

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 88
(23 January 2009)**

**Ali Mohammed Azimi
v.
Asian Development Bank**

**Florentino P. Feliciano- President
Khaja Samdani
Yuji Iwasawa**

1. The Applicant seeks the setting aside of his overall 2006 Annual Performance and Development Plan (PDP) rating of “Unsatisfactory” and adoption instead of “his true and actual performance rating.”

I. THE FACTS

Background

2. The Applicant joined the Asian Development Bank (“ADB” or the “Bank”) on 28 June 1989 as Environmental Specialist, Level 4. He was promoted to Senior Environmental Specialist, Level 5, on 11 July 1994. At his request, he was subsequently granted by the Bank special leave without pay to enable him to take on an assignment with the Global Environment Facility (GEF) of the World Bank from 1 May 1995 to 1 October 1997. Upon his return to the ADB in 1997, the Applicant was given the position of Senior Environment Specialist, Programs

West Department. Soon thereafter, he was transferred to the Office of the Director, Operations and Policy Coordination Unit, Programs Department (West).

3. The Applicant, a U.S. national of Afghanistan origin, helped establish the Bank's new Special Liaison Office in Afghanistan and served as its Officer-in-Charge from October to December 2002. Subsequently, as part of an internal reorganization, the Applicant was transferred to the Social Sectors Division, South Asia Regional Department (SARD). In early 2003, the Applicant applied for the position of Principal Programs Officer, Level 6, in the Bank's Resident Mission in Afghanistan (AFRM). However, the Applicant was unsuccessful in this effort.

4. Sometime in the first half of 2003, the Applicant and the Minister of Social Affairs of the Government of Afghanistan, proposed that the Applicant be seconded, on a special leave with pay basis, to the Afghanistan Ministry of Foreign Affairs as a senior advisor to the Ministry's department in charge of reconstruction. In November 2003, the Bank approved the Applicant's "extended leave" in the Ministry of Foreign Affairs for one year, i.e., from 1 December 2003 to 30 November 2004. Under this approval, the Applicant was to continue to handle the Bank's environmental program in the AFRM and to report directly to the Country Director (CD), AFRM and the Director General (DG), SARD.

5. SARD requested extension of the Applicant's "extended leave" for another year from February 2005 to February 2006. Although the Human Resources Division (BPHR), Budget, Personnel, and Management Systems Department (BPMSD) of the Bank expressed reservations in the form of concerns about security and costs, DG, SARD requested approval of this extension,

stating that the Applicant's presence in Afghanistan was important for ADB operations. The second extension of the Applicant's stay in Afghanistan (February 2005 to February 2006) was consequently approved.

6. On 31 October 2005, the Applicant sent an e-mail note to DG, SARD requesting a third extension of his assignment in Afghanistan, that is, until the end of 2006. Applicant also asked to be considered for inclusion in the Bank's Early Separation Program (ESP). The DG, SARD forwarded the Applicant's request to the CD, AFRM seeking the latter's view. The CD, AFRM indicated a reluctance to approve the third extension, as the Applicant had not been properly reporting to him. Eventually, however, the CD, AFRM agreed to grant the Applicant's request provided that he would cease to serve as an advisor to the Government of Afghanistan and submit monthly written reports on the progress of Applicant's three (3) technical assistance (TA) projects to the CD, AFRM and provided also that CD, AFRM and the Applicant would meet frequently to discuss the latter's work.

2005 Overall Performance Rating – “Partly Satisfactory”

7. On 14 February 2006, the new CD, AFRM assessed the Applicant's 2005 performance as “Partly Competent” in 2 out of 4 Results Assessment (key work plan outputs), and 3 out of 5 competencies forming part of the Applicant's Behavioral Assessment. The CD, AFRM wrote in the Applicant's 2005 PDP that the Applicant:

Was seconded to act as an Advisor to the Ministry of Foreign Affairs at least 50% of the time. He has provided little feedback on his achievements or outputs in this area. In addition, for the ADB-related environmental TAs, while [the Applicant] has documented some of the outcomes of these TAs, no BTORs, or other reports are on file from [the Applicant], as is required in ADB. It was therefore difficult for the supervisors to assess his activities and outputs/results in this area. Improvement in working together, knowledge sharing, and communication of results achieved is therefore required.

