

JUDGMENT CASE NO. 18

JULIO C. CABO vs. IDB

The Inter-American Development Bank Administrative Tribunal,

Composed of Dr. Gonzalo J. Facio, President, Dra. Elita Graterol, Vice President, Hon. Charles D. Breitel, Dr. Luis Coronel de Palma, Dr. Agustín Gordillo, and Hon. Kenneth G. Smith, considered the case, following the procedures established in Articles 20, 21, 22 and 23 of the Rules of the Tribunal.

The complainant appeared assisted by his attorney Mr. Ovidio Martínez. The Bank was represented by Gay Davis Miller, Esq., of counsel. In addition to the written submissions the Tribunal heard oral arguments on 12 November 1987.

WHEREAS:

1. On May 29, 1987, Mr. Julio C. Cabo, an Argentine National, Public Accountant and former staff member of the Inter-American Development Bank filed a complaint with the Tribunal, petitioning for:
 - A. Reversal of the decision which ended the competition relative to Vacancy Notice No. 86/14 regarding position 101, Special Services Assistant, Grade XI, Administrative Department, Administrative Services Division, Special Services Section. This decision is the one mentioned (but not cited) in the memorandum dated October 2, 1986 sent by Mrs. Antonieta Gutiérrez to Complainant.
 - B. Reversal of the decision made by Mr. Carlo Binetti, Acting Human Resources Deputy Manager in a letter dated November 14, 1986 denying that there was any flaw in the selection and recruitment process for the vacancy by which another applicant and not the Complainant was selected.
 - C. Reversal of the decision made by Mr. Luis Sánchez Masi, Administrative Manager in a letter dated December 19, 1986 stating that Management had adopted a final decision consistent with the interest of the Bank by selecting the candidate best qualified to fill the needs of the Bank,

And for the following reliefs:

- D. That Complainant be selected for position 101 which was the object of Vacancy Notice No. 86/14 because he is the best qualified candidate and that Management appoint him so.
 - E. That the Tribunal should find in the alternative that Management has injured Complainant by processing competition 86/14 in breach of applicable provisions, denying due process and exercising abusive authority and consequently must compensate Mr. Cabo with the amount of fifty thousand dollars (US\$50,000).
 - F. Should the President of the IDB decide that it is in the interest of the Bank not to comply with the decision which the Tribunal may render ordering that the Complainant be appointed to position 101, that the amount of compensation to be paid by the Bank to the Complainant should be the equivalent of three years at the salary he earned at the Bank.
2. In support of his petition, Complainant gave an account of facts that may be summarized as follows:
- A. Complainant joined the Bank on May 1, 1979 as messenger in the ADM/COM Section. On October 1, 1980, he was assigned duties as Computer Terminal Operator BMA/FTC which he performed until April 30, 1981. On May 1, 1981, he was assigned duties as Accounting Officer in the same Section BMA/FTC and performed them until August 30, 1981. On September 1, he was assigned duties as Budget Officer in the ADM/COM Section and performed them until May 31, 1982. He performed satisfactorily.
 - B. On October 28, 1982, HUR Deputy Manager, acting on a proposal by Complainant's supervisors, offered him a contract in the Junior professional program designed to train young professionals to fill positions of responsibility in the Bank or in their countries. Complainant worked under this program until August 31, 1984.
 - C. On September 1, 1984, the Bank gave Complainant a contract expiring on August 31, 1986 in accordance with the terms of employment set forth in the IDB Administrative and Personnel Policies, to work as HUR Assistant, DPA Department, Grade X.
 - D. Management published Vacancy Notice No. 86/14 for Position No. 0101, Special Services Assistant, Grade XI, Administrative Department, Special Services Section.

