

# ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 89  
(23 January 2009)**

**M. Zeki Kiy  
v.  
Asian Development Bank**

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

1. The Applicant seeks a revision of his Annual Performance and Development Plan (PDP) Review for 2006 to reflect a “Fully Satisfactory” rating claiming certain remedies for the improper determination of the Asian Development Bank (“ADB” or the “Bank”).

## **I. THE FACTS**

2. The Applicant has been working for ADB since 1994 and, since 1997, in the Office of Cofinancing Operations (OCO) where he was promoted in 2000 from Level 4 to Level 5 Senior Financing Partnerships Specialist.

### **The Evolution of the Performance Evaluation System in ADB**

3. Since 1994, ADB has applied several performance evaluation systems in an effort to identify the varying levels of employee performance, recognizing the outstanding performers

while providing guidance and encouragement to others seeking to improve their performance and enhance their incomes. Commonly used in such evaluation systems is the recognition of the bell-shaped curve in which those at the extremes will perform very well and very poorly, with the majority of employees in the middle.

4. From 1994 to 1997, the Performance Evaluation Review (PER) was a system with five (5) ratings. As stated in the Memorandum of Director, Budget Personnel, and Management Systems Department (BPMSD) of 6 October 1997, “There has been widespread dissatisfaction with the current PER system, and specifically with the overall rating system and its indicative allocations.” Therefore, ADB decided to revise this system and introduced a new system for the 1997 staff performance review.

5. The new system was called Staff Performance Management System (SPMS). It had three (3) rating categories: Performance fully meets or exceeds the requirements of the position (“ME”); Performance generally meets the requirements of the position, but improvements are warranted in some areas (“MI”); and Performance is unsatisfactory (“U”).

6. There was no required distribution of the ratings. The evidence shows that SPMS supervisors seldom used the second or third ratings with more than 97% of staff receiving the highest rating (“ME”).

7. There was apparent feeling that supervisors hesitated to make negative comments for fear they would interfere with morale or working relationships. This system thus gave rise to the feeling that assessment and promotion processes were not effectively merit-based.

8. A new performance management system was approved by the Board of Directors in October 2004. Its principal goal was to “establish a merit-based, transparent and effective HR management system in support of ADB’s vision ....”

9. The new system which has been implemented since 2005, involves a Performance and Development Plan (PDP) and its Implementing Guidelines. The PDP provides a number of steps: work planning at the beginning of the year with specific work outputs and measures to indicate whether those outputs had been achieved, an “Interim Review” with the Guidelines encouraging supervisors to hold regular informal discussions with staff, and a year-end evaluation which includes:

- a) A results assessment and a behavioral assessment given by the immediate supervisors of the staff. The behavioral performance is assessed in five (5) “ADB Wide Competencies” which include the “Learning and Knowledge Sharing”.
- b) A “Performance Appraisal Rating” or “overall rating” assigned by the Head of Department (HOD) after consultation with the immediate supervisors.

The rating is based on the assessment of the staff's performance relative to that of the other staff in the department and not on a year-to-year comparison.

10. In 2005, the ratings results for both behavioral and overall assessments, were to be designated "Exceptional Performance", "Fully Satisfactory Performance", "Partly Satisfactory Performance", or "Unsatisfactory Performance".

11. The rating "Partly Satisfactory Performance" was criticized by the staff who felt it was demeaning.

12. Thus, in 2006, the previous evaluative terms were changed into Exceptional ("E"), Fully Satisfactory ("FS"), Generally Satisfactory ("GS"), and Unsatisfactory ("U"). In its Memorandum of 20 April 2006, the BPMSD defined the ratings as:

....

Fully satisfactory performance – performance in all respect meets the expectations of the work unit

Generally satisfactory performance – performance generally meets requirements but needs improvement in specific areas

....

13. In its Memorandum of 29 November 2006, the BPMSD changed the description of "GS" to "performance meets expectations but improvement is required or desired in specific areas". This new description "improvement required ... desired ..." was viewed as less pejorative than the first one: "needs improvement ...".

14. In an e-mail sent on 1 December 2006 to a Staff Council representative, Director, Human Resources Division (BPHR) commented:

A Generally Satisfactory (GS) overall rating means your performance does not require additional formal performance monitoring procedures .... Staff assessed as GS may apply for vacancies and be selected for promotion. Clearly with a GS overall rating you are not being considered for termination for poor performance. However, your salary increase will be less than that for staff members rated Exceptional or Fully Satisfactory.

