

JUDGMENT CASE NO. 24

ULRIC FERDINAND THOMPSON vs. IDB

The Inter-American Development Bank Administrative Tribunal,

Composed of the Honorable Kenneth G. Smith, President, Doctor Alfredo Martínez-Moreno, Vice President, Doctor Ildélio Martins, Doctor Baltasar Cavazos-Flores, the Honorable Thomas Buerghenthal, the Honorable Luzius Wildhaber, and Doctor Guillermo López-Guerra, considered the case following the procedures established in Articles 20, 21, 22, and 23 of the Rules of Procedure of the Tribunal.

Complainant was represented by his attorney, Doctor Robert D. Sloan. The Bank was represented by Bernadete Buchsbaum, Esq. of the Office of the General Counsel. In addition to the written submissions, the Executive Secretary was commissioned with the examination of witnesses and experts, and on 7 May, 1990 the Tribunal heard oral arguments.

WHEREAS:

I. On 16 November 1989 Mr. Ulric Ferdinand Thompson, a Venezuelan citizen employed as an auditor in the Office of the Auditor General of the IDB, filed a complaint with the Administrative Tribunal of the IDB, petitioning for:

A. A finding by the Tribunal that he has been discriminated against in the granting of promotions and the assignment of work within the Office of the Auditor General of the Bank (AUG), as a result of which he has suffered emotionally, financially and professionally;

B. Advancement by at least one grade, from approximately the same time frame when other AUG auditors were promoted, his salary, benefits and Staff Retirement payments being adjusted accordingly and retroactively;

C. An upgrading of his work assignments from the menial tasks he now performs;

D. Compensation in the amount of US\$ 130,000.00 (an amount equivalent to twice his annual salary) for the mental anguish and extreme emotional distress he suffered on account of the Bank's unfair or discriminatory decisions and actions, or, alternatively, if the President of the Bank should exercise the option granted him under Article IX (1) of the Statute of the Tribunal, an amount of compensation to be fixed at the maximum allowable under that paragraph.

II. Complainant does not base the Complaint upon non-observance of the appointment contract, clauses in the Agreement Establishing the Bank, or the Rules and Regulations, but simply on flagrant discrimination in promotion practices.

A. He argues that despite his strong academic credentials and experience, his good record and evaluations, the fact that he has never been reprimanded for failing to meet AUG standards, and the promise by his first supervisor that he would be promoted to

Grade IV following confirmation, he has never been promoted. The six other AUG Auditors, some of whom joined the Bank six years after he did and have less external or internal experience and less education, have all been promoted, some once, some twice or three times.

B. Complainant alleges that when he was hired, his supervisor told him the position he occupied would be elevated to a Grade IV once he was confirmed. In 1976, when he inquired about the promised grade change, he was told by the same supervisor that there were no higher grades assigned to AUG and that the Vacancy Allocation Committee (VAC) controlled all the positions. However, his explanation notwithstanding, the following hirings and promotions subsequently took place within AUG:

1. On 9 September 1980, Mr. Carl Calhoon, an Electronic Data Processing (EDP) auditor, was hired at Grade V. After his one year probation he was promoted to Grade IV. When Complainant mentioned this to the Auditor General, Mr. William Taylor, he was informed that the position was originally a Grade IV but Mr. Calhoon had been hired as a Grade V, and because "he proved to be excellent" he had been given the Grade IV. Mr. Calhoon was recently promoted to a Grade III.

2. On 11 November 1980 Mr. Jorge Kulionis was hired at Grade VI. After two years he was promoted to Grade V and during the first quarter of 1988 he was again promoted to a Grade IV.

3. Sometime in late 1980, Mrs. Ana Knopf, an investigator, joined the AUG staff. She transferred from the Finance Office to AUG with Grade V, and in the first quarter of 1988 was promoted to Grade IV.

4. In 1973 Mr. Andrew Munch was hired at Grade V. About two years later he was promoted to Grade IV. In 1987 he was again promoted to Grade III, and was then transferred to the Finance Office in April 1988.

