

JUDGMENT CASE NO. 9

TULA AMAS 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 R. 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 Mr. José I. Estévez. 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 April 1, 1986.

The Facts

- 1) The documentary evidence submitted by the parties, as well as the statements of witnesses for the Complainant and for the Bank, show the facts of the case to be as follows:
 - i) The Complainant worked on June 6, 1984 as Special Services Assistant in the Special Services Section of the Administrative Department and was in charge of managing the petty cash fund as its principal custodian, with an alternate custodian of professional rank, Mr. Francisco Alvarez. On that day, the Complainant arrived at her office at 08:00, and found both the safe and its outer cabinet, open. She was the first staff member to arrive on that day. She then proceeded to lock the cabinet housing the safe, left the office and went to the Health Unit of the Bank, to await the arrival of her supervisors and out of fear of physical injury should the thief still be there. She returned at 08:30, when some staff members had already arrived. The alternate custodian, Mr. Alvarez, arrived at 09:00. Those staff members as well as Mr. Alvarez agreed on the advisability of waiting for the arrival of the supervisor, Mr. Ciammaichella, Chief of the Special Services Section, which took place at 09:30. Mr. Ciammaichella approved of the conduct of the Complainant and advised her immediately to notify the Bank's security service. A cash count of the money in the petty cash fund was made by Mr. Alvarez and showed US\$1,701.38 to be missing. A second count made by Messrs. Franchi and Ciammaichella reduced the shortage to

US\$1,429.93. The security guards arrived at approximately 10:00 and proceeded to question the Complainant, after which they wrote a report in which no conclusion whatever was reached. Mr. Ciammaichella reported the theft to the Chief of the Administrative Division on that same day, at approximately 17:30. On the following day, the Administrative Manager called in the Metropolitan Police, who carried out an investigation which also failed to reach any conclusion. Neither the safe nor its outer cabinet showed any signs of having been forced open. The combination to open the safe was known to the two custodians and was kept by Mr. Santa Cruz, Chief of the Division. Keys to the cabinet were kept by the two custodians and a third key was also in the hands of Mr. Santa Cruz;

- ii) On July 16, 1984, the Auditor General reported to the Administrative Manager on the internal control of the petty cash fund and noted certain inadequacies in the petty cash procedures and recommended a number of fundamental changes.
- iii) the Complainant has always received good evaluations in her nearly 25 years with the Bank. Her last rating, for the period of 1983-1984, was "Generally Above the Norm," her performance being rated as "Very Good" under the headings "Amount of Work," "Quality of Work," "Responsibility," "Initiative," "Discipline" and "Excellent" as regards "Work Relations and Cooperation." The Complainant was not evaluated in the period 1984-1985. The Bank has stated the reason to be that her new supervisor felt that the Complainant had very much neglected her duties because of her concern over her complaint before the Conciliation Committee and that, accordingly, had a mark been given, it would have been unfavorable. Management felt that such a rating might have conveyed the impression that the Complainant's freedom to exercise her right of defense was being curtailed, and decided that the evaluation should not be made. Nonetheless, the Bank paid the Complainant a merit increase as if she had been evaluated "Above the Norm."
- iv) responsibility for management of the petty cash fund is shared equally between the principal and the alternate custodian, in the sense that both have unrestricted access to the safe at any time to make transactions with the money in it, but the status of principal in contrast to alternate implies that the latter steps in only when the former is absent;
- v) on June 13, the Chief of the Administrative Services Division, Mr. Santa Cruz, informed the Complainant that it had been decided to transfer her to the Records Management

Section within the same Administrative Services Division, to the position formerly filled by Miss Yorka Ortiz, who in turn would fill the position formerly held by the Complainant in the Special Services Section, because of the administrative flaws found in connection with the theft of the petty cash fund. However, this transfer became effective only on September 20, by means of a memorandum sent by Mr. Santa Cruz to the Human Resources Deputy Manager, telling him that he had decided to transfer position 0693 of the Special Services Section, held by the Complainant, to the office of the Chief of the Administrative Services Division, assigning Miss Yorka Ortiz to it, while transferring the Complainant to position 0579 of the Records Management Section, vacated by Miss Ortiz. Four days later, on September 24, the Administrative Manager sent a memorandum to the Complainant in which, under the heading "Loss of cash from the petty cash fund", he stated that he was reprimanding her for the lack of care displayed in the performance of her duties in relation to the petty cash fund and that she would be transferred to the Records Management Section with effect from October 15, 1984;

- vi) the Bank had decided to put off the actual transfer from June to October 1984 so as to forestall any interpretation that might link the Complainant with the theft of the petty cash fund;
- vii) on September 24, 1984, written reprimands were also given to the alternate custodian, Mr. Francisco Alvarez, and to the direct supervisor of the two custodians and Chief of Special Services Section, Mr. Horacio D. Ciammaichella, and were based also on the lack of care displayed in the management of the petty cash fund;
- viii) the Complainant's direct supervisor did not take part in the adoption of the steps taken against her and, on the contrary, on several occasions firmly expressed in writing his dissent and has called the transfer "hasty and unfair." Mr. Ciammaichella complained that he was ignored throughout the process following the petty cash fund theft. The Bank maintains that it did not deem it advisable to bring him into it because he too had been found to be administratively liable, for which reason he had been reprimanded in writing;
- ix) on March 4, 1985 while the complaint was before the Conciliation Committee, the Administrative Manager decided to withdraw the written reprimand given to the Complainant and she was so advised by memorandum of March 4, 1985. In it, the reason given for the withdrawal was that the Complainant's responsibility was shared equally by her supervisors.

