

JUDGMENT CASE NO. 7 *

BENJAMIN CASTRO vs. IDB

The Inter-American Development Bank Administrative Tribunal,

Composed of Dr. Gonzalo J. Facio, President, Dr. Elita Graterol, Vice-president, the Honorable Charles D. Breitel, Dr. Luis Coronel de Palma, Sir William Douglas, Dr. Agustín Gordillo and Dr. Mozart Victor Russomano, considered the case, following the relevant procedures required or allowed by Articles 20, 21, 22, and 23 of the Rules of the Tribunal.

The complainant was represented by his attorney, Mr. Juan F. Bauta. The Bank was represented by Jerome I. Levinson, General Counsel, and Mrs. Gay Davis Miller, attorney of the Legal Department. In addition to the written submissions by the parties, there was oral argument on October 7, 1985.

Benjamin Castro, attorney, member of the permanent staff of the Inter-American Development Bank, claimed before this Tribunal against the October 12, 1984 decision of the Deputy Manager of Human Resources, denying his request for recognition of the 2% salary increase granted on August 2, 1984 by the President of the IDB.

I

The petitioner claimed:

1. That on July 6, 1984, he received a copy of the memorandum of the same date addressed by Jerome I. Levinson, General Counsel, to the staff of the Legal Department, notifying the staff of the commencement of an internal performance evaluation procedure for 1984, in order for the rating assigned to the person being evaluated to be sent to the Office of the Deputy Manager for Human Resources (HUR) on June 30, 1984 at the latest.
2. That thus far, and in spite of the fact that the memo indicated that each employee would have the opportunity to discuss his evaluation with the respective supervisor, "no

*Executive Secretariat translation, the Spanish text alone being authoritative.

one had attempted to discuss any evaluation at all with me, I had not been informed of the rating assigned to my performance, nor had I been told what period I had been evaluated."

3. That, whereas in every evaluation made of his performance he had received rating of "above the norm", he assumed that the latest evaluation made by Levinson, Jewett and de Pombo had been rated the same, and, given the date of the memo (July 6, 1984) and the deadline for forwarding the evaluation to the Office of the Deputy Manager for Human Resources (June 30, 1984), it had already been sent to that office.
4. That on August 7, 1984, he received another memo from Mr. Levinson, which established a procedure other than the one established on July 6, 1984, and requested the supervisors to prepare and discuss all evaluations no later than August 24, 1984.
5. That the President of the Bank, on August 2, 1984 had for his part ordered a 4% salary increase for grades I to IX, distributed as follows: 2% as a general adjustment and 2% for staff members whom in the last performance evaluation had received a rating of "at the norm."
6. That on September 6, 1984, his immediate supervisor presented him with his performance evaluation form (May 83- May 84) in which he was rated as "generally below the norm" and that he signed the form on September 7, 1984 "after challenging the rating assigned me."
7. That on September 27, 1984, he wrote the Deputy Manager for human Resources Administration requesting the total 4% payment ordered by the President as a salary increase, since thus far, he had only been paid the 2% general adjustment but not the 2% based on the performance evaluation.

The request was rejected on October 12, 1984 by the Deputy Manager for Human Resources Administration who informed him:

- 1) That the 2% applicable to merit was granted only to personnel who had received a rating of "at the norm" or above.
- 2) That on August 3, 1984, a memo issued by the Office of the Deputy Manager had explained that the increase would be applicable to those employees who as of May 31, 1984 had received a performance rating of "at the norm" or above.

- 3) That his evaluation was made in August and whether or not he accepted it did not change the fact that "in any event you have not received the rating of 'at the norm' or above for the applicable period."
8. That he protested the decision with the Administrative Manager (November 30, 1984, who confirmed it January 2, 1985) and that on January 8, 1985 he resorted to the Conciliation Committee. The Bank objected to his claim on the basis that he did not receive the rating required. Upon expiration on April 17, 1985 of the seventy-day term for the Committee to settle on a conciliation, he received a memo dated April 16, 1985 notifying him that the Review Committee concurred in the evaluation that had been made and that if he wished he could obtain a hearing. He so requested on April 23, 1985 and the hearing was held on May 10, 1985, although to this date he has not been informed of any decision at all.

