



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/027/  
UNAT/1659  
Judgment No.: UNDT/2011/081  
Date: 6 May 2011  
Original: English

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**Before:** Judge Marilyn J. Kaman  
**Registry:** New York  
**Registrar:** Santiago Villalpando

CABRERA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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JUDGMENT

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**Counsel for Applicant:**  
George Irving

**Counsel for Respondent:**  
Alan Gutman, ALS/OHRM, UN Secretariat

## **Introduction**

1. The Applicant appeals against the decision of the Secretary-General to place the Applicant on Special Leave With Full Pay (“SLWFP”) pursuant to former staff rule 105.2(a)(i) effective 16 January 2006.

2. The Applicant was one of eight staff members from the Department of Management (“DM”) / Procurement Division (“PD”) who were placed on SLWFP on 16 January 2006 following issuance of a December 2005 draft audit report into procurement activities and pending a follow-up investigation by a specially-constituted Procurement Task Force (“PTF”) of the Office of Internal Oversight Services (“OIOS”).

3. The issues to be addressed by the Tribunal in this Judgment are defined as follows:

a. Whether the Organization properly exercised its discretionary authority to place the Applicant on SLWFP pursuant to former staff rule 105.2(a)(i) effective 16 January 2006;

b. Whether the Applicant’s due process rights were observed when the Secretary-General exercised his discretionary authority to place the Applicant on Applicant on SLWFP pursuant to former staff rule 105.2(a)(i) effective 16 January 2006.

## **Facts**

### *The Applicant’s employment history with the United Nations*

4. The Applicant joined the Organization in 1979 as a General Service staff member, in 1991 passed the examination for recruitment to the Professional category, and ultimately was promoted to the P-3 level and transferred to United Nations

Headquarters in December 2002 under the functional title of Procurement Officer. Following the events described herein, effective 1 April 2007 the Applicant was promoted to the P-4 level.

5. On 8 November 2007, the Applicant was informed that the Secretary-General had decided that he (and another staff member) would be summarily dismissed immediately in accordance with staff rule 110.2 then applicable. Those events formed the basis for a separate appeal to the Dispute Tribunal and a judgment upholding the summary dismissal was issued in *Cabrera and Streb* UNDT/2010/034 (Judge Meeran), which was subsequently affirmed by the United Nations Appeals Tribunal in *Cabrera* 2010-UNAT-089.

6. The Secretary-General's decision for summary dismissal of the Applicant was taken after considering a 20 June 2007 OIOS/PTF report (this would have been a second OIOS/PTF report as to the Applicant, the first being the 19 July 2006 report, referred to in this Judgment as "the 2006 Report", see below in para. 45). The OIOS/PTF investigated conduct which had taken place on an evening in August or September 2002, but which was unknown at the time the Applicant was placed on SLWFP on 16 January 2006.

7. Because the summary dismissal events came to light only after the Applicant had been placed on SLWFP, those events could not have formed the basis for the Respondent's decision on 16 January 2006 to place him on SLWFP. It was for that reason that the Tribunal at the substantive hearing issued a ruling that it would not accept any (a) evidence or (b) testimony based on events surrounding the summary dismissal. The Tribunal will address this procedural aspect more fully within this Judgment.

#### *The 2003 and 2004 Draft Reports*

8. In order to fully understand the Judgment herein, some explanation of the procedures and factual background of prior OIOS audit reports is required.

9. On 7 March 2003, OIOS Internal Audit Division (“IAD”) issued a draft internal Audit Report AN2003/42/1 titled “*Audit of Systems Contract for Engineering Manpower to Peacekeeping Missions*” (“the 2003 Draft Report”). This report highlighted certain so-called “fraud indicators” involving a certain Mr. Sanjay Bahel, the then-Chief Field Procurement Officer.

10. In a Note to the file regarding a conversation between Mr. Bahel and Mr. Christian Saunders, Chief of DM/PD, Mr. Bahel identified the Applicant as the DM/PD staff member that informed Mr. Nishan Kohli, the owner of Thunderbird Industries LLC and representative of Telecommunications Consultants India Ltd. (“TCIL”), of an award before the recommendation of the Headquarters Committee on Contracts (HCC) was made public. Whether or not this notification constituted a violation of the Procurement Manual on the part of the Applicant or not was discussed extensively at the substantive hearing in this case, but certainly the audit report highlighted this information.

11. The 2003 audit investigation had been initiated at the specific request of Mr. Saunders. Apparently he was concerned about possible breaches in procurement procedures, which represented an “operational risk on the ground”, according to oral testimony of Ms. Fatoumata Ndiaye, OIOS/IAD Audit Director, given at the substantive hearing in the present case, which was held on 22 December 2010.

12. Ms. Ndiaye, also testified at the substantive hearing that the standard OIOS/IAD procedure for dealing with cases of presumptive fraud was for OIOS/IAD to forward a draft internal audit report to the relevant departmental Under-Secretary-General (“USG”). The departmental USG would prepare a response back to OIOS/IAD as to whether the audit report’s recommendations were accepted, rejected or needed modification. The purpose of the back-and-forth commenting process between OIOS/IAD and the relevant department was to determine whether any revisions to the “draft” audit report would be necessary so that a “final” audit report could be prepared. Once an audit report had been prepared in final form, it could then be used for “external” purposes.

13. If, based on audit report findings, OIOS/IAD believed that further investigation was necessary, the report would be forwarded to the Investigations Division (“ID”) of OIOS for further investigation and action.

14. The 2003 Draft Report was not subject to a back-and-forth commenting process and was therefore not put into “final” form by OIOS/IAD. The 2003 Draft Report was forwarded to OIOS/ID for possible action.

15. As concerns the Applicant, OIOS/ID investigated the allegations in the 2003 Draft Report pertaining to the Applicant and concluded that the matter did not merit further investigation. Ms. Ndiaye testified that everyone mentioned in the 2003 Draft Report (including the Applicant) was “exonerated” of all wrong-doing. This was the first examination of the Applicant’s procurement transactions and no irregularities were found.

16. Following upon the 2003 Draft Report, OIOS/ID requested OIOS/IAD to do a follow-up audit on selected peacekeeping procurement cases involving TCIL.

17. On 21 September 2004, OIOS/IAD prepared a draft internal Audit Report AP2004/600/14 titled “*Review of selected peacekeeping procurement cases—analysis of patterns of fraud indicators*” (“the 2004 Draft Report”), which then was submitted to OIOS/ID.

18. The investigation regarding the Applicant under the 2004 Draft Report involved five procurement cases (referenced hereinafter as Cases No. 1, No. 2, No. 3, No. 4 and No. 5). OIOS/ID investigated the allegations in the 2004 Draft Report pertaining to the Applicant and concluded (as with the 2003 Draft Report) that the matter did not merit further investigation. Ms. Ndiaye testified that everyone mentioned in the 2004 Draft Report (including the Applicant) was “exonerated” of all wrong-doing. This was the second examination of the Applicant’s procurement transactions and no irregularities were found.

19. It bears mentioning that since the 2003 and 2004 Draft Reports were draft audit reports only—thus not having been subject to the back-and-forth commenting process required of final audit reports—any factual inaccuracies contained in the reports were not noted or corrected. Similarly, the Applicant was not permitted to review any of the Reports, as per standard audit procedures which “limited” the information being given to staff members suspected of wrong-doing. This forms one of the Applicant’s contentions, for the 2004 Draft Report (dealing with Cases Nos. 1-5, see para. 18 above) later was determined to be “factually inaccurate”.

20. At this point the Tribunal takes notice that the Respondent contends that the issues outlined by the Applicant concerning the 2003 and 2004 Draft Reports, alleged factual errors in the OIOS reports, and violations of due process therein are not relevant to the subject of appeal, which is limited to determining whether the Respondent appropriately exercised his discretion in placing the Applicant on SLWFP in January 2006. As will be discussed herein, the Tribunal disagrees with this contention and finds both Draft Reports are relevant and have a direct bearing on whether the Respondent appropriately exercised his discretion in placing the Applicant on SLWFP.

#### *2005 developments and the 2005 Draft and Final Reports*

21. On 22 June 2005, the General Assembly adopted resolution 59/296 (Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: cross-cutting issues), paragraph IV of which requested OIOS to conduct a comprehensive management audit of the Department of Peacekeeping Operations (“DPKO”). According to the oral testimony of Ms. Ndiaye at the substantive hearing, it was exceptional for the General Assembly to request an audit into fraud and abuse under such a specific mandate. On 21 October 2005, the then-USG for Management, Mr. Christopher Burnham, requested Ms. Inga Britt-Ahlenius, then-USG/OIOS, to reinvestigate the entire Thunderbird/TCIL affair by the end of 2005.

22. On 30 November 2005, the private consultancy firm Deloitte and Touche issued a report on “Assessment of Internal Controls in the United Nations Secretariat Procurement Operations” in response to a 4 October 2005 request from the Secretariat to conduct “a six-week, forward-looking diagnostic assessment of internal procurement controls”.

23. On or about 6 December 2005 the following news story was released by FOX News, stating, *inter alia* (emphasis in original):

A six-week study of the United Nations procurement department has concluded that its management safeguards and procedures are ineffective, its oversight is weak and its response to problems lacks “urgency”.