8. In commenting upon his 2005 performance rating, the Applicant *inter alia* protested that the "... monitoring of staff activities and performance by giving timely, direct and constructive feedback on how to improve performance" is the job of the supervisor rather than of the staff member under supervision. "Unfortunately," the Applicant added, "[he] was not provided any feedback or informed of the expectations regarding [his] performance" The Applicant contested CD, AFRM's assessment and stated that, in his own belief, "[he] deserves [the] exceptional rating in the administration of TAs ..." since "[u]nder the TA, we installed the first water quality lab in the country that is contributing to safeguarding people's health by enabling the government to test polluted waters. Solar powered water purification systems were installed in 3 clinics"

9. The Applicant's overall rating from his department head, DG, SARD, for 2005, was "Partly satisfactory performance", the relevant range being "Exceptional, Fully Satisfactory, Partly Satisfactory and Unsatisfactory". DG, SARD added in his assessment of the Applicant's 2005 performance that:

... [I]n arriving at overall rating, his contributions and results achieved were assessed as partly satisfactory, taking into account the overall performance of the staff members within SARD, including those of Level 5 staff. It was also regretted that his contributions towards assistance to the Ministry of Foreign Affairs was not evident in the absence of any reporting arrangement. Thus [the Applicant's] performance during the review period was considered generally satisfactory but short of "Fully Satisfactory" under the current PDP rating. The Country Director, AFRM will [be] closely monitoring and supervising (*sic*) of [the Applicant's] work in 2006.

2006 Performance

10. Due to the Applicant's "Partly Satisfactory" performance rating for 2005, CD, AFRM met with him to lay out his work plan for 2006. The Applicant agreed that he would submit monthly written progress reports on the implementation of the TAs under his responsibility and that Applicant and CD would meet monthly to discuss those reports. The Applicant was also directed, despite his protestation, to report to the Head of AFRM's Social Sectors and Natural Resources Management Section (SSNRM) on issues concerning TA implementation and technical matters, including submission of draft Back-to-Office Reports (BTORs) and SSNRM's review.

11. According to CD, AFRM, he met with the Applicant to discuss the latter's BTORs and TA progress as their schedules permitted. At these meetings, the Applicant consistently reported that his TAs were progressing well, but failed to provide the monthly progress reports despite repeated requests for them. CD, AFRM also stated that the Applicant failed consistently to submit Mission Authorization Requests and BTORs on TA missions, as required by ADB procedures. According to the CD, the Applicant "actively avoided reporting to [him]" and showed "general disdain for following procedures." The CD also stated that for the first half of 2006, he

had no information that would lead him to believe that there were problems with the implementation of the TAs or to question the Applicant's reports.

12. The CD, AFRM first became aware of performance issues relating to the Applicant's implementation of his TAs in November 2006 when some TA consultants of the ADB, David Elliot and Anne McKlean, raised issues about his management of TAs. The issues included "issues of incompetence in professional terms" including: 1) lack of knowledge of the technical field; 2) ignorance of or disregard for Bank procedures in social and environmental safeguards; 3) failure to commit project funds to the project components planned in the TA; 4) aversion to stakeholder consultation; and 5) deviousness about intellectual ownership.

13. In December 2006, a governmental stakeholder (the Afghan Tourism Organization) provided some feedback to the Bank on the Applicant's management of his TAs and failure to consult with the stakeholders.

CD, AFRM's Note-to-File of 19 December 2006

14. The CD, AFRM followed up the matter of the Applicant's relations with other stakeholders in his TAs. The CD summarized the comments provided to him by such stakeholders in a 19 December 2006 Note-to-File in the following manner:

- a) The Programme Manager of the United Nations Environment Programme (UNEP) complained that the Applicant had claimed UNEP material as ADB's work

and that ADB's reputation in the country had suffered due to Applicant's poor relations with stakeholders and delayed TA outputs;

b) The Country Representative of the Food and Agriculture Organization of the United Nations (FAO) indicated that Applicant had used FAO information on protected areas without acknowledgement;

c) The Deputy Minister of Agriculture of the Afghan Government had seen no results of the Applicant's Natural Resources Management and Poverty Reduction TA;

d) The Deputy Director General of the National Environmental Protection Agency (NEPA) of Afghanistan stated that Applicant had failed to follow through on his promise to provide assistance on a matter and that Head, SSNRM at AFRM had instead ultimately done the work; and

e) The NEPA Director General expressed strong dissatisfaction with Applicant's performance stating that the latter circumvented government procedures, did not coordinate with key stakeholders and had unsustainable projects.

