



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/056/
UNAT/1569
Judgment No.: UNDT/2011/123
Date: 30 June 2011
Original: English

Before: Judge Marilyn J. Kaman

Registry: New York

Registrar: Santiago Villalpando

JOHNSON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Leonard Sclafani

Counsel for Respondent:

Marcus Joyce, ALS/OHRM, UN Secretariat

Notice: This Judgment has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. The Applicant was one of eight staff members from the Department of Management (“DM”) / Procurement Division (“PD”) who were placed on Special Leave With Full Pay (“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”).

2. The Applicant has two cases before the Dispute Tribunal: UNDT/NY/2010/056/UNAT/1569 (Case 1) and UNDT/NY/2009/116 (Case 2). This Judgment shall only address Case 1, and Case 2 shall be dealt with in a separate Judgment.

3. In Case 1, the Applicant appeals against the Secretary-General’s decision to place the Applicant on SLWFP pursuant to former staff rule 105.2(a)(i) effective 16 January 2006. While the Applicant was on SLWFP, the Applicant was interrogated by the OIOS/PTF regarding matters that had led the Respondent to place the Applicant on SLWFP and other related matters. By Order No. 22 (NY/2011) dated 26 January 2011, this Tribunal determined that the matter of the interrogation was implicitly before the Tribunal and that the Tribunal would consider the Applicant’s claims on that subject.

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

- a. Whether the Respondent properly exercised his 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 SLWFP pursuant to former staff rule 105.2(a)(i) effective 16 January 2006;
and

c. Whether the Applicant's due process rights were observed during the interrogations of the Applicant subsequent to his being put on SLWFP.

Facts

5. The following outline is primarily based on the material submitted to the Tribunal by the parties, as well as on the chronology of facts provided in Report No. 1916 of the Joint Appeals Board ("JAB") of 30 August 2007, to which the parties agreed in their 30 August 2007 jointly-signed statement. To provide historical context to the present case, the Tribunal has also made certain references to some factual findings from its judgment in *Cabrera* UNDT/2011/081 of 6 May 2011, which related to the same issues as those in the present case. The Tribunal takes judicial notice of these findings, while also noting that none of the facts for which judicial notice has been taken bear on the outcome of the present case.

6. The Applicant joined the Organization in July 1994 as a Logistics Officer in the United Nations Operation in Somalia. Three years later he assumed the post of Contracts Management Officer within the United Nations Angola Verification Mission. In April 1999, the Applicant was appointed Officer-in-Charge of the Transport Section, Department of Peacekeeping Operations ("DPKO"), at United Nations Headquarters. In April 2004, while still assigned to DPKO, the Applicant was deployed to Khartoum, Sudan, as Chief Administrative Officer ("CAO") of the United Nations Advance Mission in the Sudan ("UNAMIS"). The Applicant also later served as CAO with the United Nations Mission in the Sudan ("UNMIS"). At the time of his application to the JAB, the Applicant was serving as Chief, Logistics Operation Section ("LOGOPS"), Logistics Support Division ("LSD"), Office of Mission Support. His fixed-term appointment was to expire on 30 June 2007.

7. On 15 November 2006, the Applicant was returned to duty after his SLWFP, although he was advised that he would not be permitted to resume his duties as CAO, UNMIS, or to return to his post at Headquarters as Chief, LSD/LOGOPS. The Respondent's representatives also informed the Applicant that he could not return to duty within LSD, but no explanation has been given for this restriction.

2003 and 2004 Draft Reports

8. From *Cabrera*:

a. During 2003 and 2004, the OIOS Internal Audit Division ("IAD") issued two draft reports concerning certain "fraud indicators" in peacekeeping missions, namely draft internal Audit Report AN2003/42/1 titled "Audit of Systems Contract for Engineering Manpower to Peacekeeping Missions" ("the 2003 Draft Report") and draft internal Audit Report AP2004/600/14 titled "Review of selected peacekeeping procurement cases—analysis of patterns of fraud indicators" ("the 2004 Draft Report").

b. 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.

2005 and early 2006 developments and the 2005 Draft and Final Reports

9. 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”).

10. 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”.

11. 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”). From *Cabrera*: the 2005 Draft Report included a summary of the 2003 and 2004 Draft Reports and 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.

12. The 2005 Draft Report associated the Applicant by name with several procurement cases where OIOS claimed that so-called “fraud indicators” existed—the alleged unnecessary acquisition of a heavy helicopter in 2000, the alleged attempt in 2004 to inflate the volumetric fuel estimate for the short-term fuel contract for UNMIS, and the alleged acquisition of aviation support services at Cairo, Egypt, in 2005 outside the regular procurement processes.

