

# ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 93  
(5 February 2010)**

**Kai Schmidt-Soltau  
v.  
Asian Development Bank**

**Arnold M. Zack, President  
Yuji Iwasawa, Vice-President  
Lakshmi Swaminathan**

1. The Applicant contests the decision made by the President of the Asian Development Bank (“ADB” or the “Bank”) to terminate his three-year fixed term contract of employment at the completion of his one-year probationary period.

## **I. THE FACTS**

### **Background**

2. On 13 March 2007 the Applicant joined ADB as a Level 4 Social Development Specialist (Safeguards) in the Environment and Social Safeguards Division (RSES), Regional and Sustainable Development Department (RSDD), on a standard three-year fixed term contract with a one-year probationary period.

3. RSES has a regulatory function, and most of the Applicant’s time was devoted to monitoring projects of the operations departments as to their compliance with ADB’s social

safeguard policies. He was one of those assigned to update the three safeguard policies of the ADB. But on 12 July 2007, the Applicant and three others from that group sent a memo to the Vice-President, Knowledge Management and Sustainable Development (VPKM) resigning from the Safeguard Policy Update (SPU) team over the response to their draft. Apparently they had not discussed their resignation with either the Director, RSES or the Acting Director General (ADG), RSDD.

4. In September 2007, in his six-month Performance and Development Plan Review (PDP), the Director, RSES assessed the Applicant's five competencies: Application of Technical Knowledge and Skills; Client Orientation; Achieving Results; Working Together; and Learning and Knowledge Sharing. The Applicant was rated "occasionally demonstrated" for both Client Orientation and Working Together. The Director, RSES noted in his overall comments that "[the Applicant] is encouraged to adopt a problem solving team approach and avoid a confrontational stance in his compliance review work. The tone of his comments has sometimes been harsh and may be construed as accusatory or rude by [his] colleagues. A more harmonious approach would benefit the division." On 21 September 2007, the ADG, RSDD agreed with the Director, RSES' assessment, and noted that "[the Applicant] must make greater efforts to work within ADB's work culture of constructive teamwork and responsible communication." On 22 October 2007, the Applicant commented in his PDP that he had problems understanding the assessments, maintaining that the Director, RSES had not explained the reasoning behind his assessment or provided specific examples. The Applicant then signed the PDP.

5. In February and March 2008, just prior to the beginning of the one-year PDP process, the Director, RSES sought feedback from all operations departments regarding the Applicant's ongoing performance.

6. On 19 March 2008 the Director, RSES met with the Applicant to discuss his PDP at the end of the one-year probationary period. In that PDP, the Director, RSES again rated the Applicant's Client Orientation and Working Together as "Occasionally demonstrated". In the Overall Comments, the Director, RSES "noted improvement in the tone of [the Applicant's] written comments and his overall demeanour within RSES." With regard to his resignation from the SPU team, the Director, RSES noted that "it would have been appropriate for [the Applicant] to first discuss his problems with Director, RSES (and failing that [the Director General], RSDD), before signing a memo to VPKM." The Director, RSES observed that the Applicant had "been encouraged to adopt a problem-solving team approach and avoid a confrontational stance. Unfortunately, feedback received from all operational departments has been negative in terms of interpersonal style and approach to project discussions." On 16 April 2008, the ADG, RSDD, taking account of the assessment of the Director, RSES, recommended that the Applicant's appointment not be confirmed. The ADG, RSDD commented that "[the Applicant's] performance during the 12 months probationary period raises doubt if he is suitable for ADB employment. While his technical competency is relevant, his ability to work harmoniously with colleagues remains in question."

7. On 17 April 2008, the ADG, RSDD and the Director, RSES met with the Applicant to inform him of the recommendation not to confirm his appointment at the end of his probationary year. The Applicant neither signed the PDP nor wrote comments in the PDP but rather sent a

separate memo dated 24 April 2008 to the ADG, RSDD with comments. On 13 May 2008, the ADG, RSDD and the Director, RSES met with the Applicant to discuss the recommendation not to confirm his appointment. A note-to-file (NTF) of the meeting was prepared by the ADG, RSDD and the Applicant submitted his comments on the NTF on 26 May 2008, his first working day after receiving it.