15. CD, AFRM also verified the implementation status of the Applicant's TAs and found his management of the TAs unsatisfactory. By the end of 2006, all four (4) of the Applicant's TAs that were supposed to have been completed or nearly completed, had not been

completed. Many programmed results were not achieved. Only a small portion of the TAs budgets had been actually committed or disbursed.

2006 Overall Performance Rating – “Unsatisfactory”

16. CD, AFRM gave the Applicant a performance assessment rating of “Unsatisfactory” in two (2) out of three (3) Results Assessment – TA Processing and Portfolio Management; and gave the Applicant an assessment rating of “Unsatisfactory” in four (4) out of five (5) competencies – “Application of Technical Knowledge and Skills”, “Client Orientation”, “Achieving Results”, and “Working Together”. The specific findings of the CD, AFRM, in providing these statements on the TAs managed by the Applicant, included the following:

- a) completion dates were extended because of “insufficient management attention to TA timelines, and delayed consultant recruitment”;
- b) programmed outputs were not achieved;
- c) failure to coordinate closely with key sector stakeholders in the Afghanistan Government and development partners, and in many cases alienation of such stakeholders to the detriment of ADB’s reputation in Afghanistan;
- d) steering committees for the TAs were not established; and
- e) failure of the Applicant to prepare regular TA progress reports during the year as requested.

Applicant Resigns – 6 February 2007

17. On 6 February 2007, DG, CWRD sent a memo to Applicant informing him that there would be no position for him upon his return to ADB Headquarters and that, until one could be found, Applicant was to report directly to him. Applicant resigned that very day and went on “terminal leave” apparently ending on 22 May 2007.

18. The review of Applicant’s 2006 performance took place on 13 February 2007 between the Applicant and the CD, AFRM. At this review session, Applicant stated that the allegations against him made by the stakeholders were all false. The performance review meeting was to continue on the following day, 14 February 2007, but the Applicant did not appear for this meeting. CD, AFRM had stated that he would be available the following day for the continuation meeting; the Applicant had responded that he was preparing to leave Kabul.

19. On 16 February 2007, Applicant informed DG, CWRD, BPHR, the Staff Council and CD, AFRM of his dissatisfaction with the evaluation of his 2006 performance. Applicant stated that his Director (CD, AFRM) “lack[ed] basic management skills and ethical standards and [was] in no position to evaluate [Applicant’s] work.” Applicant left Kabul without completing and signing his 2006 PDP review. For his part CD, AFRM signed the Applicant’s PDP 2006 form after Applicant had left Kabul and sent the same to ADB headquarters. The Applicant became aware indirectly of his “Unsatisfactory” performance rating on 28 March 2007. After several requests by the Applicant, he was provided a copy of his 2006 PDP report on 11 June 2007.

Compulsory Conciliation, Administrative Review and Recourse to Appeals Committee

20. On 20 May 2007, the Applicant requested compulsory conciliation in respect of his “Unsatisfactory” rating. The Bank acceded to his request. The process ended on 8 June 2007 without settlement.

21. The Applicant then requested, on 25 June 2007, administrative review of his 2006 “Unsatisfactory” rating. On 10 July 2007, the DG, BPMSD found no merit in his request and denied relief.

22. The Applicant appealed, on 2 August 2007, the decision of the DG, BPMSD to the Appeals Committee. The basic claim of the Applicant was that the 2006 “Unsatisfactory” performance rating constituted an abuse of discretion on the part of the Bank and was arrived at through a process that entailed violation of the administrative procedures of the Bank.

23. On 10 December 2007, the Appeals Committee submitted its report to the President of the Bank, recommending rejection of all the Applicant’s claims for lack of merit, and denial of the relief sought. The Appeals Committee noted that the CD, AFRM had not strictly adhered to the detailed PDP Implementing Guidelines. At the same time, however, it also noted that the Applicant had failed to report to and maintain a dialogue with his supervisor in respect of difficulties confronting his TAs.