With the facts of the case explained in this fashion, the party alleged that the disagreement between himself and the Bank rests on which performance evaluation period should be considered as the "last" one in terms of the President's communication (August 2, 1984), in order for him to be granted the remaining 2% salary increase approved. For the Bank it is the one he signed on September 7, 1984 and covers the period May 83 - May 84; for the complainant, it is the one made "on the closest date prior to August 2, 1984" since the evaluation made on June 19, 1984 has still not been concluded for him. It is obvious that the President in dictating his memorandum of August 2, 1984 was aware of the existence of the Vice-president's memorandum of June 14, 1984 and if he had wished to retain the rating requirements "as of May 31, 1984" he would have said so in his memorandum of August 2 or, at least, he would not have said in that memorandum, as he did, something else quite different.*

* In a memorandum dated May 30, 1985 the President ordered that "the salaries of employees will be adjusted annually on August 1, based on the result of the corresponding general performance evaluations as of the preceding April 30."

This decision of the President, which is applicable effective in 1985, can obviously not be applied retroactively to 1984, but nevertheless proves that the President adopted a different criterion from one year to the next; in other words, the criterion of the last evaluation for 1984 and the criterion of the evaluation as of April 30, for 1985.

Consequently, the only possible conclusion is that the President's memorandum of August 2, 1984, replaced the requirement of the minimum evaluation rating "as of May 31, 1984," which the Executive Vice-president established on April 14, 1984, by that of the minimum rating in the "last" evaluation.

"The foregoing shows that the last evaluation mentioned by the President in his memorandum of August 2, 1984, need not refer to the one-year period ended May 31, 1984."

"Actually, as we have seen, the President's memorandum of August 2, 1984 makes no stipulation of the period covered by the evaluation exercise which he calls the "last" one. It is for this reason that the last exercise that it should be taken into account in granting the merit salary adjustment of August 1, 1984 may be the same evaluation exercise taking into account in granting the salary adjustment approved by the President on August 1, 1983 period, provided the interested parties were not evaluated after August 1, 1983 or before August 2, 1984 as is my case.

Furthermore, the Tribunal notes that the President says in his August 2, 1984-memorandum that:

"Individual increases shall be governed by the same criterion followed in the preceding year..."

Since in 1983 no evaluation was made on my performance yet I was duly paid the salary increase approved by the President effective August 1, 1983 on the basis that I had an evaluation "at the norm" or above in my 1973 evaluation, it is evident that I should also be paid the merit salary adjustment in 1984 which I earned, because in my 1973 evaluation I obtained a rating higher than 'at the norm.'"

"In the preceding year, the Deputy Manager for Human Resources Administration had the good judgment which he lacked in 1984 of not requiring ad hoc evaluation for a certain period in order to pay the merit salary adjustment. Instead, he merely announced that the 1983 merit adjustment would be given to those who had "as a minimum a level of 'generally at the norm' in their performance evaluations under the system followed in the past, also effective August 1." (Document 22, Annex C). Consequently, in 1984 because the President so provided, "the same criterion followed in the preceding year ought to be added here too and an attempt not be made as in my case, contrary to the instructions of the President contained in his memorandum of August 2, 1984."

"What has been said thus far should be interpreted by the Tribunal in the sense that the claimant, in alleging and proving that the incomplete evaluation which he signed on September 7, 1984 may not be considered as the "last" one in the context of the President's

memorandum of August 2, 1984, is agreeing that the aforementioned incomplete evaluation may be legally or otherwise valid in a different context. Not at all, this so called evaluation is nothing more than a maneuver conceived by the Senior Management of the Legal Department, composed of Messrs. Levinson, Jewett and de Pombo, to trend me into the department's contribution to the policy of some managers of the Bank in order to get rid of the most senior members of the staff, prior to the date of their compulsory retirement."

"The charges made against me in the evaluation are generalities not backed by duly identified specific facts on the basis upon which I can defend myself and, therefore, place me in a defenseless position. The procedure is dubious and hypocritical, since my participation in the evaluation began over 9 months ago and is still in the hands of those who originally evaluated me, who are also the ones who must presumably shall rule on my challenge of the evaluation. The process had been turned around, since the rating that was assigned to me, was forwarded to the office of the Deputy Manager of Human Resources Administration prior to July 1, 1984, and I was not allowed to begin my participation in the evaluation until September 6 of the same year. This demonstrates that the rating was not the result of the evaluation but rather that it was arranged as a farce in order to justify the previous one decided upon."