8. In a memo dated 26 May 2008 the Director General (DG), Budget, Personnel, and Management Systems Department (BPMSD) recommended to the President that the Applicant's appointment not be confirmed. In a subsequent memo dated 28 May 2008 the DG, BPMSD forwarded to the President the Applicant's comments on the NTF, informing the President that they were to be considered together with the memo dated 26 May 2008.

9. After taking into consideration the recommendation of the DG, BPMSD and the Applicant's comments, the President decided not to confirm the Applicant's appointment. On 3 June 2008, the Applicant received a memo dated 2 June 2008 from the DG, BPMSD informing him of this decision.

### **Conciliation, Administrative Review, and Appeal**

10. On 4 June 2008, the Applicant requested conciliation of the decision to terminate his contract of employment after the one-year probationary period. On 11 July 2008 the Conciliator informed the Applicant that the conciliation process had not been successful.

11. On 24 July 2008, the Applicant submitted a request to the DG, BPMSD for an administrative review of the decision not to confirm his appointment, which was denied on 8 August 2008.

12. On 21 August 2008, the Applicant appealed to the Appeals Committee with a repeated request to see the actual emails from the operations departments containing criticisms of his ability to work harmoniously. The Respondent provided all of the emails containing the feedback from the operations departments on the Applicant's performance in the Statement to the Appeals Committee. On 12 January 2009 the Appeals Committee issued its report but there was no resolution.

### **Application to the Administrative Tribunal**

13. On 5 March 2009, the Applicant submitted to the Administrative Tribunal an Application contesting the decision of the President to terminate the Applicant's contract of employment after the one-year probationary period.

14. The Applicant seeks the following reliefs:

- (i) the unsigned PDP for the period 12 March 2007 to 12 March 2008 should be set aside;
- (ii) his appointment should be retroactively confirmed; and

(iii) payment of two years' salary including full resettlement benefits as compensation for the effects of the abuse of process, abuse of discretion, discrimination and failure to follow procedures by the ADB.

15. The Applicant also requests that the Tribunal order the ADB to make certain changes to its performance evaluation system.

### **Preliminary measures**

16. In his Application, the Applicant requested that the Respondent produce a number of documents, including those pertaining to the application, meaning and interpretation of Administrative Order (A.O.) 2.01 (sections 11.1 & 4.1) and A.O. 2.12 (section 5.5).

17. On 10 July 2009, the Tribunal ordered the Applicant to specify the materials he was seeking and to explain their relevancy, to which the Applicant responded on 20 July 2009. On 30 July 2009, the Respondent submitted comments on the Applicant's written compliance with the Tribunal's order, providing a Competency Evaluation Guide (Annex 1); an email from BPHR regarding refusal by staff to sign their PDPs (Annex 2); and a PowerPoint presentation on ADB's performance management system (Annex 3).

18. In his Reply dated 30 July 2009, the Applicant requested a copy of a directive regarding refusal to sign PDPs, which was coincidentally supplied by the Respondent on the same day (*supra*). The Applicant also requested copies of emails from the Director, RSES to the Applicant which the Respondent said show the receipt of specific ongoing feedback prior to the six-

month PDP, which the Respondent provided on 17 August 2009. The Applicant further requested a copy of the material used in training supervisors on giving performance evaluation feedback, which the Tribunal ordered the Respondent to provide on 19 August 2009. The Bank provided it on 31 August 2009.

19. As the Applicant made no further request for documentation in his 7 August 2009 reply to the Respondent's comments on the Applicant's written compliance with the Tribunal's order, the Tribunal denied any further preliminary measures in its order dated 19 August 2009.

## **II. FINDINGS**

20. The Bank has the authority to establish rules for hiring and retention of personnel and the discretion to decide whether or not to confirm a probationary appointment. The Tribunal stated in *Haider*, Decision No. 43 [1999] V ADBAT Reports, para. 17:

The main objective of probation is to enable the organization to find out whether the probationer is suitable for the employment. It is clear in this context that the Respondent has the discretion to decide whether or not to confirm a probationary appointment. As was stated in the case of *Salle*, WBAT Reports 1982, Decision No. 10, para. 27: "It is of the essence of probation that the organization be vested with the power both to define its own needs, requirements and interests, and to decide whether, judging by the staff member's performance during the probationary period, he does or does not qualify for permanent Bank employment ...."