15. As a result of meetings with the managers and the negative feedback of the staff summarized in a Memorandum of the Staff Council Chairperson to Director General (DG), BPSMD dated 6 March 2007, the Bank revised the PDP system for 2007 by abandoning the “GS” category, reverting to three (3) ratings: Exceptional Performance, Satisfactory Performance and Unsatisfactory Performance. Moreover, around 30% of the top performers of the “Satisfactory” group were allowed to be nominated for a Special Recommendation. Finally, the 2007 PDP revised the description for the behavioral assessment in the five “ADB Wide Competencies”. Supervisors would now assess staff as to whether the competency was “always demonstrated”, “very often demonstrated”, “often demonstrated”, “occasionally demonstrated,” or “rarely demonstrated”. As a result of the above changes, complaints about the performance management system, by both managers and staff, decreased.

### **The Alleged “Imposition” of Quotas**

16. In a speech delivered on 20 September 2005, the ADB President, commenting on the new performance system, declared:

There must be some sort of bell shaped curve where both the exceptional performances and poor performers will be identified.

While I am not advocating a quota of any kind, I do not expect to see more than 10 percent of your staff in the first or “exceptional” box.

17. In a Memorandum to HODs on the 2005 Performance Evaluation Exercise dated December 2005, DG, BPMSD wrote:

In evaluating staff performance, departments/offices are required to take meaningful distinctions in assessing their staff, against the four levels of performance criteria .... Also, we would expect a reasonable distribution, as appropriate, of the other overall ratings ....

18. In his e-mail of 19 January 2006, Vice-President (Operations 1) wrote to his DGs with copy to DG, BPMSD:

... Box 3 should be around 15%. But not less than 10%. It seems that none of the three departments will have Box 3 anywhere close to 20% (which is all right). The risk is one (*sic*) the lower side. If the ratio is too low for Box 3, this does not look very serious. More rigorous differentiation of the performance of the staff currently in Box 2 will be able to reduce the ratio of this Box and move some people to Box 3.

19. In 2006, the rating “Partly Satisfactory” was changed to “Generally Satisfactory”. In its Answer, the Bank states that by changing the title and description of the rating, “... the percentage of staff members expected to be described by this rating would be much higher than the 10-15% in 2005, and thus, the third rating would not be perceived as a pejorative, stigmatizing rating.”

20. In his 1 December 2006 e-mail to a Staff Council representative, Director, BPMSD wrote:

Other than the President's statement, that no more than 10% of staff members should be rated Exceptional overall, there are no predetermined quotas for the Fully Satisfactory, Generally Satisfactory or Unsatisfactory Ratings. However, it should be added that the [Vice-Presidents] have discussed and seem to have reached an understanding to ensure some consistency across the Bank.

21. In his e-mail of 3 November 2006 to his Directors, DG, Southeast Asia Department (SERD) wrote:

BPMSD is thinking of a distribution of 10, 50, 30 and 10 percent in the four boxes respectively.

... I need to know that you can meet this expected distribution.

22. A Memorandum from DG, BPMSD to Vice-Presidents and HODs dated 4 December 2006 stated:

... No more than 10 percent should be given this [Exceptional] overall rating. We expect a reasonable distribution of the other overall ratings ....

23. In response to a question of whether there are any quotas for the PDP rating, the "PDP - Frequently Asked Questions" attached to the guidelines on the implementation of the 2006 PDP answered: "There are no predetermined quotas for the ratings, although no more than 10% of staff members should be rated Exceptional overall."

24. In his 20 December 2006 e-mail, DG, Operations Evaluations Department confirmed that “about 40% to 50% of staff would be Generally Satisfactory ....”

25. In its Answer, the Bank writes (para. 26):

The approximate percentage of staff that should be allocated the various ratings proved a difficult question. Some of the Vice Presidents believed that the final description of the Generally Satisfactory rating accurately depicted perhaps 60-70% of staff; others felt that in ADB’s organizational culture it would be very difficult and demoralizing to rate a large portion of the ADB staff as something less than “fully satisfactory”. A target of approximately 40% was arrived at as a compromise between the 60-70% figure and the 10-15% figure expected for the third box the previous year. Again, Respondent was sensitive about declaring a rigid “quota”. At the same time, Respondent was aware that if managers were not essentially required to achieve certain percentage distributions, departments simply would not be able to do it. In addition, Respondent had to provide some firmer parameters in order to ensure consistency across the Vice President areas in the application of the ratings. Thus, the Vice Presidents communicated to their HODs that HODs were restricted to not more than 10% of staff in the Exceptional rating, and were expected to rate at least 40% of their staff in the third, GS, rating.