24. On 17 December 2007, the ADB President accepted the recommendation of the Appeals Committee and denied all of the Applicant's claims as without merit.

Application to the Tribunal

25. On 10 March 2008, the Applicant filed this Application with the Administrative Tribunal contesting the Decision of the Bank to rate his 2006 performance with an overall "Unsatisfactory".

26. The relief the Applicant seeks from the Tribunal consists of the following:

- a) Rescission of the decision giving the Applicant an overall "Unsatisfactory" rating for the 2006 PDP period, and to give him instead "his true and actual performance rating";
- b) Payment of his "due merit increase and associated salary adjustments" applied retroactively for the 2006 period;
- c) One year's salary as "compensation for damages for the [Bank's] erroneous decision and [its] failure to comply with its personnel rules";
- d) One year's salary for damages for "injury to the Applicant's professional reputation"; and

- e) Reimbursement of legal fees and costs incurred.

II. FINDINGS

27. Essentially, the Applicant claims before the Tribunal that his overall “Unsatisfactory” 2006 rating constitutes an “abuse of due process” and was “unreasonably and improperly motivated.” He alleges, further, that the conclusions drawn in his PDP were “not grounded on a fair and truthful assessment” of his 2006 performance. The Applicant states still further that the actions taken by the CD, AFRM caused “great harm to [his] credibility and reputation both within the ADB and in the donor community.”

28. For its part, the Bank responds that the “Unsatisfactory” 2006 overall rating of the Applicant’s performance, was fully justified, being based on “facts accurately gathered and fairly weighed [the Bank having followed] a fair and reasonable procedure.”

29. The legal standards and norms which pertain to the dispute between the Applicant and the Bank in the present case, are well known, having been repeatedly invoked and applied in previous cases. In the very first Decision rendered by the Tribunal *Lindsey*, Decision No. 1 [1992], I ADBAT Reports 5, the Tribunal ruled:

12. ... The Tribunal cannot say that the substance of a policy decision is sound or unsound. It can only say that the decision has or has not been reached by the proper processes, or that the decision either is or is not arbitrary, discriminatory or improperly motivated, or that it is one that could or could not reasonably have been taken on the basis of facts accurately gathered and properly weighed

....

7. The application of such due process must involve a fair and balanced scrutiny of the staff member's qualifications, as well as of his performance during the period he has already served. ... (See, for example, the decisions of the World Bank Administrative Tribunal in *Saberi*, WBAT Reports 1981, Decision No., 5, para. 23; *Buranavanichkit*, WBAT Reports 1982, Decision No. 7, para. 28; and *Thompson*, WBAT Reports 1986, Decision No. 30, para. 28)."

....

9. ... [W]hen evidence is gathered it should be related to the whole of the period and range of activity under consideration and that hearsay and indirect evidence should be carefully weighed for reliability and cogency.

....

10. Any enquiry into the performance or conduct of a staff member must be carried out in accordance with the requirements of due process of law, in such a way that the establishment of the truth or falsehood of allegations is not itself a subject of discretion but is the consequence of an objectively verifiable and rationally explicable examination of the facts. Where the continuance or not of a staff member's livelihood is involved, it is not sufficient to rely on unexplained or unsubstantiated beliefs or vague recollections.

....

38. ... [I]f the risk of arbitrariness is to be avoided, performance evaluation should be recorded in written form after an exchange of views between those concerned and concluding in a clearly defined statement of the performance objective to be attained by the employee and communicated to him. 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." (Emphases added)

30. The twin requirements of proper evaluation of staff members' performance: a) no arbitrariness; and b) objective evaluation of performance through recourse to fair and reasonable

procedure, have been repeatedly elaborated and applied. Thus, in *Dalla (Nos. 1 and 2)*, Decision No. 73 [2005], VII ADBAT Reports 63:

59. As noted in *Haider*, Decision No. 43 [1999], V ADBAT Reports 6, para. 18: In previous decisions, this Tribunal has consistently ruled that the evaluation of the performance of employees is a matter of managerial discretion, and that the Tribunal may not substitute its discretion for that of the management (*Lindsey*, Decision No.1 [1992], I ADBAT Reports 5 para. 12). The Tribunal may intervene only when there is an abuse of discretion or if the decision is arbitrary, discriminatory or improperly motivated, or if it is one that could not reasonably have been taken on the basis of facts accurately gathered and fairly weighed.