5. Messrs. Jorge Liacuris and Ademar Toro were both promoted in 1986 from Grade IV and are now Grade III.

C. In his 15 years with AUG, Complainant has never once been given an audit to perform alone, even though he requested it many times. Furthermore, whereas all other Auditors report to, and are evaluated directly by the Auditor General in any one year, Complainant is evaluated by at least three other professionals on the staff, as he is the only one assigned to work under at least three people. Each must evaluate his performance with a view to a merit increase. Even under these circumstances, however, his overall evaluations have always been "at or above the norm," as shown by his evaluations.

D. The Conciliation Committee found that Complainant possesses the requisite academic training, experience and audit knowledge, and that his evaluations have always been "at or above the norm." From his assigned tasks and performance reviews, the Committee furthermore concluded, that he had not always had from his supervisors the opportunity to demonstrate the outstanding job skills that would have made him eligible for promotion. This attitude, according to the Committee, might not be evidence of explicit acts of discrimination against him, but did show that there were certain differences as to the level of supervision and job assignments in relation to his peers, which resulted

in situations of apparent disadvantage to the advancement of his professional career. Or, as stated in a Committee memo to Management, in the 14 years that Complainant spent in AUG he had not enjoyed the promotion opportunities afforded to several of his colleagues with less academic training and professional experience. Accordingly, the Committee recommended transferring Complainant to a Grade IV position in another Department, while preserving his current Grade V until a six-month evaluation of his performance should determine whether his work in that Grade IV was adequate, in which case he would be given the promotion.

III. The Bank answered the Complaint, asking the Tribunal to reject any and all of the claims set forth in the Complaint.

IV. In support of its petition the Bank advanced the following legal arguments:

A. Complainant was not entitled to a promotion. Promotions are personnel actions which modify salaries beyond the employee's current grade, which often involve a comparative process, and which depend on several factors such as the grade distribution within a certain department, the existence of a vacancy, and Management recommendations. They also imply that a higher standard and level of performance will thereafter be expected of the employee. In other words, promotions are not automatic. An employee may be eligible to be considered for promotion and still not be entitled to it.

In order to be eligible for a promotion the employee must meet all the criteria established in the approved job description, there must be a vacant position available, and the Manager of the Department must support the promotion. If more than one employee in a Department is eligible for promotion, and there are fewer grades available than there are eligible candidates, the Manager of the Department has the authority to determine who is the most appropriate candidate to fill the position; or in fact, the Manager may decide that none of the eligible employees is ready to be promoted. Personnel Policy 333 does not impose any restrictions on that selection by the Manager, whether by means of seniority requirements or otherwise. However, past performance is likely to play an important role in such an exercise.

B. A decision to promote is within the discretionary power of the Bank. The Bank has not only a right, but an obligation, to select the most qualified candidates for promotion. This is especially so, in view of Article VIII 5 (e) of its Charter according to which the paramount consideration in employing staff and determining conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity. The principles established by international administrative tribunals indicate that there is no right to a promotion, that a decision whether or not to promote falls within the discretionary power of the organization, and is therefore subject to limited review by administrative tribunals. In most cases, tribunals have refrained from reviewing such administrative decisions, unless they are tainted with improper motives or clearly violate the rules and regulations of the organization.

C. Although bias may be inferred from the facts of a case, the facts themselves may not be inferred. To make a *prima facie* case against the Bank, Complainant must prove the facts from which he wants inferences of bias to be drawn.

D. Seniority, academic background and past experience are not determinative of promotions. Examples abound throughout the Bank. Neither seniority in a grade, as argued by Complainant, nor seniority in the organization, are per se determinative of a promotion. And as for education and work experience, aside from the fact that all the

auditors have comparable credentials upon being hired, these factors are not determinative of good performance. Of all the promotions that took place in the Office of the Auditor General, only four of them were to a grade to which Complainant might have aspired, and it was precisely the greater merit of the other candidates as compared to Complainant's that determined their promotion.