### **The Performance Ratings of the Applicant**

26. In his PER for 1 January 2004 to 31 December 2004, the Applicant’s overall performance assessment was “performance fully meets or exceeds the requirements of the position”. Nevertheless, in the Section 2.2 of the PER, the Applicant was encouraged to “learn more about the technical aspects of commercial cofinancing, such that his marketing and teamwork initiatives can be even stronger.”



27. In 2005, the Applicant had the rating of “Fully satisfactory performance”. However, in the Section 3 of the “PDP - Learning and Development Plan” the Bank stressed:

Options for Development

Identify together short-term practical options for strengthening or acquiring skills, knowledge and experience that you both believe would help the staff member to develop further in relation to key areas of competencies defined above. The options for development must reflect the business needs of the Department and work plan requirements.

Opportunities to participate in seminars and workshops aimed at developing managerial skills will be explored. In addition, introductory seminars on commercial cofinancing and the application of credit enhancements will also be explored.

28. On 17 January 2007, Principal Director, OCO, supervisor of the Applicant, sent to him the 2006 PDP with the year’s evaluations for the Results Assessment and Behavioral Assessment. For the Results Assessment, the Applicant was given six (6) “GS-FS” and two (2) “FS” ratings. For the Behavioral Assessment, he was given one (1) “GS”, two (2) “GS-FS” and two (2) “FS” ratings. The only “GS” rating was on “Learning and Knowledge Sharing”.

29. On the same day, the Applicant returned the PDP to his Director with the comment: “I do not agree with both the Results Assessment and the Behavioral Assessment ....” As a result, the Applicant was called to a meeting by the Principal Director, OCO in the presence of the Director, OCO. He was told that his year-end evaluations for the Results Assessment would be changed to “FS across-the-board” but nonetheless, that he would receive an overall “GS” rating.

30. On 14 February 2007, the Applicant received his final 2006 PDP. For the Results Assessment, he was rated “FS” in all items. For the Behavioral Assessment, he was rated “FS” in all items except for “Learning and Knowledge Sharing” for which he was rated “GS”.

31. On 15 February 2007, the Applicant signed and returned his 2006 PDP to the Principal Director, OCO with the comments, “I do not agree with the performance appraisal rating which I understand is the direct result of an arbitrarily applied quota for Generally Satisfactory rating by BPMSD. I reserve the right to seek administrative review and beyond.”

### **The Internal Proceedings**

32. On 26 March 2007, the Applicant requested compulsory conciliation but on 19 April 2007, both parties agreed that no settlement was possible.

33. On 20 April 2007, the Applicant requested administrative review. His request was denied on 7 May 2007 by decision of Officer-in-Charge, BPMSD.

34. On 14 May 2007, the Applicant appealed before the Appeals Committee. On 10 December 2007, the Appeals Committee upheld the decision of 7 May 2007.

### **The Proceedings Before the Tribunal**

35. On 17 March 2008, the Applicant filed an Application with the Administrative Tribunal contesting the Decision of 13 February 2007 to rate him “GS” in the 2006 PDP. He seeks the following relief:

- a) the performance appraisal rating in the 2006 PDP be revised as “FS” with a commensurate salary increase to the midpoint of such rating, and that the Bank expunge all remarks in its records to the effect that his performance was judged “GS” during the relevant period;
- b) in the event that the President “decides to pay compensation in lieu of granting” an “FS” rating, he seeks equitable compensation equivalent to three years’ basic salary;
- c) costs amounting to US\$13,821; and
- d) US\$1 in punitive damages in acknowledgment of the Bank’s injury and suffering caused by the Decision contested.

In his Application, the Applicant requests also that the Tribunal order an oral hearing to corroborate his allegations pertaining to the arbitrary quota.