13. Conflicting evidence exists on to what extent the Applicant either was given a copy of, or was briefed on, the 2005 Draft Report:

- a. In the Respondent’s 4 December 2007 referral to the Joint Disciplinary Committee (“JDC”), it is stated that the Applicant “was briefed on the

contents of [the 2005 Draft Report] and was asked to provide an individual written reply. [The Applicant] complied with this request, researching one particular aspect of the report's findings and providing his submission to DPKO on 13 January 2006, which was incorporated in DPKO's comment concerning the draft audit report ...”;

b. In his 28 June 2007 written interrogatories to the JAB, the Respondent states that:

On 8 January 2006, the [Applicant] was recalled to Headquarters to assist in the preparation of DPKO's response to the conclusions contained in the draft OIOS report [assumedly, referring to the 2005 Draft Report] and was thereby made aware of the contents of the report. Hence the [Applicant] was informed of the nature and seriousness of the preliminary findings concerning unsatisfactory conduct in connection with certain procurement exercises, and of the facts that had been established to date. The [Applicant] provided his full cooperation to DPKO in connection with the preparation of its response to the draft report.

c. In the Applicant's response to Order No. 121 (NY/2011) of 21 April 2011, para. 4(b), the Applicant, however, states that he only received a copy of the 2005 Draft Report on or about 16 August 2006, as part of the JAB appeal, although in para. 6(b) of Order No. 121, the Applicant notes that, on 9 January 2006, he was given “photocopies extract[s]” of the 2005 Draft Report that “contained only the paragraphs in which their respective names were mentioned” (Applicant's reply to Order No. 121, para. 6b).

14. The Tribunal interprets these answers to mean that, at most, the Applicant was briefed on selected portions of the 2005 Draft Report, but did not have the opportunity to read, review or comment on the 2005 Draft Report before he was placed on SLWFP or before the OIOS/PTF began its investigation.

15. On 20 January 2006, OIOS/IAD submitted Audit Report AP2005/600/20 to DM and DPKO as a final report (“the 2005 Final Report”).

Creation of the OIOS/PTF and its terms of reference

16. From *Cabrera*:

a. By email dated 13 December 2005, the then-USG/OIOS, Ms. Inga-Britt 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 Industries Limited Liability Company (LLC) (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

b. On 12 January 2006, 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 a United Nations Officer”.

c. 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

17. 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 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.

18. On or about 19 January 2006, the Associated Press released a story (dated 16 January 2006) regarding the fact that eight staff members were put on paid leave, pending completion of an investigation into fraud and mismanagement in purchasing for United Nations peacekeeping. According to the contents of the release (emphasis added):

The United Nations on Monday *ordered eight staff members to take paid leave as part of its expanding investigation of fraud and mismanagement in U.N. [United Nations] purchasing for the world body's far-flung peacekeeping operations.*

...

... Secretary-General Kofi Annan has ordered the U.N. internal watchdog *to cooperate with an ongoing criminal investigation by the U.S. attorney's office.* That cooperation has already led to a guilty plea by one U.N. procurement officer, Alexander Yakovlev, who admitted to wire fraud and money laundering in federal court. A probe of the U.N. oil-for-food program had also implicated Yakovlev in corruption in the Iraq operation.

A senior U.N. official, speaking on condition of anonymity because of the sensitivity of the issue, *said the internal procurement audit outlined mismanagement and potential cases of fraud.*

...

19. On 19 January 2006, an internal press release from the United Nations Department of Public Information was issued, and contained the exact names, departments and positions of the eight staff members placed on SLWFP.

20. On 30 January 2006, by an email broadcast to the staff members at the United Nations Headquarters, the Secretary-General stated (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 prejudge anyone's conduct. Rather, this step was necessary to protect the Organization's interests and to allow us to better establish facts. 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.

21. 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 OIOS audit report (emphasis added):

... as a precautionary measure to protect the Organization, I, at the request of the Department of Management and Peacekeeping have 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.

22. On 24 March 2006, the then-Chef de Cabinet, 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.

...

23. By a letter dated 15 April 2006 to the Applicant, Ms. Adele Grant, the then-Officer-in-charge, Administrative Law Unit (“ALU”), informed him 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 within your area of responsibility. 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.

24. By a letter dated 8 May 2006, the Applicant wrote to Ms. Grant to state his objections to his continued status on SLWFP.

The OIOS/PTF investigation and the Applicant's due process

25. In response to Order No. 121 (NY/2011), the Applicant states that, when he was placed on SWLFP on 16 January 2006, the Applicant was not informed as to the existence of any due process rights to which he was entitled (see Applicant's reply to Order No. 121, para. 6(a)(i)).