"The claimant wishes as this point to assume, merely by way of hypothesis, that the position adopted by representatives of the Bank in the subject of this claim is correct. In other words, let us assume for a moment that the President's memorandum of August 2, 1984 and the Executive Vice-president memorandum of June 14, 1984, instead of contradicting each other, as the claimant contends, are harmonious and complementary, as was contented in the administrative proceedings by the representatives of the Bank."

"The result of this assumption, advanced as a hypothesis is that "the last performance evaluation exercise" of the complainant, for the purpose of determining his right to receive the 2% merit salary adjustment effective August 1, 1984, should be the evaluation exercise of his performance "as of May 31, 1984."

"That evaluation, which should have been made "as of May 31, 1984," should have been sent to the office of the Deputy Manager of Human Resources Administration prior to August 14, 1984, according to the instructions of the Executive Vice-president contained in his memorandum of August 8, 1984 (Document 23, Annex C) and could not be forwarded to the Deputy Manager of Human Resources Administration without having been "discussed" with the individuals being evaluated, as was also ordered by the Executive Vice-president in his memorandum of August 10, 1984 (Document 24, Annex C), which states that:

"As has been stipulated in the procedures of the Bank, personnel evaluations are to be discussed with the individual evaluated prior to that evaluation becoming part of that individual's permanent file."

Where are the permanent files of the members of the staff of the Bank kept? Obviously, in the office of the Deputy Manager of Human Resources Administration, where my supposed evaluation "as May 31, 1984" was sent by the Legal Department.

This supposed evaluation, as I have said many times not only was not "discussed" with me, but I was never even informed of its existence until September 6, 1984. Furthermore, as of the date of this writing, my evaluation process within the Legal Department has not still been completed since, as I said earlier, the Reviewing Committee of the Department has still not notified me of its decision on the hearing held on May 10, 1985.

The Tribunal will see, as we explained above, that the Bank in this case, has not matched its own arguments with the inevitable steps which those arguments compel to take.

The Bank, then, on the basis of this assumption not only violated its own provisions but left the claimant in limbo from August 1, 1984 when he should have received the salary adjustment he claims until the date when my evaluation though challenged and subject to final decision of this Tribunal, reached the state in which it could become a part of my personal file. In view of this situation, we wonder whether it is equitable for the Bank to have failed to pay the salary adjustment being claimed, by reason of the fact that the Bank itself, failed to comply with its own regulations and did not duly establish the ranking of the interested party.

"It is evident that what the Bank has done is unacceptable under a Rule of Equity, because by indefinitely delaying its decision on the "ranking" of an employee, the Bank could also indefinitely delay payment of the benefit to which that employee might be entitled. The fair way to proceed in these cases, in which for causes chargeable to the Bank a decision is not duly reached on the "ranking" of an employee, can be none that to begin payments of the salary adjustment on time and suspend them, if appropriate, on such date as he is given a ranking lower than "at the norm," which is not susceptible to amendment by administrative proceeding. Later, if the interested party resorts to judicial process and succeeds in raising his ranking to the minimum level required in order to be entitled to the merit salary adjustment, the Bank would reinstate the payments retroactive to the date in which they were suspended. If these rational, fair criteria were applied to the claimant, under the hypothesis we are analyzing he should be paid the salary Adjustment from August 1, 1984

to the date on which the administrative remedies were exhausted prior to appeal to the Administrative Tribunal to protest his negative evaluation, if any."

II

For his part, the representative of the Bank, in replying to the claim of the interested party, adduced:

1. That on occasion of the implementation of the new salary adjustment system, which the Managers and Independent Unit Chiefs were notified by memo from the Vice-president of the Bank, on June 14, 1984, the decision was made to conduct a performance evaluation of all Bank staff as on May 31, 1984. In this sense, on August 8, 1984, the Vice-president himself reminded the responsible officials of their obligation to update underscored grading as of May 31, 1984, and notify them on August 10, 1984 of: (a) the need to discuss the rating with the person affected; (b) the possibility of establishing exceptions whenever the evaluation was not completed; and (c) that the opinion of the Manager would prevail, in the event of discrepancy, over that of the employees "as immediate supervisor."
2. That on August 2, 1984, the President informed the staff of the 4% salary adjustment and on August 3, 1984 the office of the Deputy Manager of Human Resources Administration addressed a memo to all staff in order to inform them of the "New salary administration measures." The salary adjustments were reflected for the first time in the salary checks distributed in late September with retroactive payments made to August 1.
3. That the overall rating given the claimant of which he was informed on September 6, 1984 was that "generally below the norm," which was rejected by the person evaluated on September 7, 1984.
4. That all documents issued in connection with the evaluation and recognition of the salary adjustment are compatible with one another and, therefore, there is no doubt that the "last evaluation" which the President referred to in his memo of August 2, 1984 could only relate to the process that was being conducted in the Bank in order to update the performance evaluation of all staff members to August 31, 1984, nor that the purpose of the entire process was to apply the results to the salary adjustments of August 1, 1984.