E. Events which took place prior to 1 March 1982 are outside the relevant time frame of this case. In case No. 13 the IDB Tribunal mentioned the "principle of Negative Prescription... universally recognized in all branches of the law," noting that if a matter is not raised, the party not claiming or exercising a right within reasonable time bars itself, by its own negligence from exercising or demanding that right. Complainant claims to have been harmed by a pattern of actions by different individuals. But claims not raised, or raised and considered resolved by previous supervisors who have already left the institution, cannot be fairly reviewed, and often Bank records for earlier periods are missing or incomplete. Under the principle of Negative Prescription such claims should be barred.

F. Complainant received merit salary increases consistent with his average performance rating. Only in 1977 and 1980 were Complainant's merit increases granted a few months after the minimum time limits, and those delays were due to Complainant's performance. Furthermore, since Complainant has never availed himself of existing proceedings for the review of those evaluations, the aforesaid Principle of Negative Prescription prevents him from raising any claims at this time in connection therewith, and it must be assumed that those reviews fairly reflected his performance.

G. The remedies Complainant seek are inappropriate. To pay damages to Complainant in this case amounting to the difference between his current salary in a Grade V level, and what he would have received had he been promoted to a higher grade (presumably a Grade IV) would amount to a de facto promotion unsupported by the performance which is expected of an individual in a higher grade. Complainant has been compensated in accordance with the salary scale in effect for all staff members at that level, and has received merit increases in accordance with his "at standard" performance. He has suffered no pecuniary loss that can be traced to an act or omission on the part of the Bank. And as for the emotional distress claimed by Complainant, it may have resulted from causes unrelated to his work. In any event, the Bank is under no obligation to promote Complainant just to avoid his possible disappointment. In fact, the Bank has made every effort to help Complainant improve his performance. His supervisors clearly indicated, through comments, which areas of his work needed improvement and encouraged him to participate in seminars and continuing education courses most of which have been financed by the Bank. Furthermore, when Complainant claimed unfair treatment by one supervisor, he was given the opportunity to report to another supervisor and, more recently, when he claimed he had been discriminated against in AUG, the Administrative Manager offered him a transfer to another Department where he could have renewed chances of development, an offer which Complainant declined.

V. In his observations to the answer Complainant argues as follows:

A. He agrees that as a general rule, and in the absence of specific provisions to the contrary, decisions concerning promotions in international organizations are committed to the discretion of Management and will not be impugned in the absence of an abuse

of that discretion. However, a decision constitutes an abuse of discretion if it is arbitrary, discriminatory, improperly motivated, or carried out in violation of fair and reasonable procedures. Bias or prejudice is included in that definition.

B. While the Conciliation Committee did not find direct evidence of prejudice on the part of Complainant's supervisors, it did find that their treatment of him had placed him at a disadvantage, relative to the other members of AUG. Implicit in this finding is that Complainant was treated inequitably. Complainant's previous evaluations, experience and education clearly qualified him for assignments of greater responsibility. Such unequal treatment is a violation of the general principle of equal treatment. A single violation of the principle of equal treatment might be dismissed as due to oversight or administrative exigency, but here there is a long-standing pattern of such treatment. A pattern of unequal treatment, together with the direct evidence of unfair prejudice adduced by Complainant, supports just such an inference.

C. The Tribunal should not admit attempts to denigrate Complainant's prior performance by the making of allegations related to certain incidents outside of his documented performance record. Nor should the Tribunal permit the Bank to revise unilaterally its own administrative record at a late date. If Complainant's performance had been poor, this fact should have been included in Complainant's contemporaneous performance evaluations. To hold otherwise would result in a severe injustice to Complainant, since, due to the passage of time, Complainant is effectively precluded from contesting allegations regarding evidence made at later date. Had the Bank included references to performance defects in Complainant's performance evaluations in a timely fashion, Complainant could have then contested their merit. As the Bank's record now stands, it is clear that Complainant was, at the very least, an adequate performer.