21. The discretionary authority of the Bank should be exercised with due regard to the guarantees of due process to which probationers are entitled. "The very discretion granted to the

Respondent in reaching its decision at the end of probation makes it all the more imperative that the procedural guarantees ensuring the staff member of fair treatment be respected.” (*Salle*, WBAT, *supra*, para. 50). Thus, the probationer should be given a fair chance to demonstrate his suitability with adequate guidance and supervision in order to qualify for employment and should receive guidance and be made aware of concerns regarding his performance as well as the opportunity to defend himself against these concerns.

22. The evaluation of the performance of employees is a matter of managerial discretion, where the Tribunal may not substitute its discretion for that of the management (see *Lindsey*, Decision No. 1 [1992] I ADBAT Reports, para. 12). This Tribunal has held in *Haider*, Decision No. 43 [1999] V ADBAT Reports, para. 18, that the Tribunal may only intervene in the Bank’s decision not to confirm a probationary appointment “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.” This Tribunal has also stressed that “the discretionary power of the managerial authority in probationary cases is generally broader than usual as a result of the very nature of probation.” (*ibid.*)

23. We now turn to the consideration of the present case in the light of the foregoing criteria.

### **Abuse of Discretion or Arbitrary Decision**



24. The Applicant asserts that he has presented facts that support his claim that but for four incidents of negative feedback his work was positively received during his first year. He claims that the negative feedback eventually shared with him was neither compelling nor unanimous.

25. The Respondent argues that the consistently negative feedback that the Director, RSES had received from the operations departments gave the ADG, RSDD sufficient evidence to base his conclusion that the Applicant's ability to work harmoniously with colleagues remained in question.

26. There is nothing on the record to support the Applicant's claim that the Director, RSES and the ADG, RSDD in any way abused their discretion in recommending non-confirmation of his appointment. This is particularly the case given the broader discretion vested in the Bank in the confirmation of probationers. The emails providing the feedback from the operations departments show that they voiced concerns as to the Applicant's performance in Client Orientation and Working Together. Neither does anything on the record support the Applicant's claim that the Bank's decision not to confirm his appointment after the one-year probationary period was arbitrary.

### **Discriminatory or Improperly Motivated Decision**

27. The Applicant argues that his supervisors discriminated against him as a means of punishing him for signing the 12 July 2007 memo since the three colleagues who also signed the memo have not been terminated. The Applicant argues that the appropriate course of action would have been to institute disciplinary measures under A.O. 2.04.

28. The Respondent submits that the memo was appropriately viewed as a performance issue regarding the Applicant's ability to work together rather than as evidence of misconduct, as it did not concern a failure to observe A.O.s and other duties of employment. The Bank denies that he was singled out for having signed the memo since none of the other colleagues who signed the memo had been similarly warned in their previous PDPs about their performance.

29. The assertions of the Applicant and the Respondent differ as to whether the Applicant and the three colleagues asked the Director, RSES or the ADG, RSDD for a meeting before signing and sending the memo to the VPKM.

30. This Tribunal finds that the decision of the Bank to regard the Applicant's signing the memo as not constituting misconduct is in order.

31. The memo sent to the VPKM was noted in each of the PDPs of those who had signed it. While it is true that the other three colleagues were not terminated as was the Applicant, and that a probationary staff member who signed the memo successfully completed his probationary period and was eventually confirmed, the performance problems the Applicant confronted were peculiar to him and not experienced by the others. Under such circumstances, this Tribunal finds no evidence to support the Applicant's claim that the Bank's decision to terminate the Applicant's appointment was discriminatory.

## **Due Process**

32. The Applicant claims that his supervisor failed to give him guidance regarding the tone of his comments until his six-month PDP and that he had not received feedback as required by the PDP Implementing Guidelines (which state that feedback is a continuous process throughout the cycle). He points out that the negative email comments on his performance by operations departments were not shared with him until after the decision was made not to confirm his appointment and argues that he was not given the opportunity to verify or respond to the criticism. He notes that he neither commented on nor signed the one-year PDP and argues that the established procedures were not followed.