5. That the rating given the claimant was the one to which he was entitled, in justification of which refers to the latest performance.
6. That the claimant protested the evaluation made of him, which became "final," when it was confirmed by the Manager. "The purpose of the latest review was its amendment, if appropriate. The system in force requires that the employee be notified of the results of his evaluation, including his right to protest if he does not concur with it; but, it is not essential for the employee to concur with his evaluation in order for the decision of the Administration to become effective."

"Furthermore, if the criteria of Mr. Castro were followed, the Administrative Tribunal, acting as the review organ of last instance, will have to confirm all decisions of management in order for them to be considered obligatory. The members of the Tribunal would be turned into managers and management would be left with no other authority than that of formulating suggestions."

7. That the evaluation of Mr. Castro's performance "formed a part of that entire process. During the processing of his claim at the different levels at which it was filed, Mr. Castro failed to exhibit proof that the results of the evaluation were not reasonable or adequate."

"Mr. Castro had the opportunity to respond to what he termed the "charges." This does not keep the result of the evaluation from becoming final, unless it is shown that it contained errors when it was signed by the Manager of the Department. The evaluation form is presented to the employee in order to enable him to detect the possible presence of errors. The fact that the employee is simply not in agreement with the evaluation, unless he somehow shows that it contains errors, does not jeopardize its final quality in the sense that the results are notified to HUR in order for it to take the measures appropriate for its application."

"Mr. Castro's supervisors had no doubt at all about the results of the evaluation. Furthermore, if Mr. Castro's claim had been at all convincing there would have always been the possibility of retroactive payment. Conversely, it would not have been a reasonable burden for the Administration to later claim payment already made. Still more important, procedures such as this would imply that the Administration of the Bank cannot enforce any decision concerning the staff until it is confirmed by the Administrative Tribunal."

"Since the decision to deny Mr. Castro a merit increase was not adopted lightly, was fully susceptible to review, and the review elicited the possibility of correcting the action taken; and since the alternative requested by Mr. Castro would impose an illogical restraint on the powers of the Administration to adopt measures relating to the operation of the Bank, Mr. Castro's argument that he should have been awarded the merit increase while a final ruling on his case was pending, should be rejected."

III

The Tribunal, in order to decide, observes:

The work of the Tribunal cannot exceed the limits of a legal review function without seriously undermining the objectives for which it was created. This being so, in order to fulfil its remedial function it requires the existence of an administrative decision enacted in contrary to or in violation of a personnel policy or, in other words, an infringement of a recognized administrative right in favor of the claimant by the institution itself against which the claim is made. This being its nature, the Tribunal can by no means take the place of management in its decisions nor rule on the greater or lesser propriety of the latter. Nor can it accept the more or less justified wishes or more or less legitimate aspirations of the employees of the Bank, which only the latter is competent to rule on and whose resolutions are subject solely to review by this Tribunal for having been enacted against express and concrete guidelines established by the regulations governing the Inter-American Development Bank.

Based on the preceding considerations, the action or administrative decision which is the subject of the complaint in the present case is the one issued by the Deputy Manager of Human Resources Administration, on October 12, 1984 denying the request for immediate payment of the 2% salary increase pertaining to merit, on the basis of the performance evaluation made of the employee whose rating was "below the norm" and which was confirmed by the Administrative Manager on January 2, 1985. Pursuant to the terms of the communication of the Deputy Manager of Human Resources, the interested party was notified of the following: "The evaluation of your performance for the applicable period was made in August. Whether or not you accept this evaluation as complete and final, does not change the fact that, in any event, you did not receive a rating of "at the norm" or above for the applicable period." This criterion was repeated by the Representative of the Bank in his reply to the claim, as transcribed above.