...

The report concludes that UN procurement employees themselves are the only control on the department and that “significant reliance on people leaves the [United Nations] extremely vulnerable to *potential fraudulent or corrupt activity* and [with] limited means to either prevent or detect such actions.

...

During the past few months, *several procurement officials have been arrested. ...*

24. On 9 December 2005, information that figured in the 2004 Draft Report was leaked to FOX News, along with the Applicant’s name in connection with a number of procurement transactions.

25. On 12 December 2005, the 2004 Draft Report was prepared as an *external* report in *draft* form, which OIOS/IAD submitted to DM for comments. The transmittal memorandum requested DM to provide its comments on the draft report by 16 December 2005 in order for the report to be put into final form. Oral testimony at the substantive hearing by OIOS/IAD Audit Director, Ms. Ndiaye, was that DM did not provide comments on the 2004 Draft Report.

26. In another FOX News story dated 16 December 2005, the following question and answer were given (emphasis added):

FOX News: So far there's been in the procurement department one guilty plea, there's been a charge of another official who has plead [sic] not guilty, but still indicted, and there could be more indictments. Is the U.N. willing to go as far as to see some of its officials go to jail to get this place get cleaned up?

Burnham: The secretary-general very swiftly lifted immunity in one case we already have a guilty plea or, for that matter, for any potential future conviction. Certainly the secretary-general is committed that should *federal authorities or local authorities* request that *immunity be lifted*, I would expect the United Nations to move swiftly do to so. *We want any perpetrator of waste, of fraud and abuse, to be accounted for and if they are a perpetrator of corruption, we want them to be brought to justice as swiftly as possible.*

27. On 20 December 2005, OIOS/IAD prepared draft internal Audit Report AP2005/600/20 titled "*Comprehensive Management Audit of the Department of Peacekeeping Operations—Procurement*" ("the 2005 Draft Report"), which included a summary of the 2003 and 2004 Draft Reports. The 2005 Draft Report was submitted to DM and DPKO as a draft report on 20 December 2005, with a request for comments from DM by 31 December 2005.

28. Auditor-in-Charge, Mr. Daeyoung Park, testified at the substantive hearing in this case that DM was not *asked* to provide any comments to the Draft 2005 Report, which remained in draft form until after the Applicant was placed on SLWFP on 16 January 2006. Thus, the Applicant was placed on SLWFP based on a draft report that had not undergone any departmental review (DM/PD) before this decision was made.

29. On 20 January 2006, OIOS/IAD submitted Audit Report AP2005/600/20 to DM and DPKO as a *final* report ("the 2005 Final Report"), apparently with DM having provided comments by that point in time, but the content of those comments is unknown to the Tribunal based on the record before it.



*Creation of OIOS Procurement Task Force*

30. By email dated 13 December 2005, the then-USG/OIOS, Ms. Ahlenius, informed Mr. Jayantilal Karia (then Officer-in-Charge, United Nations Procurement Service (“UNPS”)) that she had requested the OIOS/PTF to “investigate” cases involving Thunderbird (emphasis added):

Jay,

I have asked the Procurement investigation taskforce led by Paul Roberts to include in their scope the cases involving Thunderbird that have already been investigated previously. In fact I did give that message already some time ago in an e-mail to Mr. Burnham.

*Regardless of the investigation process however, I believe management has a responsibility to act decisively to protect the organization whenever there is adequate reason to believe the organization is at risk. Nothing should stop your action to suspend any vendor or staff member that violates the procurement rules or staff rules...*

Best Regards,

Inga-Britt Ahlenius

31. On 12 January 2006, the then-USG/OIOS, Ms. Ahlenius, approved the terms of reference for the OIOS/PTF to investigate allegations of wrong-doing in United Nations procurement activities. In its 2006 Report, the OIOS/PTF itself has acknowledged that the creation of the OIOS/PTF was “the result of perceived problems in procurement identified by the Independent Inquiry Committee into the Oil for Food Programme (IIC), and the arrest and conviction of UN Procurement Officer Alexander Yakovlev”.

32. According to the OIOS/PTF Terms of Reference, the following decisions were made (emphasis added):

1. that the problems identified in UNPS *were of such a magnitude* that they need to be addressed in a comprehensive way. In this regard it is here by [sic] decided that the management and conduct of all cases, whether past, present or future within the ID concerning

procurement, either in whole or in part, shall be transferred to the Task Force....

2. that the *ID recommendation for a longer (6 months) and expanded (18+ investigators) task force on Procurement matters* should be approved...

...

6. that the task force is mandated to investigate or reinvestigate all closed, existing and new cases, matters or allegations concerning procurement. For avoidance of doubt, this is not confined to [Headquarters] UNPS.

*The decision to place the Applicant on SLWFP*

33. At the substantive hearing, the Applicant testified that, on 16 January 2006, the Applicant was called into Mr. Burnham's (the then-USG/DM) office. Mr. Burnham told the Applicant that there were "allegations of procurement fraud" against him and that if the Applicant made an admission then-and-there, the Organization would go "light" on him. Mr. Burnham indicated that the formal documents regarding the procurement fraud had not been prepared by that point in time. The Applicant testified, "At that point, I understood that an investigation would be carried out".

34. A memorandum dated 16 January 2006 from Mr. Mark Malloch Brown, then-Chief de Cabinet for the Secretary-General, informed the Applicant of the following (emphasis added):

*In view of the ongoing audit and investigation into the Organization's procurement activities, the Secretary-General has decided that it is in the best interest of the Organization to place you on special leave with full pay pursuant to staff rule 105.2(a)(i), effective immediately.*

While on special leave, you will not be discharging any of your normal functions but will be expected to cooperate fully with all audit and investigation processes. The situation will be assessed following an appropriate determination of the facts, and you will be returned to duty if no further action is required at that time.

I wish to emphasize that your placement on special leave with full pay is purely administrative measure, which is not disciplinary in nature and is taken to assist the Organization in conducting a full assessment of the situation.

35. The Tribunal takes judicial notice of the fact that, on 19 January 2006, an internal press release from the United Nations Department of Public Information was issued, and contained the exact names and positions of the eight staff members placed on SLWFP.

36. On 30 January 2006, by an email the following Letter to Staff on Procurement Activities was distributed at United Nations Headquarters in which the then-Secretary-General stated, *inter alia*, (emphasis added):

As you know, we are in the midst of a rigorous effort to strengthen management, oversight and accountability throughout the Secretariat, which I regard as essential to the future functioning and credibility of our Organization. As part of that process, we are reviewing our procurement policies, procedures and activities. Indeed, procurement has grown rapidly, from \$400 million a few years ago to more than \$2 billion today. We are also painfully aware that problems in this area have come to light in the past year. If the United Nations is to faithfully serve the world's people, we must remove any hint of suspicion and put in place a professional and trustworthy procurement system.

Last June, the General Assembly requested a comprehensive management audit of the Department of Peacekeeping Operations. From September to December, the Office of Internal Oversight Services performed the procurement portion of that review. Its report documents various instances of non-compliance with procurement rules, and indicates that more serious wrongdoing may have occurred as well. Senior management is now looking into the issues raised by the report. *OIOS is also investigating a number of cases of possible fraud, abuse and waste that were identified both in this audit and in other complaints.*

In a separate but coordinated step undertaken at the request of the Department of Management and DPKO, Deloitte Consulting is currently reviewing our procurement systems, examining our internal and management controls, and conducting a full forensic audit of the Procurement Service. Together with OIOS's work, this will allow us

to strengthen our management and procurement functions and bring UN activities in line with best practices in these areas.

In response to the findings of the OIOS report, eight staff members in positions related to procurement then or now have been placed on special leave with full pay. There is understandable unease among many colleagues about this step. Let me stress that this was an administrative undertaking, and reflects a range of different shortcomings and apparent behaviours. It was not a disciplinary action, nor was it meant to prejudice anyone's conduct. Rather, this step was necessary to protect the Organization's interests and to allow us to better establish facts.

37. On 22 February 2006, the then-Chef de Cabinet, Mr. Malloch Brown gave a statement to Member States in which he indicated that, responding to the findings of the 2005 Final Report (emphasis added):

... as a precautionary measure to protect the Organization, [the Chef de Cabinet], at the request of the Department of Management and Peacekeeping ... placed eight staff members on special leave with full pay while the issues raised by the audit are looked into more fully. This special leave is an administrative not a disciplinary measure and does not presume wrongdoing by the staff affected. *We are looking carefully into the situation of each of those eight staff. For some, the investigatory arm of OIOS is undertaking an accelerated review within a broader investigation of other allegations of possible procurement-related wrongdoing by staff. OIOS has formed a 16-person special task force to handle these cases as quickly as possible.* Several of the staff members on leave however, are not the subject of any current investigation and in their cases we have a management review under way to determine whether there were lapses or errors of management that we need to address before they can go back to work. Let me add that once that is resolved, we will happily welcome them back to the Organization as we are concerned to see them able to resume their careers without any inappropriate sanction.

