

JUDGMENT CASE NO. 19

GERARDO NAVARRO SALGADO vs. IDB

The Inter-American Development Bank Administrative Tribunal,

Composed of Dr. Agustín Gordillo, President, Hon. Kenneth G. Smith, Vice President, Dr. Ildélio Martins, Dr. Alfredo Martínez-Moreno, Dr. Baltasar Cavazos-Flores, Hon. Thomas Buergenthal, and Hon. Luzius Wildhaber, considered the case following the procedures established in Articles 20, 21, 22 and 23 of the Rules of the Tribunal.

Complainant was assisted by Dr. Juan Antonio Navarro. The Bank was represented by Maria da Cunha, Esq., of counsel. The parties did not request oral arguments be heard.

WHEREAS:

1. On 9 March 1988, Mr. Gerardo Navarro Salgado, a U.S. citizen, psychologist and former staff member of the Inter-American Development Bank, filed a complaint against the Bank in which he asked this Administrative Tribunal to find as follows:

A. That transferring Complainant on 30 September 1986 from the position of "Advisor" attached to the Program for Personal Development to the Protocol and Conferences Sector of the Secretariat Department was a breach of his employment contract with the Bank, dated 25 June 1986.

B. That if Complainant waited until May 1987 to formally file a complaint, it was because he acted prudently and reasonably.

C. That the assignment of Complainant to the Protocol and Conferences Sector of the Secretariat Department with undefined duties was inconsistent with his professional training and at variance with the contract signed by the parties.

D. That the above decisions caused Complainant mental anguish and injury recoverable in the amount of two hundred and fifty thousand dollars (US\$ 250,000.00).

2. In support of his claims, Complainant describes a series of events that may be summarized as follows:

A. On 26 June 1986 (dated 25 June) Complainant signed with the Bank a one-year employment contract to provide professional services in the position of Advisor to the Program for Personal Development (PPD) for the specific task of carrying out a preliminary evaluation of the Program and to develop a plan to improve it, in order to streamline its operations and make the most of its resources for the benefit of Bank employees.

B. In the course of July, August, and September 1986, Complainant filled the position of Advisor to the Program for Personal Development, for which he had been hired.

C. During that period, he performed professional duties on his own initiative, with the acquiescence of Mrs. Martha Salinas de Ortiz Mena, Director of PPD, in addition to his coordination work.

D. On 30 September 1986, Mr. Nelson Ocampo, Deputy Manager, Human Resources Subdepartment (HUR) advised Complainant that he was being transferred to the Protocol and Conferences Sector of the Secretariat Department, under the immediate supervision of Mr. Alfredo Henares. Complainant complied with this order while voicing his disagreement.

E. On reporting to Mr. Henares, the latter told Complainant that Protocol and Conferences had no available openings, in addition to being an area for which Complainant was not qualified. He told him that he would do his best to bring about a satisfactory solution, to which end he would speak to Mr. Sánchez Masi, the Administrative Manager, with the view to securing for Complainant a position in HUR, and that in the meantime, Complainant could stay in the Protocol and Conferences Sector.

F. The employment contract, the only document of a legal nature ever signed by the Bank and Complainant, was never altered, amended, replaced or supplemented, neither in writing nor orally.

G. From 30 September 1986 to 30 June 1987, at the request of Mr. Henares who served as Secretary and Coordinator of the Cultural Activities Committee (CAC), Complainant performed duties in the area of the Bank's cultural activities, while remaining without specifically defined duties. All of this caused him anxiety and tension with physiological manifestations, to the point of causing him injury.

H. In late October 1986, Mr. Henares told Complainant that he did not believe it was possible to secure for him a position at HUR, for which reason he advised Complainant to begin a job search, and by the middle or the end of November 1986, he told Complainant that the IDB intended to put an end to his contract.

I. On 11 February 1987, Mr. Luis de Lucio, an official of the Human Resources Subdepartment, advised Complainant that Management was interested in knowing Complainant's position regarding his contract. Complainant stated that his position was the same he had made known on 30 September 1986 to Mr. Nelson Ocampo, and then to Mr. Henares, namely, that he disagreed with Management's decision to transfer him and that, in his view, the proper course was to pay him the full amount of gross salary and benefits, and to let him go. He also explained the personal problems that this whole situation was causing him.

J. On 21 May 1987 Complainant wrote to Mr. Alfredo Henares, Chief of the Protocol and Conferences Sector, asking for compensation in the amount of two hundred and fifty thousand dollars (US\$ 250,000.00) for the mental anguish brought about by his transfer. Mr. Henares replied with a letter dated 5 June 1987 rejecting the charges and reiterating to Complainant that his contract would expire on 30 June 1987.