This Tribunal disagrees with this opinion because, obviously the discrepancy of the person evaluated with the rating given him could only lead him to challenge the evaluation, as in fact he did, and to use every administrative recourse provided for by the internal regime of the organization for that purpose, in recognition of the legitimate rights and interests of the staff members who may be affected or injured by the decisions enacted by the officials of the same. These recourses, as both parties affirm, were exercised by B. Castro, culminating with the hearing of May 10, 1985 on which he has obtained no response whatever and whose lodging by the latter prevented the continuation of the proceeding and the emanation of the ruling whereby recognition would or would not be made of the 2% salary increase for merit. The challenge of the evaluation made this impossible and curtailed the continuation of the evaluation-increase Process of the claimant and prohibited management from issuing a decision denying his petition for payment, such as the one which the Deputy Manager of Human Resources Administration issued on October 12, 1984, confirmed on January 2, 1985.

The objection made to the evaluation of B. Castro left without ground the decision opposed which is based on a false assumption and becomes voidable by this Tribunal. In this sense, it should be clarified that administrative doctrine and jurisprudence today discuss the possibility for a separate challenge of the "rating" or "position performance evaluation," which is per se an administrative proceeding, in essence not appealable. Nevertheless, preference is given to the possibility of challenging it by reason that it may constitute, as in the present case, grounds for recognition of the employees' rights, such as promotion, salary increases, granting of leaves, etc., which would be denied if the evaluation were unfavorable and be considered final because the person evaluated was denied the right to appeal. The possibility of appealing the rating is generally accepted and the case under examination proves it since the claimant was permitted access to every channel of administrative recourse in order to protest the rating of which he was notified on September 6, 1984. The Bank then, in view of the employee's claim, should have waited for the issuance of the final administrative proceeding of the competent organ confirming or reinstating the rating of 'below the norm' which had been given him, before denying him the 2% salary increase approved by the President on August 2, 1984, since the same constituted the grounds or motive of that proceeding. It should be recalled that the cause of an administrative act is composed by de facto or de jure antecedents that induce to the issuing, in such a way that these ones must be present at the time the decision is made. As Castro's rating was not definite, he could hardly be denied the 2% merit increase.

The preceding reasoning leads the Tribunal to reject the considerations made by the representatives of the Bank on the possible interference of this Tribunal in administrative matters inherent to the same, inasmuch as it is our function to review whether

administrative actions match its normative parameters and, therefore, to guarantee the rights and interests of the staff members against irregular decisions vitiated by illegality. Obviously, the Bank in enforcing its directives must approve or not the salary increase granted, subject to compliance of the established requisites (performance evaluation), but, it is essential for this to be supported by a final decision ranking the performance of the official, since the latter "per se" constitutes the grounds or reason for such decision as it is adopted on the granting of the increase.

On the basis of the foregoing, it is clear in the documentation filed in the dossier:

1. That the Bank attempted to institutionalize an evaluation system to grant salary increases for merit.
2. That it so informed the staff members and its employees sufficiently in advance and establish the modus operandi for the evaluation.
3. That the interested party was informed of the evaluation process; and
4. That he was notified of his own evaluation on September 6, 1984, which he protested on September 7, 1985.

The management itself of the Bank was guilty of delays and omissions in the evaluation process, which made it to be irregular.

In view of the foregoing this Tribunal,

DECLARES:

That the complaint is well founded; that the decision made by the Deputy Manager of Human Resources Administration, of October 12, 1984 and confirmed by the Administrative Manager on January 2, 1984, is invalid and that the Inter-American Development Bank must pay the plaintiff the salary increase of 2% from August 1, 1984 to July 29, 1985, date in which he was notified of the decision made in the hearing that took place on May 10, 1985.

The President of the Tribunal, doctor Gonzalo J. Facio and the members Charles D. Breitel and Agustín Gordillo, concur in the judgment as follows:

Based on the written, oral and testimonial submissions of the parties, and upon the deliberations of the Tribunal, we concur in the judgment only insofar as it holds invalid the purported performance evaluation of the Complainant's with respect to the year ending May 31, 1984 for failure of the Respondent Bank to

conform to the procedures laid down by the Bank in making such evaluations. In consequence, Complainant is, without more, entitled to the merit increase, since the failure of the Bank to effect a valid evaluation occurred through no fault of the Complainant. It is therefore not necessary or appropriate for the Tribunal to consider or pass upon any issue of fact or law bearing upon events preceding the measuring annual period or ensuing the fixing of the time for Complainant's right to the 1984 merit increase.

Washington, D.C. 11 October 1985

Elita Graterol
Judge

Gonzalo J. Facio
President

Eugenio Velasco
Executive Secretary