38. On 24 March 2006, Mr. Malloch Brown sent a note to the then-USG/OIOS, Ms. Ahlenius, stating, *inter alia*, (emphasis added):

I have accepted your arguments and advise that all eight cases (of staff members placed on SLWFP), regardless of their severity at *prima facie*, are currently the subject of OIOS investigating and therefore, all individuals presently on administrative leave should remain on that status until the investigations are completed.

However, I must insist that OIOS places top priority in concluding the investigations related to those staff members on administrative leave as soon as possible. As you are aware, these *staff members are already on leave for over two months*, and we are all anxious to conclude the process for these cases in order to give the concerned individuals an indication of what action will be taken.” We are still at the early stages of this process. Before we draw any conclusions, we must get to the bottom of what has happened, quickly and thoroughly, with full respect for the due process rights of staff members.

39. By a letter dated 15 April 2006 from Ms. Adele Grant, Officer-in-Charge Administrative Law Unit (“ALU”), Office of Human Resources Management (“OHRM”), the Applicant was informed that:

The decision to place you on [SLWFP] was taken by the Secretary-General in the interests of the Organization pursuant to staff rule 105.2(a) (i) in view of events taking place in the procurement area, relating to issues which arose when you were serving as a Procurement Officer. These events are subject to a number of fact-finding investigations within the Organization, as well as investigations by national bodies.

Your placement on [SLWFP] was intended to prevent accusations that key personnel involved in procurement influenced the outcome of these investigations. The decision was not linked to your performance or conduct, neither of which are being pre-judged.

As soon as the fact-finding is complete, you will be informed of how the Secretary-General intends to proceed with the matter.

*OIOS/PTF investigation and Applicant’s return to duty*

40. On 20 January 2006, the Applicant was provided a copy of the 2005 Final Report and requested comments from the Applicant.

41. On 1 February 2006 the Applicant submitted his comments to the 2005 Final Report.

42. In April 2006, the OIOS/PTF commenced operations to investigate allegations of wrong-doing in the United Nations procurement activities.

43. The Applicant's comments were not forwarded to OIOS until June 2006.
44. The Applicant was interviewed by the OIOS/PTF in mid-June 2006.
45. On 19 July 2006, the OIOS/PTF issued a report regarding the Applicant ("the 2006 Report"). The report dealt with the allegations made in the 2005 Final Report in relation to Thunderbird and TCIL contracts. The OIOS/PTF found that there was insufficient evidence to support a finding that the Applicant had violated the United Nations regulations and rules and that there was insufficient evidence of favouritism on his part.
46. With the 2006 Report, it was the third time that the Applicant had been exonerated by the Organization of wrong-doing related to procurement matters. (See finding of fact Nos. 14, 17 and 18 regarding the 2003 and 2004 Draft Reports.)
47. By a letter dated 1 August 2006, the then-Chef de Cabinet, Mr. Malloch Brown, informed the Applicant that the OIOS/PTF had concluded that the evidence "did not support any findings that [the Applicant] violated the regulations and rules of the Organization in connection with the award of ... contracts".
48. On the basis of the OIOS/PTF findings, the Applicant was requested to return to duty.

### **The procedural history**

49. On 15 March 2006, the Applicant submitted a request for administrative review of the decision to place him on SLWFP.
50. On 28 December 2006, the Applicant submitted a Statement of Appeal to Joint Appeals Board ("JAB"). The Respondent's reply and the Applicant's observations on Respondent's reply were filed in due course.
51. In Report No. 1993 of 27 June 2008, the JAB made the following recommendations:

65. In light of the foregoing, the Panel *unanimously concludes* that the respondent's actions constituted a fundamentally serious and damaging violation of the Applicant's due process rights as well as his reputation. It therefore *unanimously recommends* that he be compensated in the amount of 2 years net base salary at the time the decision was implemented on 16 January 2006.

66. The Panel *also unanimously recommends* that, as the application of Special Leave with full Pay (SLWFP) under the provisions of Staff Rule 105.2 (a)(i) in the context of an investigation concerning a staff member poses an inherent risk of violating that staff member's right to due process, the administration should:

- i. conduct a careful review of existing administrative policies to determine whether they are sufficient to meet the needs of the organization in this context;
- ii. ensure that, irrespective of the outcome of the review, instructions or guidelines are developed to clarify the rights, duties and obligations of staff in such cases and the recourse available to them."

52. On 29 September 2008, the then-Deputy Secretary-General transmitted a copy of the JAB report to the Applicant and advised him of the Secretary-General's decision which, after summarizing the Considerations, Conclusions and Recommendations contained in the JAB report, stated as follows:

The Secretary-General has examined your case in the light of the JAB's report and all the circumstances of the case. He is of the view that the decision to place you on SLWFP was taken in a manner that did not result in a violation of you [sic] due process rights or in damage to your reputation. He has therefore decided not to accept the conclusions and recommendations of the JAB and has also decided to take no further action in this matter.

53. On 31 January 2008, the Applicant filed his appeal with the former United Nations Administrative Tribunal, and as of 1 January 2010 the case was transferred to the Dispute Tribunal, under the new system of administration of justice within the Organization.

### **Relevant legal provisions**

54. Former staff rule 105.2 (Special leave) stated as follows:

(a)(i) Special leave may be granted at the request of a staff member for advanced study or research in the interest of the United Nations, in cases of extended illness, for child care or for other important reasons for such period as the Secretary-General may prescribe. In exceptional cases, the Secretary-General may, at his or her initiative, place a staff member on special leave with full pay if he considers such leave to be in the interest of the Organization;

(ii) Special leave is normally without pay. In exceptional circumstances, special leave with full or partial pay may be granted;

...

55. Former staff rule 110.2 (Suspension during investigation and disciplinary proceedings) stated as follows:

(a) If a charge of misconduct is made against a staff member and the Secretary-General so decides, the staff member may be suspended from duty during the investigation and pending completion of disciplinary proceedings for a period which should normally not exceed three months. Such suspension shall be with pay unless, in exceptional circumstances, the Secretary-General decides that suspension without pay is appropriate. The suspension shall be without prejudice to the rights of the staff member and shall not constitute a disciplinary measure.

(b) A staff member suspended pursuant to paragraph (a) shall be given a written statement of the reason for the suspension and its probable duration.

...

56. Former staff rule 110.3 (Disciplinary measures) stated as follows:

(a) Disciplinary measures may take one or more of the following forms:

...

(iv) Suspension without pay;

...

(b) The following measures shall not be considered to be disciplinary measures, within the meaning of this rule:

(i) Reprimand, written or oral, by a supervisory official;

(ii) Recovery of moneys owed to the Organization;

(iii) Suspension pursuant to rule 110.2.



57. Former staff rule 110.4 (Due process) stated as follows:

(a) No disciplinary proceedings may be instituted against a staff member unless he or she has been notified of the allegations against him or her, as well as of the right to seek the assistance in his or her defence of another staff member or retired staff member, and has been given a reasonable opportunity to respond to those allegations.

(b) No staff member shall be subject to disciplinary measures until the matter has been referred to a Joint Disciplinary Committee for advice as to what measures, if any, are appropriate, except that no such advice shall be required:

(i) If referral to the Joint Disciplinary Committee is waived by mutual agreement of the staff member concerned and the Secretary-General;

(ii) In respect of summary dismissal imposed by the Secretary-General in cases where the seriousness of the misconduct warrants immediate separation from service.

...

58. ST/AI/371 (Revised Disciplinary Measures and Procedures) of 2 August 1991 includes the following relevant provisions:

2. Where there is reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed, the head of office or responsible officer shall undertake a preliminary investigation. Misconduct is defined in staff rule 110.1 as 'failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other administrative issuances, or to observe the standards of conduct expected of an international civil servant.' Conduct for which disciplinary measures may be imposed includes, but is not limited to:

(a) Acts or omissions in conflict with the general obligations of staff members set forth in article 1 of the Staff Regulations and the rules and instructions implementing it;

(b) Unlawful acts (e.g., theft, fraud, possession or sale of illegal substances, smuggling) on or off United Nations premises, and whether or not the staff member was officially on duty at the time;

(c) Misrepresentation or false certification in connection with any United Nations claim or benefit, including failure to disclose a fact material to that claim or benefit;

...

(e) Misuse of United Nations equipment or files, including electronic files;

(f) Misuse of office; abuse of authority; breach of confidentiality; abuse of United Nations privileges and immunities;

(g) Acts or behaviour that would discredit the United Nations.

3. If the preliminary investigation appears to indicate that the report of misconduct is well founded, the head of office or responsible officer should immediately report the matter to the Assistant Secretary-General ["ASG"], Office of Human Resources Management, giving a full account of the facts that are known and attaching documentary evidence, such as cheques, invoices, administrative forms, signed written statements by witnesses or any other document or record relevant to the alleged misconduct.

4. If the conduct appears to be of such a nature and of such gravity that suspension may be warranted, the head of office or responsible official shall make a recommendation to that effect, giving reasons. As a general principle, suspension may be contemplated if the conduct in question might pose a danger to other staff members or to the Organization, or if there is a risk of evidence being destroyed or concealed and if redeployment is not feasible.

5. On the basis of the evidence presented, [the ASG], on behalf of the Secretary-General, shall decide whether the matter should be pursued, and, if so, whether suspension is warranted. Suspension under staff rule 110.2 (a) is normally with pay, unless the Secretary-General decides that exceptional circumstances warrant suspension without pay, in both cases without prejudice to the staff member's rights.