K. On 9 June 1987 Complainant addressed himself to Mr. Nelson Ocampo, HUR Deputy Manager, and on 24 June 1987 to Mr. Luis A. Sánchez Masi, Administrative Manager, asking for the same compensation mentioned above. Both, Mr. Ocampo and Mr. Sánchez Masi rejected Complainant's claims.

L. On 10 August 1987 Complainant took the matter to the Conciliation Committee. The Committee found that there was no room for conciliation and put an end to its role in the matter.

3. In support of his petitions, Complainant makes the following legal arguments:

A. The contract signed by the Bank and Complainant was for a term of twelve months. The Guidelines for the Hiring of Temporary Staff define "temporary employment" by providing that the Bank enters to individual contracts ... for the term required to complete the task. These employees carry out tasks that cannot be performed by regular Bank employees owing to human resources limitations, the nature of the work, the time or the skills required.

B. Personnel Policy No. 325 stipulates that "... the Bank requires all of its employees to conform to the rules and regulations of the Bank and to observe strictly the promise of service to which they subscribe ...". This obligation cannot be one-sided but must be bilateral, both parties being bound to discharge and require it. The employee has the right to require the Bank to fulfill this duty as well.

C. All personnel transfers, even those carried out to meet service needs, must be legally consistent with the terms of the employment contract that specifies the position to be filled and its duties.

The Bank and Complainant signed a contract for professional services which clearly specifies the title of the position and the duties to be performed. This contract must be distinguished from those that:

- (i) Do not specify the title and the duties of the position to be filled by the employee or do not specify the nature of the duties, tasks or work to be performed.
- (ii) Refer to well-defined duties in a particular position or job of which there are several within the Bank.

This was not the case of Complainant. Complainant was hired to perform a preliminary evaluation and improvement of the Program for Personal Development in order to streamline its operations and make the most out of its resources for the benefit of the IDB staff, in the position of "Advisor" attached to the supervisory unit of PPD.

A transfer of Complainant to meet service needs could have been ordered out without breach of the employment contract only by transferring him to another "Advisor" position with the duties mentioned. In other words, it would have required the existence within the Bank of two or more advisory positions with the same duties, which is not the case. Neither the title of the position filled by Complainant in the Protocol and Conferences Sector, nor—still more importantly—the nature of the duties required of him in that Department of the Bank is consistent with the employment contract signed on 25 June 1986.

D. To minimize injury, Complainant did not object to the transfer in October or in November 1986. However, he did object in May 1987, precisely because Complainant learned that the Bank intended to put an end to his employment despite the existence of the employment contract. Complainant decided to minimize the financial injury by

delaying the filing of his complaint. Had he challenged the transfer, he would have been dismissed, thereby suffering a worst injury than by the mere transfer.

E. Cancelling the transfer is only one of the remedies available when a transfer is irregular. The other is compensation. In this case, cancelling the transfer is not a remedy because the employment contract has already expired. If the breach of contract caused injury, the law universally recognizes a cause of action to claim compensation. The damages and their amounts are points to be determined, but the right to compensation stemming from a breach of contract is undeniable.

4. The Bank answered the complaint and requested dismissal of Complainant's claims for damages and emotional injuries.

5. In support of its petitions, the Bank described the facts as follows:

A. The first contacts by Bank officials with Complainant took place in early 1986 when Mr. Alfredo Henares, Chief of Protocol and an old friend of Mr. Navarro Salgado, recommended him for a position in the Program for Personal Development. Later, Complainant was interviewed by Mrs. Ortiz Mena, Director of PPD, and by Messrs. Ocampo and Sánchez Masi of the Administrative Department, who discussed with him a temporary position.

B. On 29 May 1986, by telex, the Bank made to Complainant an employment offer for one year. Complainant accepted by letter of 2 June 1986. On 25 June 1986 Complainant signed an employment contract for the period 1 July 1986 through 30 June 1987.

C. On 1 July 1986, Complainant took up his new duties at PPD. From the outset, his attitude and behavior caused problems. He demanded that everyone should refer to him as "Doctor". He threatened to lower the performance review ratings of PPD administrative employees, and even to fire them, if they did not carry out his requests, which included the running of personal errands. He asked to be kept informed of all their activities, even those carried out on direct orders from the Director and other advisors. He also demanded that the staff refrain from speaking in private with Father Somoza, who had served as PPD advisor for nearly six years. When it was time to consider PPD's budget proposal for 1987, Complainant demanded that Father Somoza be excluded from the discussion but Mrs. Ortiz Mena disagreed. In September 1986 Complainant demanded that an administrative employee of PPD turn over to him a sealed envelope being sent by the Director to Mr. Henares, the contents of which he proceeded to examine, taking out and discarding several documents, after which he inserted the remaining documents in the envelope and sent it to Mr. Henares.