... The onus is on the Applicant to establish through the presentation of evidence that the imposition of the six-month evaluation constituted an abuse of discretion. (see *Alexander*, Decision No. 40 [1998], IV ADBAT Reports 52, para. 38). It was the responsibility of the Applicant and not of this Tribunal to garner such testimonials or corroborative documentation in timely fashion to prove his case. The record shows numerous allegations, but we find no credible evidence to support those allegations. Accordingly we must deny the claims of procedural irregularity in the imposition of the six-month evaluation.

....

68. ... We find appropriate to our reasoning in this case the decision of the ADBAT in *Behuria*, ADBAT Decision No. 11 (No. 2) [1996], paras. 3 and 11:

3. Decisions with respect to the evaluation of staff members' performance are within the discretion of the Bank. Such discretion however, is not unlimited and the Tribunal must ensure that the exercise by the Bank of its discretion is not arbitrary, discriminatory, unreasonable, improperly motivated or adopted without due process.

11. It is true, as the Applicant says that prejudice is usually concealed and its existence has to be established by inference. Yet, in the view of the Tribunal, the allegations of the Applicant are not sufficient to establish bias or lack of responsibility on the part of his Manager or the Director with respect to the three items of the PER. The applicant, has, basically, asserted his disagreement with several of the Respondent's assessments of his performance, but this can not

take the place of proof of discrimination or bias, which the Tribunal finds to be absent from the record. [Emphases added]

31. In the application of these standards and norms, determination of whether or not arbitrariness or abuse of discretion has been shown and determination of whether due process in the course of evaluation of performance was observed, are performance closely related. Arbitrariness is frequently manifested by lack of regard for observance of proper procedure in the investigation of alleged nonfeasance or malfeasance. At the same time, the substantial fairness, or unfairness, of the managerial decisions and acts complained of is commonly of telling effect in evaluation of allegations of lack of due process. The rule that the Applicant must carry the burden of showing *prima facie* that the managerial act or decision being challenged was vitiated by arbitrariness or disregard of due process, is the common rule that is recognized in all judicial or quasi-judicial dispute settlement.

32. The Applicant claims that the facts set out by the CD, AFRM in Applicant's documents forming the basis for the CD's assessment and in turn the overall assessment of the DG, Central and West Asia Department (CWRD), are erroneous or false. Applicant also claims that the "Unsatisfactory" rating was given in disregard of procedures outlined in the PDP Implementing Guidelines and hence non-complying with the requirements of Administrative Order (A.O.) 2.03. The Applicant contends that the Respondent disregarded the PDP Implementing Guidelines when it:

- (i) held “surreptitious meetings with donors and government officials ... regarding Applicant’s performance and failed to check the validity or the veracity of the allegations or discuss such matters with Applicant”;
- (ii) failed to allow him to review and countersign the Note-to-File dated 19 December 2006 prepared by CD, AFRM;
- (iii) failed to refer major performance issues to BPHR “without delay”, and to discuss this report with him and provide him the opportunity to submit comments;
- (iv) failed to hold formal or informal discussions with him to provide ongoing, constructive feedback on his performance throughout the year;
- (v) failed to raise performance issues with him at his Interim Review; and
- (vi) failed to provide him a copy of his final PDP form before 11 June 2007.

33. Finally, the Applicant asserts that he suffered damage to his professional reputation by reason of the Note-to-File sent by the CD, AFRM to other officers of the Bank in connection with discussions with Afghan Government representatives. He claims also that the Bank had unlawfully interfered in his employment opportunities after his resignation from the Bank, resulting in failure to obtain a position as an environmental specialist in a United States Agency for International Development (USAID) project in Afghanistan.