- E. On July 7, 1986, Complainant Julio César Cabo, in his capacity as an IDB staff member, applied for Position No. 0101 in Vacancy Notice No. 86/14 and stated that he had joined the Bank in May 1979, had studied at the National University of Entre Ríos, Argentina, between 1970 and 1975, where he had obtained the degree of Public Accountant; that he had worked in the Bank in various positions and knew Spanish, English and Portuguese.
- F. Preliminary selection for Vacancy Notice No. 86/14 took place on August 5, 1986 and Complainant was included in the report as a Temporary Candidate qualifying for the position.
- G. On October 2, 1986, Mrs. Antonieta Gutierrez, Human Resources Officer in charge of Vacancy Notice No. 86/14 informed Complainant that "The process of selecting candidates for the above vacancy has ended and the position is being filled by another person." Mrs. Gutiérrez did not tell Complainant the name of the person who had been selected for the vacancy.
- H. On October 15, 1986, Complainant sent a memorandum to Mrs. Antonieta Gutierrez, regarding Vacancy Notice No. 86/14 and requested official copies of all documents related to the selection process. On October 21, 1986, Mrs. Antonieta Gutiérrez replied to Complainant that: "since the reports, files and documents related to candidacies in recruitment and selection processes are confidential in nature, your request cannot be granted."
- I. On October 31, 1986, Complainant wrote a memorandum to HUR Deputy Manager asking that the Conciliation Committee procedure set forth in Policy No. 326 be set in motion with regard to Vacancy Notice No. 86/14 for Position No. 0101, for which he had applied, and requesting to be chosen as the applicant best qualified in regard to that vacancy.
- J. On November 14, 1986, Mr. Carlo Binetti, HUR Acting Deputy Manager, wrote to Complainant advising him that "the reports, files and documents relating to candidates in recruitment and selection processes are confidential"; and with regard to Vacancy Notice No. 86/14, that it was posted and published, that Complainant became aware of it and took part in the procedure with equal opportunities and rights as all other candidates and, in reviewing the background information, it had been verified that Complainant's application followed the regular Bank channels and the fact that he was not selected in no way meant that the selection and recruitment procedure for the vacancy under reference was flawed.

- K. On November 21, 1986, Complainant sent a memorandum to the Administrative Manager concerning the procedure in Personnel Policy No. 326 in connection with Vacancy Notice No. 86/14; and he asked the Manager to decide the issue raised by the appointment of another person and Complainant's right as the candidate who had proven to be best qualified and suited for the position posted. On December 19, 1986, Mr. Luis Sánchez Masi wrote to Complainant stating: "Management, based on the formal and reasoned recommendation of the technical members of the panel, adopted the final decision that was obviously the most consistent with the interest of the Bank, in other words, to pick the candidate best suited to fill the needs of the Bank."
 - L. On January 16, 1987, Complainant filed the relevant complaint with the Conciliation Committee asking that Management reverse the appointment of the person selected, and appoint Complainant as the best candidate. On March 2, 1987, the Conciliation Committee discontinued processing the complaint on the grounds that it was not within its purview.
 - M. At no time did Management give Complainant access to the official documents relative to Vacancy Notice No. 86/14 or to the competition that ensued.
3. In support of his petitions, Complainant relied upon the following legal arguments:
- A. The Administrative Tribunal of the IDB had jurisdiction to hear and settle his complaint pursuant to Article II(1) and (4) of the Statute of the Tribunal.
 - B. The complaint must be ruled admissible because Complainant had met the requirements of Article II(2)(a), (b) and (c) of the Statute of the Tribunal, as well as Article 15 of the Rules of the Tribunal, by exhausting all available remedies within the Bank, including bringing the matter before the Conciliation Committee.
 - C. Personnel Policy No. 315(A)(5)(f) states that any applicant who does not agree with the selection process in a given case may resort to the appeal procedure established in Personnel Policy No. 326.
 - D. Personnel Policy No. 312 on System of Selection of Candidates establishes the principle that the Bank selects its staff according to merit and qualifications; and that the primary consideration that the Bank takes into account in appointing personnel is the need of assuring the highest possible degree of efficiency, competence and integrity.

- E. Personnel Policy No. 315(B)(4) and (5) refers to the posting procedure to fill vacancies. Inasmuch as it is a competitive procedure it excludes by definition the right of Management to proceed freely without regard to applicable regulations. In other words, Bank Management does not have discretionary power in filling posted vacancies. Posting the Vacancy Notice is an administrative decision that gives rise to rights and obligations for both Bank staff and Management. Management has an obligation to observe and enforce the requirements and terms set forth in the relevant Vacancy Notice.

Having been ruled eligible to take part in the competition and despite his being the applicant with the best qualifications, he was never asked to a meeting or interviewed by the officials evaluating the qualifications of applicants, as provided for in Paragraph (B)(11) of Personnel Policy No. 315. The Department concerned did not include his name in the slate of best qualified candidates, thereby eliminating him from the competition giving no reason and in a discriminatory way, causing him injury and overstepping its authority. In the same manner, the HUR Subdepartment disregarded Personnel Policy No. 315 (B)(13) by making its recommendation on the final selection and excluding Complainant without considering his qualifications.