D. The Tribunal should also not permit the weighing of the relative merits of Complainant and others who were promoted into positions for which he was qualified. This case has been filed because Complainant's supervisors were prejudiced against him, and those same supervisors were the ones who completed the evaluations of those other staff members. The expression of their prejudice is not limited to their pattern of project assignments, but also extends to the relative evaluations they gave to Complainant's co-workers. By consistently evaluating Complainant at a satisfactory level, and his co-workers—who appeared to Complainant to be performing at the same level—at a higher level, Complainant's supervisors were able to build a record which would support the expression of their prejudice. At the same time, they effectively precluded Complainant from making any appeal against that record, since Complainant could not be aware of the comparison of his personal evaluations relative to those of his co-workers.

E. The appropriate remedy for Complainant's unequal and prejudicial treatment, which has denied him the opportunity to demonstrate his talent and ability and to earn a promotion, is that he be promoted to a level IV position for which he is qualified, where his talents can be brought to bear on behalf of the Bank. At a minimum, Complainant should be treated as recommended by the Conciliation Committee, i.e. assigned to a level IV position and given the opportunity denied to him thus far. In any event, and in addition to this remedy, Complainant is entitled to monetary compensation for the emotional distress which he has indisputably and understandably suffered as a result of the Bank's treatment of him.

VI. The following are the relevant facts of the case:

A. In October 1974, Complainant joined the Bank as an AUG Auditor, Grade V (step 3), with a permanent contract. Mr. Thompson is the only staff member of that Office who in 15 years has never been promoted.

B. Complainant holds a Bachelor's degree in Accountancy and a Master's degree in Business Administration and his performance has been consistently graded at "Generally at or above the norm."

C. In November 1980, Mr. Thompson complained to the Controller, Mr. James Lynn, then Head of the Office of the Auditor General, of unfair and discriminatory practices against him by his supervisor, Mr. Cecil Hornbaker, and by the former Auditor General, Mr. William Willard. Complainant believes that the ill will against him stems from this grievance, which the Controller decided in his favor.

D. The following promotions, transfers and appointments took place in the Office of the Auditor General between 1 November 1974 and the time Mr. William Taylor was appointed Auditor General:

1. On 1 December 1977 Mr. Andrew Munch was assigned to position 1061, which had been left vacant by the departure of José Luis Cano, and was promoted to a Grade IV.

2. On 1 September 1980, following an internal/external competition, Mr. Carl Calhoon, an Electronic Data Processing Specialist, was hired with a Grade V and assigned to position 0016 left vacant by the departure of Mr. Tomás M. Rodrigo.

3. On 16 October 1980 Ms. Ana Knopf was transferred from the Finance Department to AUG, to occupy Special Assistant position #1150 with a Grade V.

4. On 27 November 1980 following an internal/external competition, Mr. Jorge Kulionis was hired to fill position #0422 left vacant by the departure of Mr. Juan Daly, and was assigned a Grade VI.

5. On 1 September 1981 Mr. Carl Calhoon's position was reclassified to Senior Auditor and he was assigned a Grade IV.

E. On 1 March 1982 the Office of the Auditor General became an independent unit, and Mr. William Taylor was named Auditor General. Complainant alleges that shortly thereafter, Mr. Taylor told him that Mr. Willard, who had retired, had fully briefed him about the incident with Mr. Hornbaker, and that Complainant needed to be watched because he had taken his bosses to the Controller. This is denied by Mr. Taylor.

F. The following changes, promotions, transfers and appointments took place in the Office of the Auditor General after Mr. William Taylor became Auditor General:

1. On 19 June 1983 Mr. Norman Miller was transferred from the Administrative Department to AUG and was assigned position 0663 with a Grade II.