26. By email of 11 May 2006, Ms. Laura Covill, OIOS/PTF Investigator, requested a meeting with the Applicant to discuss "the earlier stages of UNAMIS/UNMIS planning, going back to the preliminary LogOps [assumedly, logistical operations] plans of October 2003, the recce [assumedly, reconnaissance] mission in November/December 2003, and thereafter proceeding throughout 2004. Our particular interest is in the fuel consumption projections that were generated at various times during that period".

27. In reply, by email of 17 May 2006, while expressing his willingness to cooperate with the OIOS/PTF investigation, the Applicant specifically requested that he be presented with the questions that he would be asked, that he could be assisted by a counsel during the interview, and that "at minimum" he be informed about "the scope of the allegations against [him] and the evidence".

28. During the course of the OIOS/PTF, Mr. Paul Lachal Roberts, Chairman, OIOS/PTF, on 1 June 2006, wrote a letter to the Applicant, stating that the Applicant: (a) would not be given questions in advance of the OIOS/PTF interview; (b) could not be assisted by counsel; (c) could not know the scope of the allegations against the Applicant; (d) could not know the evidence in relation to the allegations against the Applicant (this letter is set out in detail in para. 105 below).

29. In a 9 June 2006 letter to the OIOS/PTF Chairman, the Applicant stated that he agreed to be interviewed, but that his participation would be "under duress" if his basic due process rights were not observed.

The 2006 Report and the Applicant's return to duty

30. On 13 September 2006, the OIOS/PTF presented its final report regarding the allegations against the Applicant (“the 2006 Report”).

31. The OIOS/PTF concluded that the Applicant had not engaged in any fraudulent activity, but had demonstrated a lack of managerial oversight:

...

206. It is evident that certain transgressions were presented to [the Applicant] after they had materialized, and that [the Applicant] was forced to react to a situation in which rules and/or policies were already ignored. Nevertheless, as the Mission's CAO it was incumbent upon [the Applicant] to establish controls to avoid future reoccurrences, create an environment mindful of the need to adhere to the Organization's financial and procurement rules, and operate within existing rules himself—setting an appropriate example. In sum, there must be a cumulative effect when findings intimate similar conduct, namely a lack of managerial oversight and the lack of proper controls to secure adherence to these rules.

...

32. On 15 November 2006, the Applicant returned to duty under the conditions stated in para. 7 of this Judgment.

33. On 4 December 2006, the Applicant provided his written response to the 2006 Report.

34. On 14 December 2006, the Assistant Secretary-General for Peacekeeping Operations, DPKO, sent a memorandum addressed to all staff of the Office of Mission Support, DPKO, informing them, in relevant part, as follows (emphasis added):

I am extremely pleased to announce that effective 17 January 2006, [the Applicant] returned to duty at DPKO headquarters. He has joined the Administrative Support Division in the role of [...] Chief of Operations in PMSS [Personnel Management and Support Service].

As you may know, in January 2006, as part of the ongoing audit and investigation in the Organization's procurement activities, the Secretary-General decided to place [the Applicant] and seven other UN officials on special leave. Following receipt of the investigative report prepared by the Procurement Task Force established by OIOS, the Secretary-General has decided that disciplinary action is not appropriate. *[The Applicant] was specifically cleared of any instance of fraud or criminal wrong-doing.*

The procedural history

35. On 15 March 2006, the Applicant submitted a request for administrative review of the decision to place him on SLWFP.

36. On 15 May 2006 the Applicant submitted an appeal to the JAB regarding the decision to place him on SLWFP. The Respondent's reply and the Applicant's observations were filed in due course.

37. On 30 August 2007, the JAB issued Report No. 1916 regarding the decision to place the Applicant on SLWFP as of 16 January 2006. The recommendations of the report were:

47. In light of the foregoing, the Panel *unanimously concludes* that Respondent's actions constituted a fundamentally serious and damaging violation of [the Applicant's] due process rights as well as to his reputation. It therefore *unanimously recommends* that he be compensated in the amount of two years net base salary.

[48]. The Panel *also unanimously recommends* that, as the application of special Leave with full Pay [sic] (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 [sic] 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.

38. On 11 August 2008, the Respondent rejected the JAB recommendations informing the Applicant that “the Secretary-General is of the view that it cannot be determined that the decision to place you on SLWFP was taken in a manner that resulted in a violation of your due process rights or in damage to your reputation...”.