D. One and a half months after joining the unit, Complainant proposed a radical reorganization of the duties of the PPD staff. In his proposal, he reclassified the position of administrative officer to "administrative-technical coordinator" with duties comprising total control of PPD activities. He sought to gain for himself the position of "administrative-technical coordinator". This new description coincided with the new permanent position included by Complainant in his proposed budget for 1987.

E. The Director of PPD, Mrs. Ortiz Mena, on several occasions reported her dissatisfaction to Complainant. She asked for explanations regarding his threats to the staff, the opening of her mail, his countermanding the specific orders she had given the

staff to report directly to her. When confronted on this matter, he always apologized, but never changed his behavior.

F. In late September, the Director concluded that Complainant was more interested in promoting his personal interest than in cooperating with the operations of PPD or helping Bank employees, whereupon she called Mr. Henares, who had recommended Complainant, as well as Messrs. Ocampo and Sánchez Masi, and informed them that she was unable to place any confidence in either the loyalty or the discretion of Complainant and that, consequently, she felt Complainant should not, indeed, could not continue working in PPD. She asked them to do whatever was necessary to remove him from the Program.

G. On behalf of Complainant, Mr. Henares asked Messrs. Ocampo and Sánchez Masi to consider the possibility of locating a position in the Human Resources Subdepartment for Complainant. Mr. Ocampo and Sánchez Masi wanted to put an end to Complainant's contract by giving him thirty days notice in keeping with the terms of his contract. On the other hand, Mr. Henares, being a friend of Complainant spoke with Mrs. Ortiz Mena and she committed her support to settle the matter through other arrangements.

H. Mr. Henares spoke with Messrs. Ocampo and Sánchez Masi and explained that he needed help in Protocol and believed that Complainant could fill this need. Mr. Henares met with Complainant on 29 September 1986 and they discussed the transfer. Complainant told Mr. Henares that he would be delighted to work in Protocol. He merely wanted, he also said, to be allowed to work in the Bank until his contract would expire and to collect his full salary. Thus, Mr. Ocampo and Sánchez Masi agreed to let Complainant work in Protocol until his contract ran out. In this, they saw a temporary solution that would give Complainant the time he needed to find other work before his contract with IDB expired.

I. On 30 September 1986, Mr. Ocampo called Complainant to his office and formally notified him that he would be transferred to Protocol immediately and should report to the office of Mr. Henares. Complainant met with Mr. Henares, who welcomed him and told him that there was much work to be done and that his arrival was very welcomed. Mr. Henares knew that Complainant had over the years developed an interest and knowledge in the area of the management of artwork. Indeed, from March 1981 to 1983, Complainant had served as Director of External Resources of the Puerto Rican Culture Institute. Complainant showed himself delighted with these new duties and began immediately to work in the office adjacent to that of Mr. Henares.

J. In February 1987, because Mrs. Ortiz Mena wanted to hire some employees for PPD and her budget continued to be tied-up with Complainant's contract, Mr. de Lucio, Chief of the Performance Evaluation Section of Personnel and the person who normally dealt with termination of temporary employees, interviewed Complainant to ascertain the latter's plan in regard to Bank employment. At the meeting with Mr. de Lucio, Complainant said he had no intention of leaving before completing the term of his contract and that he was ready to file a complaint if the contract was terminated before it ran out. Management, in line with the arrangements made in September 1986 and in view of the ability and willingness of Complainant to perform his new duties and the need to complete the work he had begun for the CAC, decided to allow the contract to run for the remaining four months.

K. Complainant performed his CAC duties with enthusiasm and produced numerous reports and memoranda of which three are the most important: "Report by the Cultural Activities Committee 1983-86" "Proposed Amendments to Documents Governing the Cultural Activities of the IDB" and the reports on the inventory and registration of IDB artwork and decorations. Complainant continued to work in Protocol until his contract ran out.

L. During his stay in Protocol, Complainant quickly made friends. He attended all staff parties and took part in the social activities of his co-workers. At that time, Mr. Henares saw Complainant and other common friends at various social gatherings outside the Bank, and Complainant did not appear to be depressed or taciturn. At work, as well as socially, Complainant never gave any sign of depression or emotional disturbance.