6. If the case is to be pursued, the appropriate official in the administration at headquarters duty stations, and the head of office or mission at duty stations away from headquarters, shall:

(a) Inform the staff member in writing of the allegations and his or her right to respond;

(b) Provide him or her with a copy of the documentary evidence of the alleged misconduct;

(c) Notify the staff member of his or her right to the advice of another staff member or retired staff member to assist in his

or her responses; and offer information on how to obtain such assistance.

If the Secretary-General authorizes suspension, the staff member shall be informed of the reason for the suspension and its probable duration and shall surrender his or her grounds pass. A staff member on suspension may not enter United Nations premises without first requesting permission and shall be afforded the opportunity to enter, under escort, if necessary to prepare his or her defence or for any other valid reason.

7. The staff member should be given a specified time to answer the allegations and produce countervailing evidence, if any. The amount of time allowed shall take account of the seriousness and complexity of the matter.

If more time is required, it shall be granted upon the staff member's written request for an extension, giving cogent reasons why he or she is unable to comply with the deadline. If no response is submitted within the time-limit, the matter shall nevertheless proceed.

8. The entire dossier is then submitted to [the ASG], Office of Human Resources Management. It shall consist of the documentation listed under subparagraphs 6 (a), (b) and (c) above, the staff member's reply and the evidence, if any, that he or she has produced. In cases arising away from New York, the responsible official shall promptly forward the dossier to [the ASG], Office of Human Resources Management.

9. On the basis of the entire dossier, [the ASG], Office of Human Resources Management, shall proceed as follows:

(a) Decide that the case should be closed, and the staff member should be immediately notified that the charges have been dropped and that no further action will be taken. This is without prejudice, where appropriate, to the measures indicated in staff rule 110.3 (b) (i) and (ii); or

(b) Should the facts appear to indicate that misconduct has occurred, refer the matter to a joint disciplinary committee for advice; or

(c) Should the evidence clearly indicate that misconduct has occurred, and that the seriousness of the misconduct warrants immediate separation from service, recommend to the Secretary-General that the staff member be summarily dismissed. The decision will be taken by or on behalf of the Secretary-General.

**Applicant's contentions**

59. The Applicant's principal contentions may be summarized as follows:
- a. Placing the Applicant on SLWFP under former staff rule 105.2(a)(i) was in effect a disguised disciplinary measure similar to suspension from service, which is only applicable after allegations of misconduct have been formulated following the application of due process requirements;
  - b. The Organization has not demonstrated any legitimate purpose or compelling interest that was served by placing the Applicant on SLWFP and publicly announcing that fact;
  - c. Grave errors were contained in the 2004 Draft Report, namely that the Applicant was not even present in New York during four out of five cited procurement transactions, rendering the audit comments "clearly erroneous";
  - d. The decision to place the Applicant on SLWFP followed two exonerations of the Applicant by OIOS/ID following the 2003 and 2004 Draft Reports; further, any so-called "fraud indicators" in those reports were based on factual inaccuracies that were never verified or corrected; thus, the Applicant was placed on SLWFP based on incorrect data known to and promulgated by the Respondent;
  - e. The Applicant was given no explanation for the decision to place the Applicant on SLWFP;
  - f. The Organization has not addressed the JAB conclusion that the decision "was not driven by facts at all, but simply by perceptions";
  - g. Other staff members were compensated for the Organization's decision to place them on SLWFP, which compensation decision is inconsistent with the arguments that the Respondent advances in the Applicant's case.

- h. Under the 2003 Draft Report, dealing with the procurement expedited approval process, the Applicant had been exonerated by OIOS/ID and any decision to put the Applicant on SLWFP as a result thereof unfairly targeted the Applicant for a fraud indicator in January 2006;
- i. The Applicant was procurement officer only in the “laptop computers” matter, and all OIOS accusations against the Applicant as to this matter were false;
- j. The decision to place the Applicant on SLWFP had already been made by 13 December 2005 and had been done so on the basis of flawed audit reports, rendering the Applicant “presumed guilty” before he had a chance to defend himself against the allegations;
- k. The Respondent acted on the basis of a draft report (the 2005 Draft Report) that contained numerous critical errors without having made any effort to solicit the Applicant’s comments in advance, in a rush to finalize the report to the General Assembly.

### **Respondent’s contentions**

- 60. The Respondent’s principal contentions may be summarized as follows:
  - a. The decision to place the Applicant on SLWFP represented a proper exercise of the Secretary-General’s discretion, pursuant to former staff rule 105.2(a)(i), which granted to the Secretary-General the authority to place staff members on SLWFP without their consent or agreement, in exceptional cases where such an action is in the interest of the Organization;
  - b. The Applicant’s case was an exceptional case for purposes of former staff rule 105.2(a) (i), since serious fraud indicators had been raised;

- c. The Organization acted in order to protect its interest to ensure the integrity of the evidence and in general of the fact-finding investigation into the matters arising from those fraud indicators;
- d. The decision to place the Applicant on SLWFP was taken to protect the Organization from the following risks:
- (i) to protect the Organization's relevant procurement files from unauthorized access, as during the relevant time a secured registry for procurement files was not in place and that most procurement files were on staff members' desks; such a situation could create a serious risk to the integrity of the procurement files, as they could be potentially available to anyone with access to the Procurement Service office area, including Procurement Service Officers;
  - (ii) to shield potential witnesses from interference or improper influence by those staff members who might have an interest in the outcome of the review;
- e. The OIOS audits were conducted in accordance with standard audit procedure and methodology, absent of any prejudice, arbitrariness, improper motive or bias;
- f. The Applicant had no right to receive a copy of the audit reports while they were in draft form, and thus did not have the right to input into the draft audit reports;
- g. The decision to place the Applicant on SLWFP was administrative in nature and not disciplinary; placing the Applicant on SLWFP did not pre-judge the Applicant's conduct and had no disciplinary ramifications;

h. The Applicant was placed on SLWFP until such time as the fact-finding and investigation into the Organization's procurement activities was concluded by the OIOS/PTF.

### **Consideration**

*Did the Organization properly exercise its discretionary authority by placing the Applicant on SLWFP pursuant to former staff rule 105.2(a)(i) effective 16 January 2006?*

Was former staff rule 105.2(a)(i) properly relied upon to place the Applicant on SLWFP?

61. In placing the Applicant on SLWFP, the Respondent has attempted to characterize the SLWFP measure as a non-disciplinary measure by stating to the Applicant that "... your placement on special leave with full pay [pursuant to former staff rule 105.2(a)(i)] is a purely administrative measure, which is not disciplinary in nature and is taken to assist the Organization in conducting a full assessment of the situation" (16 January 2006 memorandum from the then-Chef de Cabinet, Mr. Malloch Brown, to the Applicant).

62. The Tribunal notes the discussion in *Kamunyi* UNDT/2010/214 (Judge Shaw) on the issue of placing a staff member on SLWFP under former staff rule 105.2(a)(i) under circumstances that were disciplinary in nature. This Tribunal agrees with and adopts the *Kamunyi* reasoning that former staff rule 105.2 did not permit placing a staff member on SLWFP where an investigation was being made into possible wrong-doing by that staff member. To use former staff rule 105.2 in such a manner would render the provisions of former Chapter X of the Staff Rules and ST/AI/371 meaningless, since the protections of former Chapter X and ST/AI/371 would not need to be respected when the more general former staff rule 105.2 could be relied upon.

63. As stated in *Kamunyi*, former staff rule 105.2 concerned special leave. It was located in Chapter V of the former Staff Rules under the heading "Annual and special

leave”, which provided for annual leave, special leave and home leave. Under former staff regulation 5.2, special leave could be authorized by the Secretary-General in “exceptional cases”.

64. The policy behind former staff rule 105.2 was that where a staff member had reason to request special leave, he or she might do so for the reasons stated in the rule. Special leave could only be granted in exceptional circumstances, including advanced study, research, extended illness, and child care. Other than annual and home leave, the grounds on which staff members could apply to the Secretary-General for leave did not include or refer to disciplinary measures.

65. The Tribunal concurs with and adopts the *Kamunyi* findings that the phrase in former staff rule 105.2 “the interest of the Organization” constrained the discretion of the Secretary-General in granting special leave. The words “exceptional cases” related to situations referred to earlier in the same staff rule, such as where the staff member was undertaking research that would benefit the United Nations, or where a staff member was unable to perform his or her duties by reason of illness or child care obligations. The phrase “exceptional cases” was not intended to be a catch-all that extended to Chapter X of the Staff Rules on disciplinary measures.

66. When the Applicant was placed on SLWFP, the Organization in fact was conducting an investigation into “possible fraud, abuse and waste” (30 January 2006 Secretary-General letter to staff) and the Organization was deemed “at risk” (13 December 2005 email of then-USG/OIOS, Ms. Ahlenius, to the then Officer-in-Charge, UNPS). The exact nature of the OIOS/PTF investigation is discussed, *infra*, within this Judgment. The reasons for placing the Applicant on SLWFP did not fall under the rubric of advanced study, research, extended illness, and child care of former staff rule 105.2(a).