36. In his Reply, the Applicant requests in addition:

- a) A further US\$1 in punitive damages, in acknowledgment of the Bank's wrongdoing in years of denial and deception regarding its implementation of the "quota" and "forced ranking"; and
- b) Compensation equivalent to one year basic salary at the time of the Tribunal's decision for "injury and suffering caused by (i) the Bank's rampant questioning of my good standing (performance-wise) just to advance its case; (ii) its blatant dishonesty and deception which it pursued up until my Application (and still does in some very important aspects); and (iii) the degrading remarks of Principal Director, OCO which, I believe, had a material effect on my performance evaluation."

37. On 13 October 2008, the Tribunal denied the Applicant's request for an evidentiary hearing.

38. On 29 October 2008, the Applicant submitted a request for clarification of Decision No. 86 (*Anjum Ibrahim v. ADB*) pronounced in August 2008 by the Tribunal. On 14 November 2008, the Tribunal denied this request.

## **II. FINDINGS**

### **The "Fixed" Quotas**

39. The Applicant argues that it was not within the Bank's discretion to impose in 2006 a system which required a distribution of ratings. It is essential to differentiate between an

individual's specific performance rating as challenged in this case and the more generic issue of how the totality of those ratings should be utilized to recognize and reward good performance while bringing to the attention of the few underperformers the need for improvement in various aspects of their performance.

40. With regard to this issue, the Tribunal concurs with *Tay Sin Yan*, Decision No. 3 [1994], I ADBAT Reports. If a staff member satisfies the criteria laid down for a specific performance rating, he is entitled to receive it and the relevant Administrative Orders do not authorize the withholding of such rating on the basis of a fixed quota whether applicable to the Bank as a whole or to each of its divisions or departments. This jurisprudence has to be combined with accepted standards of burden of proof.

41. Thus the Applicant has the burden to prove (i) the existence of fixed or imposed quotas; (ii) the relationship between those quotas and the alleged downgrading; and (iii) had such quotas not existed, he would have been ranked "FS" instead of "GS".

42. While the Tribunal finds that an individual assessment rating should not be altered or adjusted to fit into existing rigid percentages of a quota system, it agrees with the Bank that it is a function of good management operations to use the performance rating system to reward the outstanding performers and to inform the underperformers of the need for improved performance to bring them up to the expected and recognized norms of work performance. The analogy of a bell-shaped curve is commonly used to identify the hoped for distribution. Ideally, such distribution is a reflection of diligent and conscientious supervision informing subordinates of areas requiring

improved performance. However, the history of performance review in the Bank shows that the ideal of self-regulation and administration has not been fully realised. Perhaps for a variety of reasons such as inadequate guidance from higher levels, or fear of antagonizing or upsetting subordinates with whom harmonious working relationships need be preserved, honest and constructive criticism has been too often withheld.

43. On the one hand, in the previous system, more than 90% of the staff received the top box ranking (“Performance fully meets or exceeds the requirements of the position”). In this framework, the performance evaluation system was ineffective; it is not reasonable to expect that virtually every member of the staff has the same (high) level of performance.

44. The new system, with its four overall ratings, was instituted to differentiate among levels of staff performance and supposed to “establish merit-based transparent and effective [human resource] management system in support of ADB’s vision.” An “Exceptional Performance” or an “Unsatisfactory Performance” must, by definition, remain exceptional.

45. Thus, it is not arbitrary to foresee a reasonable distribution depicted as a bell-shaped curve among the four categories with a relatively small number in each extreme box and the majority of employees being divided relatively equally between the two interior boxes.

46. On the other hand and in order to avoid too many discrepancies between the different departments of the Bank, it was reasonable to suggest distribution throughout the Bank as a whole. However, that kind of distribution cannot be rigid or composed of fixed percentages. Each

supervisor or head of service has a “guideline” but cannot be required to alter an objective assessment under the *Tay Sin Yan* Judgment merely to meet a prescribed percentage quota.

47. The record of this case does not show that there were such mandatory fixed percentage quotas. On the contrary, the Bank's advices we find were intended to be only advisory guidelines, or as noted:

- a) “expected” (memoranda or e-mails of 5 December 2005, 3 November 2006 and 4 December 2006)
- b) desirable: “Box ... should be around ...” (e-mail of 19 January 2006) or “would be”
- c) “approximate” (Bank's Answer)

48. Moreover, the Applicant does not provide adequate proof that, even in the absence of any fixed quotas, he would have been ranked as “FS” and not “GS”.

