

JUDGMENT CASE NO. 29

NÖEL X. BELT vs. IDB

The Administrative Tribunal of the Inter-American Development Bank,

Composed of Judge Kenneth G. Smith, President, Judge Alfredo Martínez-Moreno, Vice President, Judge Ildélio Martins, Judge Baltasar Cavazos-Flores, Judge Thomas Buergenthal, Judge Luzius Wildhaber and Judge Guillermo López-Guerra considered the case under the procedure prescribed by Articles 20, 21, 22 and 23 of the Rules of the Tribunal.

Complainant was represented by his attorney, Néstor Cruz, Esq. The Bank was represented by Javier Cayo de Abreu, Esq. of the office of the General Counsel of the Bank. In addition to the written pleadings, the Tribunal asked the Executive Secretary to hear the testimony of witnesses and on 10 November 1992 the full Tribunal heard oral arguments.

WHEREAS:

A. On 17 March 1992 Mr. Noël X. Belt, a Cuban citizen and staff member of the Inter-American Development Bank filed a complaint with this Administrative Tribunal petitioning for the following:

1. That the 1990 and 1991 Merit Pay increase exercises with respect to Complainant be declared null and void.
2. That the whole 1990 Merit Pay increase exercise for all employees be declared null and void.
3. That Complainant receive an "outstanding" rating for both periods, with pay raises of 11.1 percent and 13.75 percent respectively, for 1990 and 1991.
4. That the originals of all documents with negative comments about Complainant be turned over to him and that the Administrative Manager give him written assurances that no copies will be left in Bank files or in the possession of any present or former Bank official.
5. That Mr. Antonio Vives, General Consultant, Operations, Mrs. Rosa Lawson, Deputy Manager, Human Resources, Mrs. Betancourt, the Bank's registered nurse and all other offenders, be disciplined in proportion to the seriousness of their violations, to the satisfaction of, and notification to, Complainant.
6. That Mr. Keith Bezanson, Administrative Manager and Mr. Stimson Eveleth, General Deputy Manager, Operations, be mailed letters of serious reprimand by the President or his designee and be informed that they will obtain no future references from the Bank.
7. That a permanent injunction issue, forbidding any future violations of Complainant's rights by the offenders, under penalty of termination from the Bank.

8. That the Tribunal declare that there has been widespread disregard of Complainant's contract rights by the offenders and that such disregard constitutes an abuse of immunity, which could result in loss of immunity by the Bank and the offenders.

9. That the Tribunal order the Bank to waive immunity of offenders, so they may be subject to suit in the United States.

10. That the Tribunal declare that the offenders' actions were not part of their functional duties and that the offenses were objectively observable actions taken by the offenders in their individual capacities.

11. That Complainant be appointed a member of a Study Group to devise improved policies to handle employee medical files, with a view, *inter alia*, to preserve their strict confidentiality.

12. That Complainant's medical file be turned over to him.

13. That he be awarded a sum equivalent to three years' salary, adjusted by raises of 11.1 percent for 1990 and 13.75 percent for 1991.

14. That he be awarded back pay, with all the appropriate contributions made by the Bank to the pension fund.

15. That he be awarded US\$ 2,650,000.00, net of tax, in compensatory damages for loss of professional reputation, anguish, and humiliation caused by the offenders, and in accord with current verdicts in United States courts for comparable violations of United States law.

16. That he be awarded US\$ 1,350,000.00, net of tax, in punitive damages in accord with current verdicts in United States courts for comparable violations of United States law.

17. That he be awarded attorney's fees, interest, and costs.

B. In support of his petitions, Complainant made the following arguments:

1. The acts complained of constitute violations of Tribunal Jurisprudence, Bank Policies, Universal Principles of Law, including but not limited to Due Process of Law, the Agreement Establishing the Bank, and the Bank's Code of Ethics and United States law which Complainant argues is applicable under the Bank's Code of Ethics.

In the alternative, Complainant argues that many of the acts complained of were not part of the "functional duties" of the offenders and therefore the offenders have lost immunity.

2. Complainant's supervisor, Mr. Antonio Vives, refused to discuss with Complainant the criteria used for review in the 1990 Merit Pay increase exercise. This refusal coupled with the manner in which Mr. Vives addressed Complainant at certain times during the rating period violates Bank Policies thereby rendering the 1990 Merit Pay exercise invalid.

Furthermore, the entire 1990 Merit Pay increase exercise, with respect to all employees, should be declared void for vagueness, under principles of Due Process of Law.