- F. The legal system governing employment in the Bank is a set of rules that recognizes the principle of due process in managerial procedures that involve staff rights. This principle was violated by Management with respect to Complainant's rights as an applicant under Vacancy Notice No. 86/14.

Specifically, by Management's refusing to make available to Complainant the official documents pertaining to the Vacancy Notice and posting and barring him from learning the contents of those documents on the pretext that they were confidential, thus preventing him from exercising his rights.

The tribunals of international organizations have repeatedly held that the principle of due process must be applied and observed in employment relations with the staff. It is enough, in this connection, to cite Judgement No. 74 of December 5, 1958 by the Administrative Tribunal of the United Nations, stating that:

"In the view of the Tribunal, rules of fairness and justice require access to documents held by Management insofar as they

relate to the employee and are relevant to the procedure under consideration. If this is not done, the employee does not enjoy "due process" in preparing and filing his appeals."

- G. In labor law, overstepping of authority by the employer to the detriment of the legally protected rights of the worker is unlawful, and the employer's decisions in such cases are invalid. In the instant case, Management did not apply Personnel Policy No. 315 impartially and objectively. The whole competition procedure was biased against Complainant to prevent him from filling the posted vacancy and remaining on the IDB staff.
- 4. That Complainant petitioned the Tribunal to order the production of the documents which he had requested by memorandum on October 15, 1986 and which were denied him by Management. Complainant noted that in preparing the complaint he did not have access to the documents related to Vacancy Notice No. 86/14, position 101.
- 5. The Bank, answered the complaint and asked for a dismissal in its entirety because it was not valid or justified.
- 6. The Bank in support of its petition gave the following account of the facts:
 - A. At the time he applied to be considered for position 101, Mr. Cabo was a temporary employee of the Bank and at the time the final selection was made he was no longer an employee.
 - B. The stated qualifications for the vacant post were three years experience in similar work, preferably in the Bank, the ability to speak two of the official Bank languages, and a secondary level of education.
 - C. By submitting the application form twelve individuals applied, among them Mr. Cabo. His application was considered among those of other candidates and he was considered among those "qualified." Mr. Juan R. Cock-Betancourt, the individual eventually recommended by the selection panel as most suitable candidate, was a permanent employee and was certified as qualified on the same document. The information concerning the applicants was provided to the Administrative Manager who appointed a panel.
 - D. The panel informed the Administrative Manager that three finalists had been selected and that the other three

candidates interviewed, including Mr. Cabo, were noted as having comparatively less appropriate qualifications. The panel noted that the candidate recommended had 10 years and 9 months of experience and had worked in the Bank since 1979.

- E. The Administrative Manager approved Mr. Juan Cock-Betancourt's appointment to position 101 effective October 1, 1986.
 - F. The Bank does not contest that Mr. Cabo performed various tasks for the Budget and Management Accounting Division while he was employed by the Bank as a messenger prior to October of 1982, but considers this irrelevant to the present claim. The employment history of Mr. Cabo as a Junior professional is equally irrelevant (and his performance was not satisfactory). His last appointment with the Bank was given in consideration for a settlement agreement and his performance was, again, not satisfactory.
 - G. Mr. Cabo was careless in filing his application form, indicating that he had entered the Bank in September of 1984. He did not mention the location of the University of Entre Ríos, República Argentina, but merely made reference to "E. Ríos." His application form listed two years of relevant experience.
 - H. Mr. Cock-Betancourt showed more relevant and appropriate educational background for the position. His application also showed him to have been a Bank employee longer, and he was a permanent rather than a temporary employee.
 - I. Mr. Cabo's assertion that he was never interviewed as a candidate for position 101 is not true.
7. The Bank argued that the points of law on which Mr. Cabo relied were not valid because:
- A. Mr. Cabo's assertion of jurisdiction was based upon Article II of the Tribunal Statute. The Statute provides that such complaints are admissible only if filed with the recommendations of the Conciliation Committee. In this case the Conciliation Committee issued no recommendations after deciding that it did not have jurisdiction to hear the claim because the decisions identified by Mr. Cabo as the ones challenged were made after he had left the Bank.
 - B. The Statute of the Tribunal provides that the "Tribunal shall hear and pass judgement upon any application by which a member of the staff of the Bank alleges nonobservance of

the contract of employment or terms and conditions of appointment of such staff member. Nothing in Mr. Cabo's employment contract, which was a temporary contract for a fixed term of two years expiring on August 31, 1986, gave him the right to be selected, after the expiration of that term, over other qualified candidates in a competition for a vacant position. In addition, the "terms and conditions" of Mr. Cabo's appointment included the Agreement for Settlement and Release of Claims, which specifically provided that upon the expiration of that term of employment the Bank would have no obligation whatsoever to continue to employ Mr. Cabo.