67. Since the Tribunal has determined that former staff rule 105.2(a)(i) did not permit placing a staff member on SLWFP where an investigation into possible wrong-doing by a staff member was being made, the Tribunal will not address, as



being inapplicable, the parties' contentions regarding "exceptional circumstances" under former staff rule 105.2(a)(i).

68. Moreover, the 16 January 2006 letter from Mr. Malloch Brown to the Applicant placing the Applicant on SLWFP indicates that the decision was taken at the highest level (by the Secretary-General himself), which would not make any sense at all if putting the Applicant on SLWFP was "administrative" in nature.

69. Juxtaposed against provisions of Chapter V of the former Staff Rules, regarding annual leave, special leave and home leave, are the provisions of Chapter X (Disciplinary measures and procedures).

70. Under former staff rule 110.3(b) in Chapter X, the only measures that were not considered to be disciplinary measures within the meaning of former staff rule 110.3 were: (i) reprimand, written or oral, by a supervisory official; (ii) recovery of moneys owed to the Organization; and (iii) suspension pursuant to rule 110.2.

71. Omitted from the list of non-disciplinary measures under former staff rule 110.3(b) was any mention of placing a staff member on leave pursuant to former staff rule 105.2(a)(i), thus suggesting (as determined in *Kamunyi*) that former staff rule 105.2(a)(i) had a different purpose behind it.

72. Stated another way, the Respondent's principal argument in this case is that the decision to place the Applicant on SLWFP under former staff rule 105.2(a)(i) was an "administrative measure" only and not disciplinary in nature. However, the listing of non-disciplinary measures in former staff rule 110.3(b) did not include placing a staff member on SLWFP under former staff rule 105.2(a)(i).

73. The Tribunal finds that former staff rule 105.2(a)(i) was not properly relied upon to place the Applicant on SLWFP.

Was the OIOS/PTF investigation a preliminary investigation under ST/AI/371, sec. 2, or a formal investigation under ST/AI/371, sec. 6?

74. Having determined that former staff rule 105.2(a)(i) was not properly relied upon as authority for placing the Applicant on SLWFP, the next inquiry is whether the OIOF/PTF investigation constituted a preliminary investigation only under ST/AI/371, sec. 2, or whether it, in fact, had the purposes and aims of a formal investigation under ST/AI/371, sec. 6. This inquiry is important, for it determines whether the act of placing the Applicant on SLWFP constituted a *de facto* suspension for disciplinary purposes and whether the Applicant should have been afforded certain due process rights as a result.

75. A preliminary investigation under ST/AI/371, sec. 2, is differentiated from a formal investigation under ST/AI/371, sec. 6, as occupying different places within the overall structure of ST/AI/371. The distinct procedural steps for disciplinary matters are:

- a. An initial “reason to believe” that a staff member has engaged in unsatisfactory misconduct (sec. 2);
- b. A preliminary investigation to determine whether the belief of unsatisfactory conduct is “well founded” and whether the matter “should be pursued” further through formal investigation following due process rights (secs. 3 and 4);
- c. An evaluation by the relevant responsible official recommending whether to pursue the matter further (sec. 4);
- d. A decision by the ASG/OHRM, whether the matter should be pursued with written allegations of misconduct (sec. 5);
- e. The initiation of a formal investigation with the filing of formal charges against the staff member (sec. 6);

- f. The implementation of due process rights for the staff member and right of the reply for the staff member (sec. 6);
- g. The review by the relevant official of the entire dossier on whether the matter should proceed further (sec. 9a); and
- h. Where it appears that misconduct has occurred, referral to the Joint Disciplinary Committee (sec. 9b).

76. For an investigation to be regarded as merely preliminary in nature, some “reason to believe” must exist that a staff member has engaged in unsatisfactory conduct, but the investigation must *not* have reached the stage where the reports of misconduct are “well founded” and where a decision already has been made that the matter is of such gravity that it should be pursued further, through a decision of the ASG. Where the latter threshold has been reached, the investigation at that point ceases to be preliminary and in substance converts to a formal investigation with a focus on a specific staff member.

77. It is a fundamental principle of due process that where an individual has become the target of an investigation, then that person should be accorded certain basic due process rights. Note is taken of Judgment No. 1246 (2005) of the former Administrative Tribunal, which stated (emphasis added):

IV. Having given due consideration to the foregoing, the Tribunal will next state its decision. First, it wishes to underline the importance that procedure has, an importance which has been emphasized in recent years throughout developed legal systems, under the title of due process and otherwise known as the principle of no punishment *sine processu*. That importance has been repeatedly highlighted in the various decisions of appropriate organs of the United Nations system and has been further emphasized and developed by the case law of this Tribunal. ...

V. In conclusion, the Tribunal is of the opinion that *the assurances of due process and fairness*, as outlined by the General Assembly and further developed in the rules of UNDP [the United Nations Development Programme], *mean that, as soon as a person is identified, or reasonably concludes that he has been identified, as a*

*possible wrongdoer in any investigation procedure and at any stage, he has the right to invoke due process with everything that this guarantees.* Moreover, the Tribunal finds that there is a general principle of law according to which, in modern times, it is simply intolerable for a person to be asked to collaborate in procedures which are moving contrary to his interests, *sine processu*.

78. Certainly, the OIOS/IAD audit reports spanning a three-year period of time (the 2003, 2004 and 2005 Draft Reports—all in draft form) provided the Organization with “reason to believe” that the eight staff members in question had engaged in unsatisfactory conduct for which a disciplinary measure could be imposed (ST/AI/317, sec. 2).

79. However, by the time the eight staff members (including the Applicant) were placed on SLWFP, an investigation into “possible fraud, abuse and waste” was already being made, according to the then-Secretary-General himself (30 January 2006 email to staff). The eight staff members had been identified under the 20 January 2006 OIOS/IAD audit report as possibly having committed wrongdoing and had been specifically identified by name and position in a 19 January 2006 United Nations press release that also linked the eight staff members to an on-going criminal investigation by the United States Attorney.

80. These identifications of the eight staff members and their linkage to criminal wrong-doing meant that the investigation by the OIOS/PTF had long since passed the preliminary stage and that a *de facto* investigation into actual misconduct was taking place.

81. Similarly, the then-USG/OIOS, Ms. Ahlenius, decided, as early as 13 December 2005, that the OIOS/PTF should undertake an “investigation” into “closed, existing, and new cases or allegations concerning procurement” (see the OIOS/PTF Terms of Reference, para. 6). The Terms of Reference for the OIOS/PTF were approved on 16 January 2006 and the Organization already felt that the case should be “pursued” (ST/AI/371, sec. 6) because of a belief that the eight staff members in question had engaged in unsatisfactory procurement conduct warranting

suspension under ST/AI/371, sec. 4 (“the problems identified in UNPS were of such a magnitude that they needed to be addressed on a comprehensive way”) (see the OIOS/PTF Terms of Reference, para. 6).

82. This Tribunal notes the case of *Zerezghi* UNDT/2010/122, in which a staff member challenged the lack of due process rights during an OIOS investigation. The Dispute Tribunal there held that the due process rights of ST/AI/371 did not exist during the investigation, which this Tribunal believes is a reference to the preliminary investigation under ST/AI/371, sec. 2.

83. The Applicant’s case is fundamentally different from *Zerezghi*: at the time the applicant (*Zerezghi*) was interviewed by OIOS, the respondent had not formed any opinion one way or the other (the purpose of a preliminary investigation) as to the likelihood that the applicant likely had committed the acts in question. For the eight staff members placed on SLWFP, including the Applicant, by the time the then-USG/OIOS, Ms. Ahlenius, on 13 December 2005, decided to constitute a special OIOS procurement task force, the Respondent had already decided that the eight staff members should be the target of an investigation into a number of cases of “possible fraud, abuse and waste” and “procurement wrongdoing”, which was announced in the public realm.

84. Thus, the 2006 OIOS/PTF investigation from January-August 2006 into the activities of the eight staff members who were placed on SLWFP *cannot* be regarded as a preliminary investigation only under ST/AI/371, sec. 2.

85. In the Applicant’s case, the 2003 and 2004 Draft Reports that were “revived” and the 2005 Draft Report constituted the preliminary investigation findings for purposes of ST/AI/371, for these identified the eight staff members with corresponding “fraud-indicators” for each. The decision to constitute the OIOS/PTF clearly came within the realm of an official investigation under ST/AI/371, secs. 5-6, as to “whether the matter should be pursued” through written allegations and a formal investigation process.

86. The Tribunal finds that, having passed the threshold of a preliminary investigation, the OIOS/PTF investigation was not a preliminary investigation under ST/AI/317, sec. 3, but rather constituted a formal investigation under ST/AI/371, sec. 6.

Did the decision to place the Applicant on SLWFP constitute a *de facto* suspension?

87. Having determined that the OIOS/PTF constituted a formal investigation for purposes of ST/AI/371, the Tribunal also finds that the Organization should have implemented the due process protections of ST/AI/371 when placing the Applicant on SLWFP.

88. In addition to being a formal investigation under ST/AI/317 which required implementation of the due process protections of that administrative instruction, the decision to place the Applicant on SLWFP also constituted a suspension for disciplinary purposes, for which the due process protections of ST/AI/371 attached.