2. On 1 August 1983 Mr. Jorge Kulionis was promoted to a Grade V.

3. On 17 November 1986 the Auditor General began a procedure to transform Auditor positions in his Office from fixed-grade level positions into career positions and submitted to the Administrative Manager a proposal for career positions path criteria. On 25 February 1987 the Position Evaluation Committee (PEC) agreed with the Auditor General's proposed career path criteria. On 17 March 1987 the Executive Vice President approved the changes in the Manning Table as of 31 December 1986, and authorized any actions deriving therefrom to be taken retroactively to 1 January 1987.

4. On 5 June 1987 the Auditor General requested that Mr. Ademar Toro and Mr. Jorge Liacuris both be promoted to the newly reclassified Grade III positions.

5. Meanwhile, on 3 June 1987 the Vacancy Allocation Committee (VAC) approved the retention by AUG of Grade II position #0665.

6. On 15 June 1987 the Auditor General requested that Mr. Andrew Munch be promoted to that position with a Grade III.

7. On 5 August 1987 the Auditor General requested that the entire career path and grade distribution package, as approved by the Position Evaluation Committee, and with the retention of position #0665 as approved by the Vacancy Allocation Committee, be reflected in the Bank's roster. On 1 October 1987 the Executive Vice President approved the addition of one Grade IV and deletion of one Grade V position to reflect all the actions adopted since November 1986.

8. On 20 November 1987 the Auditor General requested the promotions of both Mr. Jorge Kulionis and Ms. Ana Knopf to the two Grade IV levels then available.

G. On 28 October 1988 Complainant initiated the formal grievance procedure in accordance with Personnel Policy No. 326, which led to this Complaint before the Tribunal.

CONSIDERING:

In this case, Complainant seeks a ruling by the Tribunal that he should have been promoted to a Grade IV and that the Bank's failure to promote him was discriminatory and therefore an improper exercise of discretion.

An employee does not, in principle, have a right to a promotion unless that right is established by the contract of employment or by rules governing such employment. Complainant does not deny the validity of this principle. Instead, he claims that he would have been promoted but for the fact that he was the victim of a series of discriminatory practices by the staff of the Bank, which resulted in his being treated differently and unequally from other employees in the same Department.

Although the Bank's decision to promote or not to promote an employee is an act within its discretion, that decision may be validly challenged and set aside if it constitutes an abuse of discretion, that is, if it is tainted by improper motives, if it is arbitrary or discriminatory in character. (See Buria-Hellbeck vs. IDB, Case No. 23, 18 November 1989.)

The allegation that such an abuse of discretion has taken place must be proved by evidence, whether direct or circumstantial, that is convincing in character. The burden of presenting that evidence is on the one making the allegation. Here, therefore, it is on Complainant. This is not an easy burden to discharge even though it may be aided, in some circumstances, by reasonable inferences and presumptions.

There is some evidence in the record of this case to suggest that Complainant was not always treated by his superiors in a fair or considerate manner.

The Tribunal holds that the evidence adduced by Complainant does not establish in a convincing manner that the failure of the Bank to promote him was the product of discrimination or of any other improper practice or motive. While as already stated, the record reveals some isolated instances of somewhat inconsiderate behavior towards Mr. Thompson by some of his superiors, it reveals no pattern of unequal treatment, abusive behavior or collusion against him by those of his superiors who either evaluated his performance or had the authority to recommend or pass on his promotion. The conclusion that the requisite discriminatory treatment has not been demonstrated, finds support also in the Tribunal's own examination and comparison of the performance evaluation of those co-workers of Complainant who were promoted to the grade to which he aspired. There is no evidence to support the allegation that these evaluations were tainted either by bias in favor of those co-workers or induced by prejudice against Complainant.

ACCORDINGLY:

The Complaint is unanimously dismissed by the Tribunal.

Washington, D.C., 9 May 1990.

Kenneth G. Smith.

Alfredo Martínez-Moreno.

Ildélio Martins.

Baltasar Cavazos-Flores.

Thomas Buergenthal.

Luzius Wildhaber.

Guillermo López-Guerra.

Hernán Sáenz-Jiménez
Executive Secretary.