No provision in the Personnel or Administrative Policies of the Bank provides a right to any current or former temporary employee candidate for a posted position to be selected in preference over another qualified permanent-employee candidate. The contrary was true. Personnel Policy 315 provides a preference for permanent Bank staff members when selecting among candidates for a vacant position.

- C. The Bank also relied on Personnel Policy No. 312 and upon the similar provision in Article VIII of the Agreement Establishing the Inter-American Development Bank which require the Bank in choosing staff to select individuals of the highest efficiency, competency and integrity, and considered that the Bank had followed this prescription for selecting from among the candidates. The prescription implied more than a selection of the candidate who had reached the highest level of formal education. It required matching experience and ability to do the job. It requires that the candidate be suitable for the position. This goal was aptly described in Judgement No. 49 of the OAS Administrative Tribunal as selection of the candidate who possesses the "qualifications that meet the prime purpose of the position in the most natural fashion."
- D. Administrative Policy AM-302, provides that Bank documents dealing with personal histories are confidential. The documents requested by Mr. Cabo contained information given to the Bank by other candidates with the implicit understanding that this information would not be made public. The right of privacy to all interested staff, and the duty of the Bank to maintain the confidentiality of its archives must be protected. The confidentiality of such documents cannot be protected if any staff member or former staff member, by merely filing a claim, is considered entitled to receive copies of the personal and professional histories of other individuals. Therefore, Mr. Cabo's rights in this situation did not take priority; they must be

balanced with the rights of others. Assurance that due regard would be given to each of these conflicting legal interests was possible only if such documents were revealed on the basis of the protections afforded by providing them to the Conciliation Committee (upon the request of the Committee) and to the Administrative Tribunal, rather than directly to the staff member.

8. In accordance with the evidence brought before the Tribunal the following facts have been established:
 - A. Complainant entered the Bank on May 1, 1979 as Messenger in Section ADM/COM and remained in a Messenger position until October 3, 1982. In addition to his duties as Messenger he was assigned duties as Computer Terminal Operator BMA/FTC, Accounting Officer BMA/FTC, Budget Officer ADM/FTC. His performance was satisfactory.
 - B. Complainant resigned his permanent post and joined the Bank's Junior professional program on November 1, 1982. His supervisors deemed his performance unsatisfactory and Management decided to dismiss him. Mr. Cabo appealed before the Conciliation Committee which decided in his favor but Management released him on March 15, 1984. Mr. Cabo then established a complaint before this Administrative Tribunal on July 18, 1984. While the process was pending, the Administrative Manager offered Mr. Cabo a transaction whereby he was given employment from September 1, 1984 through August 31, 1986 as Assistant HUR (Grade X).
 - C. On July 7, 1986, Management posted Vacancy Notice No. 86/14 to fill position 101, Special Services Assistant (Grade XI). The requirements for the position were: high school education, three years experience in stockroom tasks, two of the Bank's official languages.
 - D. On July 21, Complainant as a temporary employee submitted an application for competition 86/14. He stated in his application that he had worked with the Bank since September 1984. That he was a Public Accountant from the University of "E. Ríos" and that he had a graduate diploma in Business Management from The American University. That his related experience was, messenger, computer operator (BMA, EMD and RER). In ADM/COM from 1979 to 1980 and in BMA from 1980 to 1981. That he was proficient in Spanish and English and knew Portuguese.
 - E. On July 24 Mr. Juan R. Cock-Betancourt filed his application for competition 86/14 stating: That he had entered the Bank on November 27, 1979. That he had a High School Diploma

from "W.T. Woodson H.S." and some courses at "Northern VA Comm. College" and The American University as well as an EPD course at the Bank. He indicated related courses in typing, speed reading and two in filing. As related experience he referred to 10 months ADM/COM, knowledge of the Bank and its offices since 1979, and three years in a restaurant responsible for inventory control of food and liquors. He said he was proficient in Spanish and English.