34. Counter-arguments made by the Bank in submitting that Applicant's 2006 performance was clearly and truly "Unsatisfactory" include the following:

- a) The Applicant consistently failed, despite repeated requests from his supervisor, the CD, AFRM, to report to the latter on the progress, or lack thereof, in managing the Applicant's portfolio of TAs;
- b) The Applicant consistently failed to follow project administrative instructions and ADB procedures;
- c) The Applicant mismanaged the TAs placed by the ADB under his responsibility, with the result that the TAs' implementation was frequently delayed; and
- d) Many program outputs were not accomplished and activities not recorded.

35. The Bank stresses, firstly, that the CD, AFRM gathered feedback on Applicant's 2006 performance from credible available sources (e.g. the Afghan Government stakeholders in the TA projects) with close familiarity with the details of implementation of Applicant's projects. This feedback, made necessary by failure of the Applicant to report on the progress or lack thereof his portfolio of projects, was reported in the CD's Note-to-File dated 19 December 2006. The Bank also submitted reports from the ADB consultants involved in the administration of Applicant's projects.

36. Secondly, the Bank stressed it had external consultants to conduct an audit of the Applicant's TA projects. The external audit confirmed the overall assessment of Applicant's performance by the CD, AFRM. The audit report cites Applicant's failure to follow ADB's established rules and procedures governing approval of contract and project variation, poor maintenance of key project documents, including procurement records and consultant's contracts; and poor compliance with project administration instructions. The overall result was that objectives of the Applicant's projects were simply not realized.

37. The Bank further stressed that the Applicant had not submitted any evidence to support his allegation that the CD, AFRM had "colluded" with a former ADB consultant whose consultancy had been terminated for incompetence and misconduct and the London newspaper Financial Times. The Financial Times article cited by the Applicant which was in part critical of the ADB, did not come out until five months after the Applicant had been given the "Unsatisfactory" rating. Moreover, the Bank noted that it had no motivation at all to "collude" with the Financial Times since the article reflected poorly on the Bank and identified some ADB officers involved, including the CD, AFRM. Basically, the Bank argued that the Applicant had not offered any reason that would reasonably explain why his supervisors would have been improperly motivated to give him an undeserved "Unsatisfactory" rating. The Bank emphasized that it had not tried to make a scapegoat out of the Applicant and indeed had not terminated Applicant's employment with the Bank. The Applicant forthwith resigned when the CD, AFRM informed him upon his return from his extended engagement in Afghanistan, that there appeared to be no ADB job waiting for him.

38. The Tribunal notes that the observance by the Bank of all of the elements of the implementing guidelines in respect of the performance evaluation found in A.O. 2.03, relating to providing the Applicant with feedback concerning his performance, may have been less than perfect. The Tribunal must, however, also note that the Applicant materially contributed to the difficulties encountered by the Bank in ascertaining the level of quality of his performance and in giving the Applicant “feedback” on such performance, by refusing to report to his supervising officer – the CD, AFRM, and to meet with the latter for the second day of his 2006 performance review and generally to comply with ADB requirements and processes.

39. In respect of Applicant’s claim of “unlawful interference [by the Bank] in [his] employment opportunities after his resignation from the Bank”, relating to an employment position apparently available in a USAID project in Afghanistan, the Bank noted that it was the Afghanistan Government and non-government organizations (NGO) stakeholders who had informed the USAID about the Applicant’s professional abilities and shortcomings. The Tribunal considers that there was failure on the part of the Applicant to submit evidence of any kind to sustain this last contention of his. The record is bereft of any relevant document or any material other than private email correspondence by a personal friend to the effect that the Applicant had been selected by USAID to serve as Chief of Party (“COP”) for a project related to the Applicant’s areas of expertise; and a second private e-mail from the same personal friend advising Applicant that the USAID had withdrawn its approval of Applicant’s candidacy as “COP” for the USAID project. Thus, the record is bare of anything to suggest any connection between the Bank and the USAID mission in Afghanistan.

40. From its examination of the record of this case, the Tribunal considers that the Applicant has not discharged his burden of showing *prima facie* that the “Unsatisfactory” 2006 performance of the Applicant was the result of arbitrariness, abuse of discretion, or improper motivation on the part of the Bank or that there was material disregard or failure to comply with the requirements of A.O. 2.03, and the Implementing Guidelines relating to performance evaluation.

DECISION

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