89. That the decision to place the Applicant on SLWFP constituted a *de facto* suspension as a disciplinary measure is evident from the requirements for, and attributes of, a suspension.

90. The requirements governing a suspension can be found by looking at the provisions of Chapter X of the former Staff Rules, particularly former staff rules 110.2 and 110.3, and ST/AI/371.

91. Under former staff rule 110.2, a proper suspension requires that (a) an “investigation” is being made, (b) into matters that are disciplinary in nature, (c) following a charge of misconduct, (d) with a statement of the reasons for the suspension, and (e) its probable duration.

92. Under ST/AI/371, sec. 4, a suspension may be imposed upon a staff member following a preliminary investigation and must involve conduct that is of “such a nature and of such gravity”, including where the conduct in question “might pose a

danger to other staff members or to the Organization, or if there is a risk of evidence being destroyed or concealed and if redeployment is not possible”.

93. Under ST/AI/371 sec. 2, the acts for which disciplinary measures may be imposed (including suspension) include: acts or omissions in conflict with the general obligations of staff members; unlawful acts (e.g., theft, fraud, possession or sale of illegal substances, smuggling) on or off United Nations premises; misuse of office, abuse of authority, breach of confidentiality, abuse of United Nations privileges and immunities; and acts or behaviour that would discredit the United Nations.

94. From the above, a suspension under former staff rule 110.2 constitutes an involuntary directive for the staff member to cease all work-related duties and responsibilities, for some period of time (defined at the outset but normally not greater than 3 months) pending completion of an investigation into possible grave wrong-doing, including acts or behaviour that would discredit the United Nations. For a suspension to occur, the Organization must officially charge a staff member with misconduct and the decision must be that of the Secretary-General or his designate. The staff member also should be given reasons for the suspension.

95. Excepting that an official charge of misconduct against the Applicant had not been filed, the decision to place the Applicant on SLWFP bore all the markers of a suspension during a disciplinary investigation under ST/AI/371, rather than the characteristics of a benign administrative measure, such as a SLWFP under former staff rule 105.2(a)(i):

- a. Most significantly, the 16 January 2006 memorandum from the then-Chef de Cabinet to the Secretary-General, Mr. Malloch Brown, informed the Applicant that an “investigation” was already ongoing; presumably, the working of such an important communication from the Chef de Cabinet would be drafted and reviewed carefully before sending; with an “investigation” being initiated, the provisions of ST/AI/371 should have been activated and an official charge of misconduct should have been filed;

- b. The findings of the OIOS/PTF cleared the Applicant of having violated the regulations and rules of the Organization, which means that misconduct had been investigated by the OIOS/PTF;
- c. The 13 December 2005 email from the then-USG/OIOS, Ms. Ahlenius, to the then Officer-in-Charge, UNPS, Mr. Karia, specifically mentioned that the organization might be “at risk”, mirroring the concern in ST/AI/371, sec. 4, that the conduct in question “might pose a danger to the Organization”;
- d. The above-mentioned 13 December 2005 email specifically referenced “suspending any staff member that violates the procurement rules or staff rules”, mirroring the prohibition in ST/AI/371, sec. 2(a), for “acts or omissions in conflict with the general obligations of staff members...”
- e. The creation of the OIOS/PTF was the result of perceived problems in procurement identified by the Independent Inquiry Committee into the Oil for Food Programme, and the arrest and conviction of Mr. Yakovlev, UN Procurement Officer, again “of such a magnitude” reflecting concern under ST/AI/371, sec. 4, over conduct of “such a nature and gravity” that could warrant an investigation and suspension;
- f. The broad media attention given to placing the staff members on SLWFP, including the Applicant, referred to by FOX News as “potential fraudulent or corrupt activity” requiring cooperation with federal authorities or local authorities in the lifting of immunity so that “any perpetrator of waste, of fraud and abuse [would] be accounted for”. High United Nations officials clearly suspected that the eight staff members had engaged in behaviour which would be disciplinary misconduct in nature. In addition, these suspicions were discussed freely in the public realm, violating all notions of due process for the eight staff members;



g. The 30 January 2006 letter from the Secretary-General to all United Nations staff stated that “OIOS is investigating a number of cases of possible fraud, abuse, and waste”—conduct that clearly requires the procedural protections of ST/AI/371;

h. The OIOS/PTF Terms of Reference identified the problems within the Procurement Division as being “of such a magnitude” as to warrant the creation of the OIOS/PTF (a special *ad hoc* task force), reflecting concern over conduct of “such a nature and gravity” that could warrant an investigation and suspension under ST/AI/371, sec. 4;

i. The 15 April 2006 letter from Ms. Grant, Officer-in-Charge, ALU/OHRM, , to the Applicant stated that placing the Applicant on SLWFP was “intended to prevent accusations that key personnel involved in procurement influenced the outcome of the investigations”, reflecting the concern in ST/AI/371, sec. 4, that suspension may be contemplated “if there is a risk of evidence being destroyed or concealed”;

j. The same 15 April 2006 letter from Ms. Grant stated that placing the Applicant on SLWFP was “subject to a number of fact-finding investigations within the Organization” which could only mean that an “investigation” subject to the provisions of ST/AI/371 was already in process.

96. Because the 2005 Final Report indicated that “instances of non-compliance with procurement rules and ... more serious wrongdoing may have occurred” (30 January 2006 Secretary-General letter to staff), the Applicant could only have been placed on SLWFP pending investigation of unsatisfactory conduct for which a disciplinary measure could be imposed (ST/AI/371, sec. 2) and the Organization should have charged with Applicant with misconduct as a result.

97. Since the OIOS/PTF investigation was not a preliminary investigation under ST/AI/371, sec. 2, but rather constituted a formal investigation under ST/AI/371, sec. 6, and since the act of placing the Applicant on SLWFP constituted a *de facto*

suspension, the Organization's failure to file a formal charge of misconduct against the Applicant is all the more striking.

98. In reality, the Respondent charged the Applicant with misconduct on a *sub silentio* basis, made a decision that the case against the Applicant should be pursued, and constituted its special OIOS/PTF to look into the matter. The impression conveyed is that of a purposeful denial of due process rights for all eight staff members concerned.

99. The Tribunal finds that the decision to place the Applicant on SLWFP under former staff rule 105.2(a)(i) constituted a *de facto* suspension under former staff rule 110.2 and ST/AI/371.

100. The Tribunal finds that the procedures and protections of ST/AI/371, sec. 6, should have applied when placing the Applicant on SLWFP (*de facto* suspension) and during the OIOS/PTF investigation.

101. The Tribunal finds that the Organization did not properly exercise its discretionary authority by placing the Applicant on SLWFP pursuant to former staff rule 105.2(a)(i) effective 16 January 2006.

*Were the Applicant's due process rights observed when the Secretary-General exercised his discretionary authority to place the Applicant on Applicant on SLWFP pursuant to former staff rule 105.2(a)(i) effective 16 January 2006?*

102. Having determined that the Applicant was being formally investigated under former staff rule 110.2 and sec. 6 of ST/AI/371, that the Organization erred in placing the Applicant on SLWFP under former staff rule 105.2(a)(i), that the act of placing the eight staff members on SLWFP constituted a *de facto* suspension under former staff rule 110.2 and sec. 6 of ST/AI/371, and that the provisions of ST/AI/371 should have applied, it is necessary to determine whether the due process rights were afforded under ST/AI/371.

103. Where a proper investigation is being conducted under ST/AI/371, sec. 6, into wrong-doing, a staff member must be: (a) informed in writing of the allegations against him (sec. 6); (b) informed of his right to respond (sec. 6); (c) provided a copy of the documentary evidence of the alleged misconduct (sec. 6); (d) notified of his right to the advice of another staff member or retired staff member to assist in his responses (sec. 6); (e) informed of the reason for the suspension (sec. 6), (f) informed of the probably length of the suspension (sec. 6); (g) offered information on how to obtain such assistance (sec. 6); (h) given a specified time to answer the allegations and produce countervailing evidence (sec. 7). None of these procedural protections were given to the Applicant in this case (see more in para. 125 below).

Was the *de facto* suspension based on reports that were “well founded” under sec. 3 of ST/AI/371?

104. At this point, it is necessary to recall that, in order for a suspension recommendation and the actual suspension to go forward, any preliminary investigation must, under ST/AI/371, sec. 3, present evidence that the report of misconduct is “well founded”. That is, if a preliminary investigation is not based on solid evidence, then the legal basis for a suspension under ST/AI/371 does not exist.

105. It has been the Applicant’s consistent contention that the 2003 and 2004 Draft Reports, which remained in draft form for several years and which did not bear the scrutiny of the back-and-forth commenting process between OIOS/IAD and relevant procurement officials (see finding of fact Nos. 8-18), contained fundamental inaccuracies regarding the Applicant’s alleged participation in so-called procurement irregularities. When the inaccuracies in the 2003 and 2004 Draft Reports were carried forward, without correction, to the 2005 Draft Report on which the decision the place the Applicant on SLWFP was based, then those inaccuracies rendered the 16 January 2006 decision flawed and incorrect. The Applicant’s contentions have merit.