In his testimony before the Tribunal, Mr. Epstein, the Administrative Manager at the time, added that he had done it as a conciliatory gesture;

- x) at the time of the theft, the Bank had no manual, policy or regulation with instructions on how a staff member who discovers a theft should proceed.

The impugned decision

The Complainant challenges the decision taken by the Bank on September 24, 1984 which was in the following terms:

"In light of the loss of cash in your custody, and in view of the delay in reporting it, as well as other shortcomings detected in the course of the investigations conducted by the proper authorities, and the report issued by the Auditor General, all of which show that there has not been strict compliance with the instructions issued by the Division for the handling of these monies, I must reprimand you for the lack of care displayed in these activities until the day of the incident.

I take the opportunity to inform you that this office considers it beneficial for the Bank and for you to transfer you to the Records Management Section. Accordingly, please report to Mrs. Jo Anne García Meléndez, Section Chief, on October 15, 1984."

The Relief sought

The Complainant seeks orders for:

- (I) the removal from the files of all documents relating to the reprimand and of all documents in which Management expresses views related to the Complainant's ability and performance as from June 6, 1984 insofar as they differ from her performance evaluation of May 31, 1984.
- (ii) the cancellation of the transfer and reinstatement within thirty days to an administrative position within the Special Services Section, the duties of which are of a similar nature to those performed by the Complainant until October 1984.
- (iii) the obtaining by the Bank of information as to whether the Complainant's name is included in any kind of Metropolitan Police record, and if so, that the Bank take the necessary action to clear up the situation and expunge any such record.

The Issues

The reprimand having been withdrawn by memorandum of March 4, 1984 and the representative of the Bank having given the Tribunal the assurance that all documents relating thereto have been removed from the Complainant's personnel file, the first claim no longer arises.

In regard to the third claim, the Bank has no power to require the Metropolitan Police either to disclose information as to the contents of their records or to expunge any such record. That being so, the third claim fails.

The Tribunal, in these circumstances, must limit its consideration to the claim for cancellation of the transfer and for reinstatement within the Special Services Section in an administrative position the duties of which are of a similar nature to those discharged by the Complainant until October 1984.

The Allegations of carelessness and lack of judgment

The Tribunal does not consider it necessary for the purposes of this judgment to embark on any detailed examination of the standard of care exhibited by the Complainant as a custodian of the petty cash fund. Nor does it propose to comment on the procedures or practice followed in the Special Services Section in respect of the fund either generally or in the light of the recommendations made by the Auditor General on July 16, 1984. It is sufficient to observe that whatever shortcomings in judgment and conduct the Complainant and those associated with her may have shown, these must be looked at in the context of the then-prevailing and apparently accepted procedures which, as this incident demonstrates, had serious weaknesses.

The Bank's submissions

It is contended on behalf of the Bank that the transfer of the Complainant was wholly unconnected with the theft from the petty cash fund and with the reprimand issued to the Complainant.

Neither the proved facts nor the terms of the letter of September 24, 1984 support this contention. It is clear that there is a circumstantial linkage between the reprimand and the transfer which would be perceived, whether it was so intended or not, as a disciplinary measure taken by the Bank as a consequence of the Complainant's alleged shortcomings.

Conclusion

The Tribunal recognizes that the Bank has the right to transfer a member of its staff from one post to another provided that there is no violation of any personnel policy or of any term or condition of the staff-member's employment, and provided that the duties to which the staff-member is reassigned are such as the member is capable of performing. However, in the instant case, the decision to transfer is flawed in that it constitutes a sanction as a disciplinary measure for which there was no justification either in respect of procedure or on the merits. Accordingly, the impugned decision is hereby quashed.

Having regard to the view which the Tribunal takes of the Bank's powers of transfer, the further relief sought by the Complainant is denied.

Agreed; all concur except judge Russomano, who voted rejecting the complaint. For the sole purpose of compliance with Art. 25, No. 3, final paragraph, of the Regulations, judge Russomano states the grounds for his dissent as follows:

- 1) the Bank's rules and regulations give the Management broad power to transfer an employee from one post to another whenever it sees fit and doing so, violates no internal rule or the rights of the employee concerned;
- 2) in the present case, I see no misuse of authority, no violation of the current regulations, and no infringement of the rights of the plaintiff;
- 3) to the contrary, it appears evident from the information presented that the plaintiff did not perform her duties as custodian of the petty cash with due diligence; this would have warranted the adoption against her of much more drastic measures, which were not taken. In face of facts of grave import, the Bank did no more than exercise its right to transfer the plaintiff, leaving her remuneration and employment status unchanged;
- 4) the plaintiff has suffered no moral injury whatever, for the Bank never charged her with fraudulent or criminal acts. To the contrary, it kept her in its employment with all her rights intact, and awarded her a wage increase as if she had been rated "Above the Norm" (in her employees' evaluation), all of which constitutes a public expression of respect for the plaintiff's moral conduct.

President, Dr. Gonzalo J. Facio, attended the public hearing and concurred with the judgment, but is absent at the signing of this judgment. Consequently, Vice-president, Dr. Elita Graterol's signature appears below.

Washington, D.C., April 4, 1986.

William R. Douglas
Judge

Elita Graterol Calles
Vice-President

Eugenio Velasco
Executive Secretary