49. The chart of the performance assessments of all OCO Professional Staff in 2006 shows that five (5) members of that staff (including two managers) out of a total of eleven (11) were ranked as “GS”. Thus the Tribunal finds that the Applicant was not the theoretical staff member on the margin who was ranked in a “GS” rating (rather than in any other rating) only because of a quota set at an arbitrary level.

50. The Tribunal also notes that in his initial 2006 PDP, the Applicant was given, one (1) “GS”, two (2) “GS-FS” and two (2) “FS” for the Behavioral Assessments. After he challenged this evaluation, the Applicant received on 14 February 2007 his final 2006 PDP, in which he was rated “FS” in all items for Behavioural Assessments but one (“Learning and Knowledge Sharing”). Thus, the Bank improved its evaluation of the performances of the Applicant, while, had there been mandatory quotas, it would have been logical to have downgraded the Applicant.

51. For those reasons, the Tribunal is not persuaded by the allegation of the Applicant that there were immutably “fixed” quotas or that if there were such, they were applied to the Applicant.

### **The Evaluation of the Applicant's Performances**

52. In *Lindsey*, Decision No. 1 [1992], I ADBAT Reports, para. 12, this Tribunal decided:

... 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 ....

53. Accordingly, the Tribunal has to monitor just the boundaries of the designated categories. The Applicant has the burden of proving that in its evaluation rating for 2006, the Bank



acted arbitrarily, in a discriminatory manner, or with improper motivation (See *Alexander*, Decision No. 40 [1998], IV ADBAT Reports 41).

54. With regard to the limited monitoring cited above, the Tribunal makes the following observations:

a) The Applicant did not have a right to a particular form of evaluation. It resulted from the presentation of the facts that during his period of service, he knew without protest (except for the 2006 PDP) and had been subjected to no less than six performance evaluation systems including the system implemented from 2007.

b) The assessment of a performance is inevitably subjective but being subjective is not necessarily synonymous with being arbitrary. The former is a personal assessment that might differ among supervisors depending on the evidence of performance while the latter is a determination which has no rational basis whatsoever and is not reasonably related to the evidence of performance.

c) The only reason why the Applicant was ranked as “GS” was his relative weakness in “Learning and Knowledge Sharing”. In his final 2006 PDP, he was rated “FS” in all items but that one. That was not a surprise; the Applicant has always rated as needing improvement in “Learning and Knowledge Sharing”.

d) To be ranked “GS” instead of “FS” because of a “GS” rating among other “FS” is not arbitrary; it is the reasonable application of the definition of the “FS” ratings: “performance in all respects meets the expectations of the work unit”.

- e) The chart provided by the Bank shows that no staff who received an overall “FS” rating had any individual “GS” rating.

55. It is true that the “GS” rating was assigned at the end of 2006 to the Applicant without prior discussions of performance issue or feedback during the same year. That may not have been the ideal situation for acquainting him with his shortcomings. However, the Applicant does not persuade us that merely with a meeting in June or July 2006, he would have improved his “Learning and Knowledge Sharing” to the extent to be ranked as “FS”. The Tribunal notes that for years it had been the weak point of the Applicant’s performance.

56. Unlike the previous “Partly Satisfactory” rating, the “Generally Satisfactory” ranking is not pejorative. The Applicant keeps all his rights with regard to the applications and/or the promotions, with merely a restraint in access to increases in compensation. In fact, this consequence is not relevant; indeed in the last year, the salary of the Applicant was at the midpoint of the average or just above it.

57. Furthermore, the 2006 PDP introduced team bonuses, a recognition for staff who contributed to their department through excellent team work. The Applicant did not receive such a bonus although four (4) staff in his department OCO did, including two (2) who had received “GS” ratings.

58. Finally, the Tribunal notes that in 2006, 300 professional staff received a “GS” rating.

### **The Remedy**

59. Even if the Applicant had been able to prove either he was the victim of a system of fixed quotas or his “GS” performance evaluation was arbitrary, it does not necessarily follow that he would be entitled to any financial damage. As stated above, the “GS” rating is not a bar to promotion and the Applicant does not offer proof that the Bank had plans to create any reward that would have prejudiced staff who received a “GS” rating.

60. With regard to the punitive damages, it is not demeaning to state that someone’s performance meets expectations but improvements are required or desired in specific areas. Such notification of needed improvement is indeed for the benefit of employees to encourage change in performance to enable them to reach the higher levels of performance evaluation.

### **DECISION**

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