M. On 4 May 1987 Complainant was sent the regular notice of contract expiration. At roughly the same time, Complainant asked Mr. Ocampo for a three-month extension of his contract in order to complete the project on which he was then working. Mr. Ocampo and Henares informed Complainant that there were no funds available for the extension. Complainant also asked Mr. Ocampo about other vacancies within the Bank and was told that there were no adequate openings available.

N. On 21 May 1987 Complainant wrote to the Executive Vice President about his claim for compensation. His complaint was channelled through Mr. Henares, who received it on 1 June 1987.

6. The Bank bases its petitions on the following legal rules and principles:

A. The following IDB policies and regulations are applicable in this case: Personnel Policies 321, 325, 326, and 328; Sections OR-220 and OR-306 of the Organization Manual; and the employment contract between the Bank and Complainant, dated 25 June 1986 (signed on 26 June 1986).

B. Removal of Complainant from PPD was not a breach of the essential terms and conditions of Complainant's temporary contract.

(i) The Bank had the right and the duty to remove Complainant from PPD by transferring him or terminating his contract.

a. Complainant was hired as a temporary employee for the term of one year, in accordance with the Hiring Guidelines for Temporary Staff. His contract was for a fixed term of one year and not for the duration of a specified particular task. He was hired as an advisor to PPD in order to help the unit's Director to pre-evaluate and improve PPD with a view to bettering its services and making the most of its resources for the benefit of IDB employees. From the first day he was interviewed for the position, Complainant was aware that he would be a subordinate of the Director of PPD, that his appointment was strictly temporary and that its success depended to a high degree on the ability he displayed in performing, to the satisfaction of the Director, the duties that PPD would assign to him.

b. IDB policies are silent on the transfer of temporary employees because they are hired for a limited time and for a specific purpose, and

under normal circumstances they are not considered for transfers. Personnel Policy No. 328 concerning rotation applies only to the permanent staff. Consequently, there are no clear rules on how to effect transfers of temporary staff. In addition, it was necessary to continue paying Complainant's salary out of funds from PPD's budget authorized for his contract. Accordingly, the amendment of Complainant's contract came about as a matter of fact and was carried out through oral communications ratified by the actions of the parties.

c. Because he was unqualified for the specific job for which he was hired and there was no equivalent function within the Bank, Management had the option of putting an end to Complainant's contract or of offering him other work for the remainder of his contract. In choosing the latter, the Bank elected to proceed in the manner most favorable to Complainant.

(ii) Complainant accepted and ratified the transfer.

a. Complainant could have refused the transfer, put an end to his contract by giving thirty days notice, or, lastly, challenge the decision of the Director of PPD to remove him from the Program. But Complainant did none of these three things and instead, as he had agreed with Mr. Henares, accepted his new work.

b. Complainant met with Mr. Ocampo, who gave him formal notice of his transfer to PPD, and Mr. Henares assigned him his new duties in Protocol. These new duties were to draw up an inventory of the artwork and decorations owned by the Bank, to prepare a proposal to amend the documents governing the cultural activities of the Bank and a report of CAC activities for 1983-86. Complainant showed himself delighted with the idea and set to work with great enthusiasm. The salary and benefits provided for in his contract were fully paid to him and he never complained about the transfer either to Mr. Henares or to Messrs. Ocampo and Sánchez Masi. For eight months he reported for work and worked diligently on CAC activities. He accepted full payment of his earnings and benefits until the end of his contract. He never told his supervisors that he felt professionally or emotionally hurt.

(iii) The Bank chose not to put an end to Complainant's contract and it did not conspire to force his resignation. The Bank does not deny that on more than one occasion it considered the option, to which it was entitled, of putting an end to the contract of Complainant. But it does deny any plan to force or provoke Complainant's resignation.

C. In the way of this complaint stand the procedural deadlines and the principle of estoppel by laches.

(i) Complainant received and accepted the specific notice of his transfer. His transfer from PPD to Protocol took place on 30 September 1986. This decision was communicated to him expressly and specifically by Mr. Ocampo and his new duties were explained to him by Mr. Henares.

(ii) Complainant failed to file a complaint within the procedural deadline set for that purpose. Personnel Policy No. 326(E) provides that "a matter shall be presented to the (Conciliation) Committee within 90 working days of notification to the employee of the decision which is being challenged, provided that the administrative remedies ... are exhausted within the 90 day period." The decision that Complainant seeks to challenge is his transfer to Protocol, which took place on 30 September 1986. Complainant did not formally complain about the transfer until 21 May 1987, when the 90-day period had long run out.