3. Certain Bank officials engaged in a pattern and practice of harassment, intimidation, retaliation, discrimination, collusion, conspiracy and secret trials in an effort to end Complainant's work relationship with the Bank through several methods including early retirement and termination.

4. In December of 1990, Mr. Vives falsely accused Complainant of having threatened him with aggression and publicized such falsehood to others, thereby violating Bank Policies and various Principles of Law.

5. Also, during the 1990-91 evaluation period, the Bank's nurse, Mrs. Alicia Betancourt, without Complainant's authorization, made several calls to Complainant's treating physician to inquire about his health. She also asked non-treating physicians for their opinion with respect to Complainant's state of health and allowed unauthorized persons, including Complainant's superiors, to review his medical file. These actions not only constitute violations of Bank Policies but also intentional infliction of emotional distress, negligence, invasion of privacy and breach of confidential and privileged relationship.

6. The 1991 Merit Pay increase exercise with respect to Complainant should be declared null and void since the resulting award is the product of retaliatory action of Bank officials against Complainant.

7. As confirmed by the Conciliation Committee, all administrative requirements have been met by Complainant. Therefore, the matters are properly admitted.

C. The Bank answered the Complaint and asked the Tribunal to dismiss the petitions on the following grounds:

1. Complainant's claim concerning the 1991 Merit Pay increase exercise is inadmissible due to Complainant's failure to first exhaust administrative procedures.

2. Complainant's 1990 Merit Pay increase award reflected a fair, objective evaluation of his performance. Furthermore, the method of evaluation for this exercise was clearly stated in several circulars and memoranda issued by the Department of Human Resources that year and was later explained to Complainant in a staff meeting conducted by Mr. Vives. Thus, the 1990 exercise is not void with respect to Complainant nor with respect to other Bank employees. However, the Bank also argues that the validity of Complainant's 1990 Merit Pay increase is a moot issue since it has offered to revise Complainant's 1990 Merit Pay and remains willing to revise it.

3. There is no evidence that the Bank or its officials acted improperly against Complainant or overstepped their authority, nor was Complainant subjected to secret proceedings or retaliatory actions.

4. The medical records kept in the Bank's health unit are property of the Bank because they originate in the relationship of employment. Complainant, therefore, does not have the right to determine who may, in the course of his official duties, have access to the information in those records.

5. Under the strict wording of Article II(1) of its Statute and Article 9(1) of its Rules of Procedure, the Tribunal lacks the authority to rule on the petitions set out in Items 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 15, 16, and 17 of the remedies included in the Complainant's brief.

D. The parties produced copious documentary evidence consisting of memoranda, correspondence, resolutions, rules, policies, legal writings and the case law of this and of other administrative tribunals. The following witnesses testified: Andrés Bajuk, Noël X. Belt, Alicia Betancourt, Rolando Castañeda, Stimson Eveleth, Dr. Jacob Katzow, Rodrigo Mayén-Girón, José Santaballa, Jorge Teller, José Villegas and Antonio Vives.

On 21 October 1992, after all the evidence offered by the parties had been received, Complainant received and produced a copy of an aide mémoire which memorializes the actions taken by Mrs. Betancourt from Friday, 14 December 1990 through the following Wednesday, 9 January 1990 [sic] regarding Complainant. Complainant claims to have received this document anonymously. In a memorandum dated 28 October 1992, the Bank acknowledges that the aide mémoire was in fact prepared by Mrs. Betancourt. However, a copy of the document obtained from Mrs. Betancourt's file contains certain additional information which does not appear in the copy received by Complainant.

E. The body of evidence has served to establish the following facts:

1. Complainant has been working for the Bank since July 1964.

2. Complainant was absent from work on sick leave 54 days, of which 50 were justified by medical certification, during the period of 1 January, to 31 December 1983. During the period of 1 January, to 31 May 1984 Complainant was absent on sick leave 20.7 days of which 19.5 days had medical certification.

3. In 1984, after Complainant authorized the Bank to obtain information from his physicians, Mr. James A. Chase, Chief of the Insurance and Preventive Medicine Section, reviewed the information gathered and prepared a memorandum which he sent to Mr. Luis A. Sánchez Masi, Human Resources Deputy Manager, in which he outlined various administrative options available with regard to Complainant's illnesses, including: (a) resignation; (b) termination by Bank due to unacceptable performance; (c) acceptance of early retirement incentive; and (d) prolonged disability leave.