106. According the 2005 Final Report, the following “fraud indicator” was made (emphasis added):

123. OIOS reviewed five procurement cases [Cases Nos. 1-5, see para. 18 of this Judgment] awarded to Vendor Y, to identify and analyze patterns of fraud indicators. *All* of these cases involved the Chief of PD Field Procurement Section who was also a frequent Officer-in-Charge for PD, *and a PD officer*. The total value of these five cases was \$48.6 million. These findings were included in a separate audit report transmitted to DM, which included a recommendation as to accountability [reference to AP2004/600/14].

107. Following this excerpt in the 2005 Final Report is a table representing Cases Nos. 1-5 (see para. 18 above).

108. A number of difficulties exist with paragraph 123 of the 2005 Final Report:

a. First, the Applicant was not stationed at United Nations Headquarters during 1999-2000, which covered four of the contracts in question; the record unequivocally demonstrates that the Applicant *could not have been involved* in three of those cases (Case Nos. 1, 3 and 4 mentioned in para. 123 of the 2005 Final Report);

b. OIOS incorrectly identified the Applicant as being linked in “all five cases” to the then Chief of PD, Field Procurement Section, Mr. Bahel, who was a primary focus of investigation at that time (reference is made to FOX News reports); this so-called link either had no actual basis in fact or was premised on “suspected” favouritism and not on fact (2 February 2007 memorandum from the then-USG/OIOS, Ms. Ahlenius, to OHRM);

c. In a 2 February 2007 memorandum to OHRM, the then-USG/OIOS, Ms. Ahlenius, conceded that a “mistake” occurred in linking the Applicant in Case No. 2, but she minimized the gravity of this mistake by stating that auditors are only required to identify fraud indicators and that (para. 13):

[At the time the report was being drafted, OIOS had previously had indications that Mr. Bahel and [the Applicant] were together involved in suspected favouritism of Mr. Nishan Kohli, the owner of Thunderbird and representative of TCIL. Therefore *while*

*inaccurately worded*, the report correctly reflected the auditor's view that Cases 2 and 5 are interrelated.

109. At the substantive hearing in this case, the Auditor-in-Charge, Mr. Park, testified that it was a "mistake" to say that the Applicant was involved in all five cases; he further testified that perhaps it was a "mistake" to consider that the Applicant was involved in Case No. 2, since the information about that case came from the then Chief of PD, Field Procurement Section, Mr. Bahel, himself. If the Auditor-in-Charge knew at the substantive hearing that it was a "mistake" to name the Applicant in connection with Case No. 2, then he also should have known, at the time the relevant reports were written, that it was a "mistake" to name the Applicant in connection with Case No. 2.

110. The OIOS/IAD Audit Director, Ms. Ndiaye, testified that the drafting of the 2005 Draft Report was "unfortunate writing".

111. In her 2 February 2007 memorandum to OHRM, the then-USG/OIOS, Ms. Ahlenius, confirmed that "[i]t is clear that the procurement officer in question [for Case No. 2] is the then Chief of PD, Field Procurement Section, Mr. Bahel. [The Applicant] raised his concern over this issue in an e-mail to me to which I responded on 12 June 2006 and where I clarified that the Internal Audit Division had only got his comments *after the report was finalized*" (emphasis added). This comment also reflects the awareness that a "mistake" occurred in the report when it named the Applicant in connection with all five procurement transactions (see para. 18 above).

112. Thus, three different OIOS officials have admitted they made a "mistake" in linking the Applicant to *all* five procurement transactions under investigation. If the Applicant had been given the opportunity to comment on these so-called fraud indicators at an earlier stage, the Tribunal believes that he could easily have dismissed any involvement in, at least, Case Nos. 1, 2, 3, and 4. However, the Applicant's own comments were not even considered by OIOS, as they were received after the report was finalized. Finally, given the high-profile nature of the

investigation that was taking place, it was incumbent on the Organization to ensure that the highest standards of accuracy were in place.

113. As stated by the Applicant, the 2003 and 2004 Draft Reports were based on factual inaccuracies that were never verified or corrected. Grave errors existed within the 2004 Draft Report, and the Applicant was placed on SLWFP based on data that was incorrect and should have been verified by the Respondent.

114. The Respondent through its witnesses has attempted to clarify that auditors are not “investigators” and are not required to verify the accuracy of facts presented to them. As the Tribunal understands this testimony, the contention is that auditors are responsible only for communicating so-called “fraud indicators” to OIOS/ID, which has the responsibility for undertaking a full investigation to determine whether the indicators have been substantiated or not.

115. The Tribunal understands this conceptual difference, but has difficulty in understanding how it could apply in this case. The question must be: how was it possible for OIOS to rely on so-called fraud indicators that were clearly *false* as to the Applicant? For example, the Applicant was not even present in New York at Headquarters for Case Nos. 1, 3, and 4, and how could such a fundamental error be overlooked? The Tribunal understands that auditors are required to cross-check and verify, in some manner, the reliability of the information presented to them. Auditors surely cannot take at “face value” in the first instance whatever information is presented to them. Such verification either never happened in this case or fundamental facts demonstrating the Applicant’s non-involvement in these procurement irregularities were overlooked.

116. Regarding Case No. 5, the so-called laptop standardization issue, in her 2 February 2007 memorandum, the then-USG/OIOS, Ms. Ahlenius, stated that the substance of the audit findings as discussed in the 2003 and 2004 Draft Reports remained “pertinent” (para. 14 of the memorandum).

117. However, a close reading of the 2 February 2007 memorandum indicates that the 2004 Draft Report was “inaccurately worded” (i.e., incorrect) regarding the Applicant. In light of the errors in 2003 and 2004 Draft Reports, which were carried forward in the 2005 Draft Report, and in light of the fact that that the Internal Audit Division only received the Applicant’s comments *after* the 2005 Final Report was finalized, it is difficult to see how the conclusions of 2003 and 2004 Draft Reports can remain “pertinent”.

118. As stated by the Applicant in the current proceedings, “[E]ven after the OIOS Investigations Division found no wrongdoing, the OIOS Auditors did not take the opportunity to revise the accuracy of their initial findings and make sure that they were based on sound, competent, relevant and reasonable evidence before forwarding their reports to the Department of Management” (Applicant’s Closing Statement, 18 January 2011, para. 18).

119. The Tribunal finds that the *de facto* suspension of the Applicant on 16 January 2006 was not based on reports that were “well founded”.

Did the reasons proffered by the Organization form a sufficient basis for placing the Applicant on SLWFP in this case?

120. The Respondent avers that in placing the Applicant on SLWFP (even though, as found by the Tribunal in the above, this constituted a *de facto* suspension), the Organization was seeking to protect its relevant procurement files from authorized access and to shield potential witnesses from interference and to protect the integrity of the investigation.

121. The Tribunal is not convinced that these were live issues justifying the placement of the Applicant on SLWFP.

122. First, the goal of protecting witnesses was not achieved, since the staff members who were placed on SLWFP were not directed to avoid speaking with their colleagues or from entering United Nations buildings while on SLWFP.

123. Second, no direct connection exists between the goal of protecting the files and the decision to place the Applicant on SLWFP. The procurement cases being reviewed were several years old and the files were retired; it was explained by the Applicant and not contradicted by the Respondent that a different system now exists for maintaining active files contrasted with maintaining archived files in 2006. The Respondent only needed to secure the files relevant to the work of the OIOS/PTF, and there was sufficient time to do this before the eight staff members were placed on SLWFP. The relevant files, in fact, ultimately were transported to another building. The Applicant was not involved in the procurement transactions under investigation and the Respondent has not established the Applicant's connection to any missing files.

124. The Tribunal finds that the reasons proffered by the Organization for placing the Applicant on SLWFP did not form a sufficient basis for the Organization's action of placing the Applicant on SLWFP in this case.

What due process guarantees were required under ST/AI/371 and what procedural rights were afforded to the Applicant?

125. The Tribunal lists the rights afforded to the Applicant under ST/AI/371, sec. 6, with a corresponding analysis of whether the Organization offered those rights to him:

a. *Sec. 6(a)—the right to be informed of the allegations and of the right to respond to the allegations:* the Organization did not observe this provision, as the 16 January 2006 memorandum from Mr. Malloch Brown to the Applicant was general in nature, did not contain any official allegations against the Applicant, did not specify the cases of alleged wrong-doing against the Applicant, and did not inform the Applicant of his right to respond;

b. *Sec. 6(b)—the right to be provided with documentary evidence of the alleged misconduct:* as of the date that the Applicant was placed on SLWFP



(16 January 2006), the Organization apparently was still continuing to revise the “documentary evidence” on which it would be relying for any possible misconduct charges, as the 2005 Draft Report (dated 9 December 2005) only was finalized as of 20 January 2006 (the 2005 Final Report). The purpose of filing official charges against a staff member is to put them on notice, so they can properly defend themselves against any allegations. Without proper charges, however, the Applicant would be hard-pressed to defend himself in any manner;

c. *Sec. 6(c)—the right to be informed of his right to the advice of other staff members to assist in his responses:* the 16 January 2006 memorandum did not observe this right;

d. *Sec. 6—the right to have the Secretary-General himself authorize the suspension:* it is assumed that the then Secretary-General authorized the suspension, although there is no direct evidence of this fact or of him delegating his authority to the then-Chef de Cabinet, Mr. Malloch Brown;

e. *Sec. 7—the right to be given a specified time to answer the allegations and to be informed of the procedure for producing countervailing evidence:* the 16 January 2006 memorandum did not inform the Applicant of these rights;

f. *Sec. 8, secs. 6(a)-(c)—the right to have the entire dossier (including the staff member’s reply and countervailing evidence) submitted to the ASG/OHRM:* it is unclear whether this provision was observed, or how this requirement fit in with the mandate of the OIOS/PTF;

g. *Sec. 9(a)—the right to be informed, if the case is closed, that the charges have been dropped and that no further action will be taken:* the OIOS/PTF concluded, basically, that the Applicant had not engaged in any fraudulent activity, but had engaged in managerial failings; this conclusion

does not exhaustively addresses that the charges will be dropped and that no action will be taken.