33. The Respondent claims that prior to his six-month PDP, the Applicant's supervisor gave him written and verbal feedback to advise him that the tone of his comments was unduly harsh and points out that the PDP Implementing Guidelines in any event do not apply to probationers. The Bank argues that at the end of the probationary period, it gave the Applicant only the substance of the negative feedback from the operations departments to avoid potentially negative confrontation by him with the authors of the emails. The Bank presented in its Statement to the Appeals Committee all the emails from the operations departments because the Applicant was at that time no longer present at ADB Headquarters. The Bank argues that the one-year PDP was complete despite the fact that the Applicant did not sign it because the supervisors explained to him the basis for the non-confirmation recommendation and he provided comments in writing.

34. A.O. 2.03, para. 2.2, provides that "[t]he performance of a new staff member will be reviewed in accordance with Section 11 of A.O. No. 2.01 (Recruitment and Appointment of

External Candidates). Thereafter, the procedures applicable to staff members with confirmed appointments will apply.” The PDP Implementing Guidelines apply only to the performance evaluation of staff members with confirmed appointments, and not to staff members on probation such as the Applicant.

35. Nonetheless, the evidence shows that prior to the six-month PDP, the Applicant was in fact given written and verbal feedback to advise him that the tone of his comments was unduly harsh.

36. In the light of the negative assessments the Director, RSES gave the Applicant in the six-month PDP, in February and March 2008, just prior to the one-year PDP, the Director, RSES properly sought feedback from all operations departments regarding the Applicant’s ongoing performance. Then, in the course of the one-year PDP, the Director, RSES gave the Applicant the substance of the negative feedback from the operations departments and the Applicant had the opportunity to rebut the substance of the negative feedback. Having regard to the potential consequences and the sensitivity of the feedback, the Tribunal finds it reasonable that the Bank delayed sharing the actual copies of the feedback with the Applicant until the appeal stage when the Applicant was no longer at ADB Headquarters.

37. Part 3.2 of the PDP form states: “The basis for the overall recommendation has been discussed and explained to me .... My comments are as follows, if any ....” A staff member signing the PDP does not signify that he agrees with the rating but only acknowledges that the supervisors met with the staff and explained the basis of the recommendation to him. In the present case, the

supervisors met with the Applicant on 17 April 2008 to explain the basis for the non-confirmation recommendation. While the supervisors gave him the substance of the negative feedback from the operations departments, the Applicant, dissatisfied that the emails from the operations departments had not been shared with him, asserted that the basis for not confirming his employment was unsubstantiated. The Applicant provided comments to the PDP in writing in a separate memo on 24 April 2008. On 13 May 2008, the supervisors met again with the Applicant to discuss their recommendation not to confirm his appointment. The Applicant submitted comments on the NTF of the meeting on 26 May 2008. On 2 June 2008, the President decided not to confirm the Applicant's appointment, after taking into consideration the recommendation of the DG, BPMSD and the Applicant's comments on the NTF. Under such a sequence, because the Applicant submitted a memo containing his comments to the PDP on 24 April 2008 as well as comments on the NTF on 26 May 2008 which the Bank took into consideration in deciding not to confirm his appointment, this Tribunal finds that the Bank followed appropriate procedures even though the Applicant did not sign the one-year PDP.

38. The Tribunal finds that the Applicant received adequate notice about concerns regarding his performance and the opportunity to address these concerns and defend himself against them throughout his probationary period. We find that the Bank properly followed the procedures for evaluation of a probationer's performance set out in Section 11 of A.O. No. 2.01 and complied with the requirements of due process in reaching its decision not to confirm the appointment of the Applicant.

39. The Tribunal accordingly concludes that the Applicant has failed to prove that there was an abuse of discretion, or that the decision was arbitrary, discriminatory or improperly motivated, or that it could not reasonably have been taken on the basis of facts accurately gathered and fairly weighed. We conclude also that the Bank complied with the relevant requirements of due process in reaching its decision not to confirm the Applicant's appointment.

**DECISION**

For these reasons, the Tribunal unanimously decides to dismiss the Application and all claims for relief.