(iii) The delay by Complainant in filing his claim eliminated any possibility of correction or defense on the part of Management, thereby setting in motion the principle of estoppel by laches. The time frame set out in Personnel Policy No. 326 is not arbitrary. It is designed to provide sufficient time to file complaints while preserving a certain degree of stability and legal certainty as well as allowing for the possibility that Management may take practical and reasonable corrective steps. Accordingly, beyond the failure to file within the prescribed time, Complainant's delay effectively deprived the Bank of the opportunity to change or reconsider its actions (had it been appropriate) or to stand by the decision challenged, within the bounds prescribed by the contract between the parties.

D. Complainant was not injured by his transfer to the Protocol and Conference Sector.

(i) Complainant cannot claim to have suffered a financial injury, since all salary and benefits provided for under his employment contract were paid to him in full. There has been no injury whatever affecting the reputation of Complainant or his ability to find employment, inasmuch as the Bank has not made known its evaluation of Complainant's performance.

(ii) The only injuries Complainant claims to have suffered, and for which he is asking two hundred and fifty thousand dollars (US\$ 250,000.00) in damages, are emotional injuries whose existence, causation by actions of the Bank, and monetary value, he fails to prove. The only evidence Complainant puts forward with regard to the alleged emotional injury is a letter from Dr. Juan Buono, dated 19 January 1988. This letter is untimely and was written by a friend and roommate who happens to be psychiatrist. Dr. Buono's letter offers no evidence as to his own expert qualifications, his knowledge of the psychological clinical history of Mr. Navarro Salgado, or the absence of bias. Complainant has offered no evidence in support of the monetary value he assigns to the alleged injury.

7. In his observations on the Answer to the Complaint, the claimant laid special stress of the following:

A. The only person who mentioned a term of contract during the interview process was Mr. Ocampo. At no time was there any discussion or factors that might have a bearing on the success of Complainant within the program, or on his professional competence. Complainant never expressed interest in a long-term appointment, but only in receiving a new employment offer at the end of the year, because it was his view that a year would not be sufficient to meet the needs of PPD.

B. Specifically rejecting the mention of attitudes and behavior said to have caused problems on his part from the moment he took up his duties as PPD Advisor until 1 July

1986. Proof of the opposite is that he was the only person left in charge of the Program in an official capacity while Mrs. Ortiz Mena travelled in Europe in July 1986. In addition:

- (i) It is not true that he demanded that everyone address him as Doctor. The fact that Mrs. Ortiz Mena and Messrs. Ocampo and Henares called him Doctor does not mean that he required them to do so.
- (ii) It is not true that he threatened to demote or fire Messrs. Gustavo Weikert and Francisco Cabrera if they did not carry out his requests.
- (iii) It is not true that he required Messrs. Weikert and Cabrera to buy his lunch; on the contrary, all PPD staff, including Complainant, took turns performing this task.
- (iv) It is not true that he required the above gentlemen to provide him with books for his personal use; instead, Complainant let the Program use his own personal books.
- (v) It is not true that Complainant required the staff of the Unit to refrain from speaking in private with Father Somoza.
- (vi) It is not true that Complainant asked that Father Somoza be excluded from the discussion of PPD's budget for 1987.
- (vii) As for the correspondence of Mrs. Ortiz Mena which he is accused of opening, he must make it clear that: all non-personal outgoing mail was always checked by Complainant to make sure that it was correctly and fully sent out, as Mrs. Ortiz Mena had instructed him to do. The reason why he opened the envelope was that Mr. Cabrera told him that the information was confidential, whereupon it struck him as inadequate to have it sent out in an inter-office envelope kept shut by a string. Without requiring anything from Mr. Cabrera, but simply as part of the normal office procedure, a xerox copy of the letter was made, no document was removed or discarded, and the papers were placed in a manila envelope sealed with glue.
- (viii) It was with authorization from Mrs. Ortiz Mena that Complainant gave Mr. Dickerson, Chief of the IDB Cafeteria Service, the telephone number of Mrs. Ortiz Mena's house, without Complainant knowing that it was private.
- (ix) He was never evaluated in accordance with the procedure established by the Bank for professional staff members; nor was he ever given, as called for by the contract, the evaluation standards. His performance was never observed or objectively followed, nor was there any discussion with him about improving or maintaining the expected performance, nor was there ever any preparation of a performance review form, nor lastly, were the results of any such evaluation ever discussed with him.
- (x) He never filled out a BMA-8 form to request payment for overtime, such payments are not made to professional staff.
- (xi) He never filled out a DPA-12(3) form requesting travel authorization. It was Mrs. Ortiz Mena who thought that Complainant was the right candidate to

travel to the Field Offices because he was professionally qualified and was unmarried.

