violated) by the Bank, the Tribunal has no jurisdiction to adjudicate upon such an application.

53. In service matters, generally, the contract of appointment or the terms of appointment of an employee do not include a right to be promoted or appointed to the next higher grade. It is always the right of the employer to select any of the candidates for appointment to a particular grade or to select an employee for promotion to a higher grade. It is never the right of the candidate, whether employee or not. I have seen the Applicant's letter of appointment which does not mention any such right. However, if the contract or the terms of employment include such a condition or binds the employer to a certain procedure of promotion, this Tribunal certainly has the jurisdiction to examine whether the prescribed procedure has been followed by the employer. If there is a fault in the procedure, it can surely be rectified by us. But that does not mean that the aggrieved employee would necessarily be promoted. It only means that the entire procedure will have to be re-run which may or may not result in the promotion of the aggrieved employee. There is sufficient case-law to support this view. The procedure in this case has been meticulously followed. The philosophy behind this principle is that if the employer fails to choose the most suitable candidate, it is the loss of the employer and not that of the employee or the candidate.

54. Now, in the present case the Applicant's grievance is that the Appointee has been selected for promotion to the next higher grade or level in preference to her, while in her own

judgment she was the best candidate. It is obvious that the Tribunal cannot substitute its own judgment for that of the Bank. But a procedural flaw can be removed if one existed and if it violated the contract of the Applicant's appointment or any of the terms of her appointment. The rectification again would be for the benefit of the Bank and also simultaneously to honor the Applicant's contract in case there is a violation of that contract. But strangely enough, the Applicant has failed to bring to the notice of the Tribunal any term of her appointment bearing upon promotion, much less its violation. If the Application was wanting in this regard, it was open to the Applicant to point out an A.O. or a regulation relating to promotion to or selection for the next higher grade which might have been disregarded. But her Application and Reply are wanting in this behalf. It is therefore not possible to grant any relief to the Applicant.

55. I am conscious of the A.O.s 2.02 and 2.03 which speak of selection purely on merit uninfluenced by the extraneous consideration like gender, etc. Such orders or policies of the Bank are of two kinds – those conferring rights on the employees and those conferring rights on the Bank (the employer). The first kind includes the staff retirement plan, medical benefits, and pensionary benefits, etc., while the second is like A.O. 2.03. This order ensures that only the most suitable candidate is selected for the vacancy. It is obviously for the benefit of the Bank. If the selection panel, acting on behalf of the Bank, failed to select the most suitable candidate, i.e. the Applicant as asserted by herself, the Bank should be aggrieved not the Applicant. But the Bank is defending the panel.

56. It is however true that the Bank did not, in so many words, raise objection to the jurisdiction of the Tribunal or question the Applicant's right to be promoted. They seem to

contest the relative merits of the Applicant and the Appointee. But jurisdiction is a matter which should be decided by the Tribunal independently of the pleadings of the parties. For, the parties cannot, by agreement *inter se*, confer jurisdiction on a forum in which it does not exist.

57. The allegations of gender discrimination or personal bias do not stand proved by the evidence produced by the Applicant. If no woman has been promoted in CTLA in the last so many years or if the Applicant's boss has a poor opinion of her, it neither proves discrimination nor bias. For all that we know, it may all be justified. Further, the Applicant has no right to say that the Appointee should not have been selected. She has, under Article II of the Statute, to confine herself only to her own contract and terms of her employment.

58. In short, there is no force in the Application which is hereby dismissed *in toto*. I, however, endorse the Appeal Committee's observations regarding the exchange of emails in the department of CTLA.”

DECISION

For these reasons, the Tribunal unanimously decides to:

1. dismiss the Applicant's claims; and
2. orders the Bank to pay the sum of US\$5,000 to the Applicant.