4. Shortly thereafter, and continuing for several years, the Bank's Health Unit, without Complainant's authorization, made several calls to Complainant's treating physicians to inquire about Complainant's health.

5. Mr. Antonio Vives, formerly junior to Complainant, became Complainant's supervisor in January 1990. Prior to this time, Complainant had criticized some work prepared by Mr. Vives.

6. The Bank implemented a new Merit Pay Evaluation System during the 1989-90 Merit Pay increase exercise. Various memoranda and circulars were issued to Bank staff throughout the year which explained the new system of review. The Bank maintains that Mr. Vives fulfilled his supervisory duty to explain and discuss with Complainant the process followed in distributing salary increases. However, the evidence proves that there was no timely discussion between Mr. Vives and Complainant regarding Complainant's evaluation for this period, as required by Bank Policy.

7. For the 1989-90 Merit Pay increase exercise, Complainant received a 5.3 percent salary increase. Stating in its Answer to the Complaint, that "...there were elements or factors that justified a revision of the Merit Pay received by the Complainant...", the Bank admits that Complainant's 1990 Merit Pay increase evaluation should be revised. In fact, the Bank was unable to produce any documents, prepared contemporaneously with the determination of Complainant's 1990 Merit Pay increase award, which explain the criteria used in evaluating Complainant's performance. The only document the Bank was able to produce regarding the criteria used was prepared over a year later for purposes of litigation in response to an inquiry from the Conciliation Committee.

8. In December 1990 Complainant and Mr. Vives had a disagreement. Complainant contends that Mr. Vives "insulted, shouted at, humiliated, and berated" Complainant for misplacing some files. The Bank claims that Complainant threatened Mr. Vives by shouting such things as "I'm going to destroy you," "I'm going to ruin you," and "I'm going to have you thrown out of the Bank before February 28th."

9. Complainant did not "threaten to kill" Mr. Vives.

10. Mr. Bezanson sought authority to dismiss Complainant from the Bank, but no action, disciplinary or otherwise, was taken.

11. The Health Unit, at the direction of the Administrative Department, disclosed privileged information contained in Complainant's medical records.

12. On 5 February 1991 Complainant was transferred to a new unit. Mr. José Villegas became Complainant's supervisor.

13. Mr. Villegas recommended that Complainant be awarded a salary increase in line with a performance rating of "excellent, at least at the midpoint," for 1991. This works out to be an 11.5 percent salary increase. Complainant received a 9 percent salary increase and a rating of "satisfactory to fully satisfactory" for the 1991 Merit Pay increase exercise. However, regarding this issue, Complainant did not follow the grievance procedures established in Bank Personnel Policies.

14. On 14 June 1991 Complainant filed a formal complaint before the Conciliation Committee. On 30 December 1991 the Conciliation Committee issued its Report on the Proceedings. Not completely satisfied with the ruling issued by the Conciliation Committee, Complainant filed his Complaint with the Administrative Tribunal.

CONSIDERING:

1. The Bank was unable to produce any contemporaneous documentation regarding the 1990 Merit Pay rating of Complainant. In addition, the Bank has conceded that the Complainant's merit increase rating for 1990 should be revised and proposed a formula by which this should be done, which Complainant finally rejected. The original rating for 1990 placed Complainant in the "satisfactory to fully satisfactory" category of the salary review matrix. The formula proposed for revision of the rating would leave Complainant in this same category. The 1991 rating which formed the basis for the revision proposed by the Bank has been rejected by Complainant. He had received a rating for that year from his immediate supervisor, Mr. Villegas, which placed him in the category "above fully satisfactory to excellent." In his evidence Mr. Villegas said that he had recommended that Complainant be "awarded in line with the performance rating of excellent at

least at the mid point." Complainant's final rating for 1991 was, however, reduced to the "satisfactory to fully satisfactory" category.

2. Complainant alleges that he was told by Mr. Villegas that in a conversation he (Villegas) had with Mr. Souza, the Operations Manager, Mr. Souza had commented in respect of Complainant's evaluation: "you must understand that Mr. Belt was rebellious last year." Mr. Villegas was the Bank's witness and when asked by the Bank's Counsel whether he had had such a conversation with Complainant, Mr. Villegas gave an answer which, while not expressly admitting Complainant's version of the conversation, at least left it open for the conclusion that the Complainant's version may well have been true. In the view of the Tribunal these circumstances tend to taint the final rating for him in 1991 and should not, therefore, form a basis for the revision of the 1990 rating.