(xii) Mrs. Ortiz Mena never specifically advised Complainant of her dissatisfaction with his performance, either orally or in writing.

C. Complainant did not agree with his transfer to Protocol and Conferences. On the contrary, he told Messrs. Ocampo and Henares that he should be compensated for the months remaining under his contract and then let go, because Protocol was an area for which he was not trained.

D. In Protocol he was assigned a secretarial station (SW-1250) as his work station, which runs contrary to the applicable IDB rules, under which, professional staff must be assigned a private office.

E. He did see Mrs. Ortiz Mena in the hallways of the Bank, and if she found him to be in "good spirits" it was because he has good manners.

F. He did explore the possibility of long-term employment in the Bank, just as he did elsewhere in the Washington, D.C. area.

G. Complainant never asked Mrs. Nelly Alvarez to give him all work related to the CAC. This was done on the initiative of Mr. Henares. In addition, Complainant never had any interest in a possible position as CAC Coordinator.

H. The mental anguish suffered by Complainant always displayed, though the symptoms were severe, intra-personal and never inter-personal manifestations, so that it is possible that those around him were not aware of his condition.

I. By transferring Complainant and changing the duties to be performed, the Bank disregarded one of the essential elements of the contract it had signed with him. The agreed duties to be performed were an essential element of the contract. Indeed:

(i) Although the draft contract described them vaguely as "those to be indicated by the supervisory unit," the contract itself specified "evaluation and improvement of the Program for Personal Development in order to better develop its services and make the most of its resources for the benefit of the IDB staff."

(ii) Mr. Luis Sánchez Masi justifies the transfer by reminding Complainant that Bank Management retains at all times the ability to make organizational decisions and exercises it with the fluidity required by circumstances. Transfer of Complainant to the Protocol and Conferences Section of the Secretariat Department was brought about on ascertaining that Complainant could render adequate services consistent with the activities then required by that Section.

J. Complainant did not file a claim prior to 29 December 1986 because the Bank considered firing him, and in this way he avoided worse injury. The time limitation argued by the Bank is not absolute but qualified, and this is one such case.

K. Complainant produced an opinion from an expert physician showing that he did suffer injury as a result of Bank actions, which evidence will be enlarged on when the procedural time arrives to produce evidence.

8. In its observations, the Bank laid special emphasis on the following:
- A. The Complainant's observations concerning the facts set out in the Bank's Answer are devoid of substantial relevant content and do not prove his allegations.
 - B. In his Observations, Complainant acknowledges the following:
 - (i) Having behaved in a fully normal fashion throughout the period in which he claims to have been so deeply afflicted by the actions of the Bank, which is inconsistent not only with the emotional injury he claims to have suffered, but also with his statement concerning his social withdrawal for long periods and his having suffered extreme fatigue.
 - (ii) Having accepted the transfer without lodging any complaint, which left Bank Management unaware that there was a problem that might be corrected.
 - C. The Complainant's Observations introduced irrelevant and repetitive information often set in voluminous attachments that have no bearing whatever on the complaint at hand.
 - D. Complainant does not refute the essential facts set out by the Bank, namely:
 - (i) Mrs. Ortiz Mena, as Director of PPD, was dissatisfied with the services of Complainant and she let him know of her dissatisfaction.
 - (ii) In view of Mrs. Ortiz Mena's dissatisfaction and in line with the terms of the contract, the Bank was entitled to put an end to the contract by giving thirty-day notice.
 - (iii) The Bank, thanks to the efforts of Mr. Henares, located other work for Mr. Navarro Salgado in the Protocol Section.
 - (iv) Complainant was transferred to Protocol with his consent. There he was assigned duties related to the CAC, which he performed in a satisfactory fashion until his contract ran out, and for which he received the full amount of agreed salary and benefits.
 - (v) While he worked in Protocol, Complainant suffered no injury whatever.
 - E. Complainant wants his case to be an exception to the principle of negative prescription but offers no valid reason for that exception. If Mr. Navarro Salgado felt he was the object of an injustice, he could have raised his claim immediately and availed himself of the protective powers of the Conciliation Committee to suspend any controversial action under Personnel Policy No. 326.
 - F. Complainant offers no proof whatever of the injury he claims to have suffered, except his own expert testimony and the opinion of a specialist for whom no evidence is offered of:
 - (i) His qualifications as an expert.
 - (ii) His absence of bias.

(iii) His adequate knowledge of the alleged condition of Complainant.

9. The parties produced abundant documentary evidence: contracts, resolutions, memoranda, draft letters, internal correspondence, applications, notes, routing slips, forms, rules and policies relating to the hiring, performance, transfer and claims' of Complainant, Mr. Gerardo Navarro Salgado.