- F. On August 5, 1986, the preselection process took place and both Mr. Cabo and Mr. Cock-Betancourt qualified. The panel that was appointed for the purpose met and determined that to perform better in the position the candidate should be:
- i. Experienced in tasks involving detail.
 - ii. Courteous and calm.
 - iii. Mature, not needing constant supervision.
 - iv. Fluent in two of the Bank's official languages.

The panel interviewed the preselected candidates, among them Mr. Cock-Betancourt and also Mr. Julio C. Cabo. Each panel member selected the three candidates he thought to be the best and once they were chosen the lists were put together. Mr. Cabo and another candidate had not been selected by anyone. At that time, the panel eliminated Complainant. The panel eventually recommended three finalists of whom Mr. Cock-Betancourt was first.

- G. On October 2, 1986, Mrs. Antonieta Gutiérrez informed Mr. Cabo that the position had been awarded to another candidate. On October 15, Mr. Cabo requested access to the competition's documentation in order to prepare the recourse authorized by Personnel Policy No. 326 and on October 21, his request was denied by Mrs. Antonieta Gutiérrez by reason of confidentiality.
- H. On October 31, 1986, Complainant appealed before the Human Resources Deputy Manager but Mr. Carlo Binetti, Acting Deputy Manager confirmed the denial. On November 21, Mr. Cabo elevated his appeal to the Administrative Manager who in turn confirmed the denial on December 19, 1986.
- I. On January 16, 1987, Complainant brought his complaint to the Conciliation Committee which on March 2, 1987 decided the case was not within its purview.
- J. At no time did Management give Mr. Cabo access to the information pertaining to competition 86/14.

9. OPINION:

The documentary and oral evidence before the Tribunal establish that the selection process, about which complaint is made by the Complainant, was conducted in strict compliance with the applicable provisions of the Personnel Policies of the Bank. The real ground of the complaint is that, in making its selection, the panel which eliminated him from the competition had no discretion to exercise and was obliged to select him as he was the best qualified candidate. In his observations on the answer of the Bank to his complaint, Mr. Cabo conceded that if selection of the best candidate in a competition in accordance with Personnel Policy No. 315 "is a discretionary right of the institution" his complaint "is obviously groundless."

Personnel Policy No. 312 provides that in appointing personnel and in determining their conditions of service, the primary consideration that the Bank will take into account will be the need of assuring itself "of obtaining personnel of the highest possible degree of efficiency, competence and integrity." In accordance with this policy, the selection panel for which Personnel Policy No. 315 provides, is required by Personnel Policy No. 315(B)(II) to select the candidates who in the opinion of the members of the panel "best meet the requirements for the vacant position."

In our opinion, the fact that the panel is required to make selections from a number of candidates who must, to begin with, have the basic qualifications for the vacant position, involves the exercise by each member of the panel of a judgment based on all relevant considerations, of which academic qualification is only one, in order to decide which candidates are best suited to fill the vacancy. This amounts, in our opinion, to the exercise by the panel of a "discretion," which is not to be interpreted to be arbitrary, but on the other hand, permits the measure of suitability within or without the particularized categories.

It has not been established that in exercising its discretion to eliminate Mr. Cabo from the competition, by not including him among the three best qualified candidates, the panel acted arbitrarily or from any improper motive.

10. ACCORDINGLY,

The complaint of Mr. Cabo is without merit and is hereby disallowed.

Washington, D.C. 13 November 1987.

Kenneth G. Smith
Judge

Gonzalo J. Facio
President

Hernán Sáenz-Jiménez
Executive Secretary

President Facio and Judge Smith would disallow the complaint on the additional ground that the Tribunal had no jurisdiction to entertain the complaint, which is raised in the reply by the Bank to observations on the Bank's answer. Article II of the Statute of the Administrative Tribunal provides as follows:

"The Tribunal shall hear and pass judgment upon any application by which a member of the staff of the Bank alleges nonobservance of the contract of employment or terms and conditions of appointment of such staff member."

At the time when the selection process was conducted in this case Mr. Cabo was an employee of the Bank by virtue of the contract for two years which expired on August 31, 1986. He has not alleged any nonobservance of this contract in his complaint nor has he shown anywhere in his complaint the nonobservance of any terms or conditions of his appointment under the contract or the breach of any regulations or rules in force relating to such appointment.

Washington, D.C. 13 November 1987.

Kenneth G. Smith
Judge

Gonzalo J. Facio
President

Hernán Sáenz-Jiménez
Executive Secretary