3. While it is not for the Tribunal to fix salary ratings, the Tribunal nonetheless considers itself entitled to use another rating for a period not far removed from 1990, and which is free from taint, on which Complainant's rating should be based (see Castro v. IDB, Case No. 11). There was no evaluation or rating for 1988-89. For the evaluation period 1987-88, the Complainant received an evaluation in the highest category for that year. This is consistent with evaluations he had received for previous years. It is also consistent with the assessment of Complainant's value as an employee which, in his evidence, the witness Mr. Andrés Bajuk, Chief of the Office of the Presidency, said he gave to the Administrative Manager Mr. Bezanson in a conversation which they had subsequent to the incident of 14 December. Though the system of rating for merit increases has been changed since 1987-88 yet to the extent that the systems rate performance the Tribunal has determined that the equivalent category under the new system would be "above fully satisfactory to excellent," which is where Mr. Villegas said he had recommended that the Complainant be placed, although in 1991. The Tribunal is of the view that Complainant should be placed at the mid point in that category.

4. Policy No. 373 of the Bank's Personnel Policies provides that "personal medical reports maintained in the medical office will be considered strictly confidential and may only be shown with the prior authorization of the Bank's physician and the respective employee." Personnel Policies of the Bank are incorporated by reference in the contracts of employment of the Bank's personnel and thus form an integral part thereof.

5. Policy No. 373 confers a right on the employee to deny access to his medical files and to the information contained therein to all persons other than to the properly authorized medical personnel of the Bank. Access to the files and to the information contained therein may be authorized only by the employee himself and by the Bank's physician.

6. The rule of confidentiality thus established by the above Policy is clear and unambiguous. Its purpose, among other things, is to protect the employee's privacy against unauthorized intrusion. Accordingly, when the contents of such records, in whole or in part, are disclosed by the Bank's nurse to the Bank's Personnel Manager on his specific instructions without compliance with the requirements of Policy No. 373, as we find below was done in this case, there is a breach of Policy.

7. While there is in this case some conflict in the evidence as to whether all or part of the file was disclosed and as to the nature of the information that was disclosed, the evidence admits of no doubt that some information designed to be protected by the Policy was disclosed and that this information related to the medical treatment which Complainant had undergone. The disclosure was a serious breach of the Complainant's contract of employment for which relief

must be provided so as to leave no doubt whatsoever that violations of Policy No. 373 will not be tolerated.

8. The foregoing conclusion of the Tribunal does not address the issue of the ownership of, or claim to, the medical files as such. This subject, raised by the Complainant's contention that he has a right to have his medical records on file in the Bank turned over to him, has nothing to do with the confidential character of these files, nor with his right of access to them. He had, moreover, advanced no valid legal argument to sustain the contention, and the Tribunal has discovered none. This claim must, therefore, be denied.

9. The petition of the Complainant in respect of his 1991 merit increase rating is denied as the necessary administrative and conciliation grievance procedures were not complied with. Petition number 2 is denied as Complainant has no standing to make the claim in that petition. His petitions numbered 4, 7, and 17 are denied. There is no power to grant those numbered 5, 6, 9, 10, 11 and 16 and there is no legal basis on which to grant those numbered 8 and 15.

ACCORDINGLY IT IS ORDERED:

1. That the Complainant's merit increase rating for 1990 be annulled and a rating at the mid point of the "above fully satisfactory to excellent" category in the matrix for 1990 be substituted.

2. That the Complainant be paid a Merit Pay increase at the above rating as from 1 August 1990 with all the attendant benefits, including the consequences for subsequent years.

3. That Complainant be awarded the amount of US\$ 10,000.00 (ten thousand dollars) for the breach of the Personnel Policy No. 373 relating to the confidentiality of medical records.

Washington, D.C., 13 November 1992.

Kenneth G. Smith
President.

Alfredo Martínez-Moreno.

Ildélio Martins.

Baltasar Cavazos-Flores.

Thomas Buergenthal.

Luzius Wildhaber.

Guillermo López-Guerra.

While concurring with the Tribunal's decision that there was a breach of Personnel Policy No. 373, Judge Smith respectfully dissents from the award made for this breach. He holds that the Tribunal is a creature of the Statute by which it was established and he is not convinced that the Statute confers the power to award compensation or relief of the kind being awarded in this case.

Kenneth G. Smith
President.

Hernán Sáenz-Jiménez
Executive Secretary.