126. In sum, the Applicant was deprived in numerous ways of due process rights afforded to staff members under ST/AI/371. While the 2006 Report cleared the Applicant of all wrong-doing (no official charges were filed), the *de facto* suspension of the Applicant through SLWFP should never have occurred, as it was based on inaccurate facts that had been in the possession of the Respondent since 2004 and were not verified in 2005. If the Applicant had been given the proper procedural protections of ST/AI/371, where the factual inaccuracies could have been discovered at an early stage, this Tribunal believes that the Organization would have lacked a “well founded” basis for the suspension from the outset.

127. The Respondent has suggested that the events leading to the Applicant’s eventual summary dismissal from the Organization in November 2007 (as adjudicated in *Cabrera and Streb*) are relevant in the decision to place the Applicant on SLWFP. Assuming, *arguendo*, that the Respondent is correct in his contentions, this means that the Respondent *knew*, as of January 2006, about the events that justified the summary dismissal and was in a position of suspecting the Applicant of possible disciplinary wrong-doing all along.

128. If the Respondent truly harboured a suspicion at the time that the Applicant had engaged in wrong-doing that eventually could lead to the Applicant’s summary dismissal, the Respondent was not accurate when telling the Applicant about the reasons for placing the Applicant on SLWFP *and* the Respondent purposely deprived the Applicant of the due process protections of ST/AI/317 as a result. Attempting to insert the summary dismissal events into this case amounts to an *ex post facto* application of evidence that is not proper, and the Respondent undermines his own argument.

129. In sum, the necessity of affording the Applicant the protections of ST/AI/317 became all the more imperative if *Cabrera and Streb* is taken into account.

130. However, as noted by the Tribunal (Judge Meeran) in *Cabrera and Streb* (exact language reordered for purposes of this Judgment), “it is important to record, in view of the concerns expressed by [the Applicant] that there was no evidence either in the course of the criminal trial or in the [OIOS/PTF] investigation that either applicant engaged in conduct which amounted to the conferring of favours or benefits on the representative of the two vendors” (para. 11). “Following an internal audit and investigation into certain apparently questionable practices in the Procurement Division, a policy of zero-tolerance was implemented with regard to the acceptance of hospitality from vendors. However, it is important to note that this rule was not applicable at the material time. There was within the Procurement Division a culture of acceptance of modest hospitality from vendors. It would be fair to observe that a senior procurement officer had a certain attitude towards such issues, as a consequence of which he found himself facing a criminal prosecution and subsequent conviction” (para. 16).

131. The Tribunal recognizes that the creation of the OIOS/PTF was the result of perceived problems in procurement identified by the Independent Inquiry Committee into the Oil for Food Programme, and the subsequent arrest and conviction of Mr. Yakovlev, UN Procurement Officer. To be sure, the Organization must be a good steward of the finances of its Member States and must take steps to ensure that staff members do not violate the Organization’s procedures and regulations. What makes the handing of the Applicant’s case troubling is that his case—and that of the other procurement officials placed on SLWFP on the same day—was played out in the public arena with repeated statements to news media and to Member States. The Organization’s response in this case did not respect rights clearly and unambiguously afforded to staff members when misconduct is suspected. A strong Organization is one that enforces its regulations and rules, while at the same time affording staff member rights, with the assurance that legal processes will provide a just outcome.

132. The Tribunal finds that the Applicant's due process rights were not observed when the Secretary-General exercised his discretionary authority to place the Applicant on SLWFP pursuant to former staff rule 105.2 effective 16 January 2006.

### **Compensation**

133. The purpose of compensation is to place the staff member in the same position he or she would have been in, had the Organization complied with its contractual obligations (see the United Nations Appeals Tribunal in *Wu* 2010-UNAT-042). Under *Antaki* 2010-UNAT-096, the United Nations Dispute Tribunal has an unquestioned discretion and authority to quantify and order compensation under Article 10.5 of its Statute for violation of the legal rights of a staff member as provided under the Staff Regulations, Rules, and administrative issuances.

134. The compensation award may be for actual pecuniary or economic loss, non-pecuniary damage, procedural violations, stress and moral injury (*id.*). The award of compensation for non-pecuniary damage shall not amount to an award of punitive or exemplary damage designed to punish the Organization (the Statute of the Dispute Tribunal, art. 10.7, and *Wu* 2010-UNAT-042). Compensation may not be awarded where no harm has been suffered (*Sina* 2010-UNAT-094, *Antaki* 2010-UNAT-096).

135. Compensation may be awarded for egregious conduct surrounding an investigation. "It is apparent from the reasons given ... that this case is particularly egregious, commencing with the findings of the obviously biased investigation ... from the outset" (*Mmata* 2010-UNAT-092).

136. The Applicant testified at the substantive hearing that his professional reputation has been irreparably injured and that he has been caused humiliation and stress by the way in which the OIOS/PTF investigation was carried out, and by the attendant publicity given to it by the Organization (including identifying the Applicant by name). In this regard, the Applicant differentiated the nature of his

personal indiscretions leading to his summary dismissal, from being essentially charged with fraud.

137. The Tribunal notes that a charge, either explicit or *sub silentio*, as here, of fraudulent misconduct constitutes a particularly serious indictment for any procurement officer.

138. The Tribunal was able to observe the Applicant's demeanour at the substantive hearing. The fact that the Applicant has suffered stress and humiliation as a result of the events described within this Judgment was evident by the distress he exhibited.

139. The Tribunal finds that the Applicant is entitled to compensation in this case based on the serious nature of the conduct investigated by the OIOS/PTF, by the fact that placing the Applicant on SLWFP constituted a *de facto* suspension, by the fact that the Applicant was wrongly suspended for a period of approximately six months, by the fact that the Organization assisted in allowing the Applicant's situation to be aired in the public arena, by the fact that serious breaches of the Applicant's due process rights occurred, and by the stress, humiliation and emotional suffering that would occur to any individual in such position, including the Applicant.

140. The Tribunal wishes to stress that its decision as to the compensation to be awarded to the Applicant in the present case are based on the serious breaches committed against him as described above and which are entirely separate and distinct from the subsequent events dealt with in *Cabrera and Streb*.

141. The Tribunal finds that the Applicant is entitled to the sum of two years' net base salary in effect as of January 2006.

## **Conclusion**

142. The Tribunal finds that former staff rule 105.2(a)(i) was not properly relied upon to place the Applicant on SLWFP.

143. The Tribunal finds that the OIOS/PTF investigation was not a preliminary investigation under ST/AI/371, sec. 2, but rather constituted a formal investigation under ST/AI/371, sec. 6.

144. Having determined that the OIOS/PTF constituted a formal investigation for purposes of ST/AI/371, the Tribunal also finds that the Organization should have implemented the due process protections of ST/AI/371 when placing the Applicant on SLWFP.

145. The Tribunal finds that the decision to place the Applicant on SLWFP under former staff rule 105.2(a)(i) constituted a *de facto* disciplinary suspension under former staff rule 110.2 and ST/AI/371, sec. 6.

146. The Tribunal finds that the procedures and protections of ST/AI/371, sec. 6, should have applied when placing the Applicant on SLWFP (*de facto* suspension) and during the OIOS/PTF investigation.

147. The Tribunal finds that the Organization did not properly exercise its discretionary authority by placing the Applicant on SLWFP (*de facto* suspension).

148. The Tribunal finds that *de facto* suspension of the Applicant on 16 January 2006 was not based on reports that were “well founded”.

149. The Tribunal finds that the reasons proffered by the Organization did not form a sufficient basis for placing the Applicant on SLWFP (*de facto* suspension) in this case.

150. The Tribunal finds that the Applicant’s due process rights were not observed when the Secretary-General exercised his discretionary authority to place the Applicant on SLWFP (*de facto* suspension).

151. Under art. 10.5 of the Statute of the Dispute Tribunal, the Respondent shall pay the Applicant two years’ net base salary in effect in January 2006 as compensation. This sum is to be paid within 60 days of the date of this Judgment

becomes executable during which period the US Prime Rate shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

*(Signed)*

Judge Marilyn J. Kaman

Dated this 6<sup>th</sup> day of May 2011

Entered in the Register on this 6<sup>th</sup> day of May 2011

*(Signed)*

Santiago Villalpando, Registrar, New York