10. When production of evidence was called for, only the Bank offered the testimony of witnesses. The President of the Tribunal accepted the evidence proposed and commissioned the Executive Secretary to receive it. He also authorized this testimony to be given in the form of sworn statements in writing. Consequently, the depositions of the witnesses Martha S. de Ortiz Mena, Nelson Ocampo, Nelly Alvarez, Luis Sánchez Masi, Alfredo Henares, Francisco Cabrera and Gustavo Weikert, all proposed by the Bank, were taken by means of written sworn statements.

11. Long after expiration of the deadline set by the rules, Complainant asked to personally question Mrs. Martha S. de Ortiz Mena, Mr. Nelson Ocampo, Ms. Nelly Alvarez and any other witness for the Bank. Complainant based this petition on the following:

A. Admission of the written statements by Mrs. Salinas de Ortiz Mena, Mr. Ocampo and Ms. Alvarez without acknowledging his right to examine the witnesses runs contrary to the principles governing all adversarial proceedings.

B. Statements made by Mrs. Ortiz Mena and the other witnesses, as well as their facial and corporal expressions in the presence of the Tribunal or its representative, would help the judges to decide whether they are true, only partly true or, notwithstanding the prestige of the witnesses, false. Such observations can be made only by examination of the witnesses by the parties.

C. There are no disputed facts in this case, except for the statements connected with the witnesses proposed by the Bank. All other facts, including the injury to Complainant, are proven by documents found in the record. That is why Complainant offered to produce no evidence within the regulatory deadline, as it is not necessary to prove facts that are acknowledged or unchallenged.

12. The Bank asked that Complainant's request to examine the witnesses be denied. The reason stated is that Complainant's request to questions the witnesses Martha S. de Ortiz Mena, Mr. Nelson Ocampo and Ms. Nelly Alvarez is untimely and improper because:

A. Ever since the Bank answered the complaint, Complainant had knowledge of the existence and the content of the written statements signed by Mrs. Ortiz Mena, as well as of the depositions of Mr. Ocampo and Ms. Alvarez, submitted by the Bank. Nevertheless, Complainant did not ask the Tribunal to examine these witnesses within the time frame established for that purpose under Article 20 of the Rules of the Administrative Tribunal.

B. The statements of witnesses presented by the Bank are described by Complainant as opinions and conjectures, which is ambiguous and provides no basis to assess their admissibility. Besides, opinions are relevant and admissible to show the state of mind of the witnesses, which in turn makes it possible to determine whether they exercised, in a proper manner, the administrative discretion embodied in their authority by deciding to transfer Complainant from PPD to Protocol.

C. The burden of proof rests on Complainant. He must at least show that he has a credible *prima facie* case. In this instance, Complainant has offered no evidence whatever to warrant shifting the burden of proof to the Bank. Complainant has not shown that he disagreed with the transfer from PPD to Protocol, or proven that he suffered emotional injury as a result of that transfer. Complainant's total failure to present such evidence within the time set for that purpose should alone and fully discharge the Bank from the obligation to produce any evidence. The opposite would mean placing an unreasonable burden on the Bank by calling on it to present affirmative defenses against any accusations leveled at it, however groundless they may be.

D. The weighing of the evidence, testimonial or otherwise, is a matter for the judge, in this case the Tribunal. That is why the Tribunal must ultimately decide if the personal appearance of witnesses is needed, in addition to their written statements. As Complainant offered no evidence requiring refutation, and as the Bank has produced a number of corroborating pieces of evidence in the form of documents and written and sworn statements, appearance by the witnesses in person would be redundant.

13. Complainant insisted on his request to personally question the witnesses proposed by the Bank, arguing as follows:

A. The employment contract, the duties for which Complainant was hired, the fact of the transfer and its date, which are basically the facts of the case, are not disputed. The question as to whether or not Complainant accepted the transfer is raised by the Respondent, who must therefore prove it.

B. Examination by the Plaintiff of a witness for the Defendant is not evidence for the Plaintiff but a procedure universally followed in order to ascertain the truth and correctness of the facts and the credibility or untruthfulness of the deponent. The credibility of each of the witnesses whose written statements are part of the record must be evaluated by the judge after each of the witnesses is examined by both parties.

C. When a piece of documentary evidence is submitted with a complaint, an answer to a complaint, a replication or a rejoinder, without its authenticity or relevance being questioned, it is admitted as evidence without it being necessary to specifically request that it be admitted as such.

D. In a labor relations case such as this one, the principle is recognized that it is employer who bears the burden of proof. In our particular case this means proving the appropriateness of the transfer and its consistency with the employment contract signed by the parties. At worst, Complainant is obliged only to prove the employment contract, its terms, the transfer, its date, the position and duties to which he was transferred, and why he did not complain sooner. But in the instant case, all of these points have been conceded.

E. The burden of proof does not rest on Complainant to show that he did not threaten dismissals, that he did not demand to be addressed as Doctor, that he was not interested in attending meetings as Bank representative, that he did not ask for special favors, that he did not take time off for personal matters and that he did not countermand Mrs. Ortiz Mena's orders. Proof of all these allegations is a matter for the Bank, which has made them.

F. Consequently, the fifteen-day period established in Article 20(2) of the Rules does not apply to Complainant's request.

14. The President of the Tribunal decided to deny, on grounds of untimeliness, the request made by Complainant.

15. The evidence collected points to the following proven facts:

A. Under the contract signed on 25 June 1986 the Bank and Complainant agreed that the latter would provide professional services as Psychologist for one year as from 1 July 1986. The duties to be performed are defined by the contract as pre-evaluation and improvement of the Program for Personal Development, in order to improve its operations and the use of its resources for the benefit of Bank employees. Under the contract, either of the parties could terminate it by simply giving thirty days advance notice.

B. On 1 July 1986 Complainant began to work for PPD, where he generated a considerable amount of ideas, programs and documents.

C. Professionally, relations between Complainant and the Director of PPD soon became difficult, and the Director asked the Administrative Department to remove Complainant from the Program she headed.

D. On 30 September 1986 Complainant was transferred to the Protocol and Conferences Section, where he was assigned a series of tasks related to the Cultural Activities Committee. Complainant performed the CAC work efficiently, without it becoming apparent that he was suffering any emotional injury.

E. In February 1987, Mr. Luis de Lucio, Chief of the Performance Review Section, interviewed Complainant to ascertain his position regarding his employment contract. Complainant told Mr. de Lucio that he hoped the Bank would reconsider his transfer or, if not, would pay him the full amount of salaries and benefits agreed over the life of the contract and then let him go.

F. On 4 May 1987 Mr. de Lucio corroborated to Complainant that on 30 June 1987 his contract would expire and would not be renewed.

G. On 21 May 1987 Complainant formally lodged a written administrative complaint claiming damages, which culminates in these proceedings.

H. Complainant worked for the Bank until his contract expired, and received the full amount of compensation agreed on.

CONCLUSIONS:

16. The facts and arguments before the Tribunal present the following issues:

A. Whether the complaint is barred because it was not brought before the Conciliation Committee within the time specified in Policy 326 (E) (1), that is to say, within ninety working days of notification to the employee of the decision which is being challenged.

B. Whether the transfer of Complainant constitutes a breach of his contract of employment giving rise to the damages claimed.

17. On the first issue, it is not disputed that the complaint was not brought to the Conciliation Committee within the time limits specified. The Complainant seeks to excuse his failure to bring a timely complaint by arguing that if he had done so he would have run the risk of his employment being terminated on thirty days notice, thus causing him greater financial injury.

18. The Tribunal has the power in very exceptional cases to admit a complaint even though it was filed after the expiration of the time limit, Article 15, Section 4 of the Rules. The argument advanced by the Complainant shows that he was aware of the time limits but freely chose not to comply with them in order, as he says, to avoid a potential notice of termination of his employment contract.

19. Without considering whether a termination, if in fact it had been resorted to, would have violated the Complainant's rights, it is clear that his failure to file a timely complaint was a matter of his own free choice and that he was not impeded from doing so either by the Bank or by any other legally relevant considerations (See, e.g., Judgment Case No. 4, Andrew James Burey vs. IDB, 18 April 1985).

20. The Tribunal's finding regarding the first issue disposes of the instant claim. Nevertheless the Tribunal considers it worth noting that, as far as the second issue is concerned, Complainant by performing the duties of his new assignment without objection, at least none that was made known to or unequivocally reported to the Bank, must be regarded as having consented to the alteration of the terms of his contract and thus cannot validly claim a breach of his contract of employment.

ACCORDINGLY:

The Tribunal unanimously decides to dismiss the complaint.

Washington, D.C., 5 May 1989.

Agustín Gordillo.

Kenneth G. Smith.

Ildélio Martins.

Alfredo Martínez-Moreno.

Baltasar Cavazos-Flores.

Thomas Buergenthal.

Luzius Wildhaber.

Hernán Sáenz-Jiménez
Executive Secretary.