39. In his reply to Order No. 121 (NY/2011), the Respondent explains that the reason the Respondent rejected the JAB recommendation in the Applicant’s case was that the Applicant “was reprimanded”. (It should be noted that this “reprimand” was never issued pursuant to the processes of Organization’s administrative instructions, is the subject of a separate analysis in Case 2 (Judgment No. UNDT/2011/124, and has been determined by the Tribunal to have been improperly-issued as not following the procedures of ST/AI/292 (Filing of adverse material in personnel records) and ST/AI/371 (Revised disciplinary measures and procedures) as well as offending the principle of good faith and fair dealing).

40. On 30 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 justice within the Organization.

41. Based on the request of the parties in their jointly-signed statement of 27 September 2010, the Tribunal decided to handle the present case on the papers. In the same statement, the parties indicated that they agreed to consolidate the handling of Case 1 and Case 2.

Relevant legal provisions

42. 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;

...

43. 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.

...

44. 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.

45. 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.

...

46. ST/AI/371 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

47. The Applicant makes the following primary contentions:

- a. The circumstances surrounding the decision to place the Applicant on SLWFP were not “exceptional” for purposes of former staff rule 105.2(a)(i);
- b. The Applicant was not given a cogent reason for his being placed on SLWFP; the reason given was nothing more than a summary declaration; the Respondent’s reasons for placing the Applicant on SLWFP were pretextual in order to create the perception among the United Nations Member States that the Organization was taking appropriate action in the face of adverse audit findings;
- c. The Respondent has not provided any objective evidence to show that if the Applicant had continued to perform in his normal duties, the Applicant could or would have tainted the OIOS/PTF investigation; thus, the Respondent has not explained how placing the Applicant on SLWFP could benefit the Organization;
- d. The Respondent’s failure to preserve the confidentiality of the investigation and the Applicant’s identity showed that the Respondent was more interested in using SLWFP to manipulate perceptions about the integrity of the investigation, than taking actual steps to preserve the due process integrity of the investigation;
- e. The Applicant’s due process rights were violated during the OIOS/PTF investigation; *Zerezghi* UNDT/2010/122 is distinguished;
- f. At the outset of the OIOS/PTF, the Respondent had already determined that the Applicant was the target of a criminal investigation in the most explicit meaning of the term as it is used in criminal jurisprudence and likely guilty of accusations; in fact, the Respondent referred the Applicant’s case to the United States Attorney for the Southern District of New York;
- g. The Respondent’s decision not to follow the JAB recommendation constitutes discriminatory treatment, for the Respondent has not explained

how or why the Respondent accepted the JAB recommendations for payment of two years' salary to another staff member and 18 months' salary for two other staff members placed on SLWFP under similar circumstances; and

h. The Applicant has suffered public humiliation, damage to his career and reputation, and psychological injury; the Applicant was effectively prevented from competing for a vacant post at a higher level within the Organization.

Respondent's contentions

48. The Respondent makes the following primary contentions:

a. The Tribunal should assess whether or not the exercise of discretion was plainly unreasonable or manifestly unjust;

b. The Applicant bears the burden of proving that the Organization exhibited bias and demonstrated a lack of good faith;

c. The decision to place the Applicant on SLWFP was taken on the basis of the draft 2005 Report, and the Applicant was able to reply to it;

d. It was manifestly reasonable to conclude that this was an exceptional case under former staff rule 105.2(a)(ii); the Respondent was not obligated to look behind the fraud indicators as they stood at the time, but rather to take appropriate action on the basis of those findings; "this was a large-scale investigation of an unprecedented nature, following indications of irregular activity";

e. The Applicant was given a reason for placing him on SLWFP as an administrative measure to "assist the Organization in conducting a full assessment of the situation";

f. In concluding whether placing the Applicant on SLWFP was in the best interests of the Organization, the Respondent “considered how such a sensitive investigation would be perceived and the risks of accusations against those involved”; the decision to place the Applicant cannot be dependent on evidence that the Applicant would have interfered with the investigation; “perception of professionalism of the investigation was a legitimate consideration” in placing the Applicant on SLWFP;

g. The Applicant’s due process rights were not violated in deciding whether to place the Applicant on SLWFP; in particular, the Applicant was provided a copy of the Draft 2005 Report and the Applicant provided his comments on it that were communicated to the Chef de Cabinet on 16 January 2006; and

h. The Respondent relies on *Zerezghi* UNDT/2010/122 for authority.

Consideration

Did the Respondent properly exercise his 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?

49. 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).

50. The Tribunal notes the discussion in *Kamunyi* UNDT/2010/214 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 wrongdoing 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.

51. 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”.

52. The policy behind former staff rule 105.2 was that where a staff member had reason to request special leave, s/he 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. No reference was made in former staff rule 105.2 to disciplinary measures as possible grounds to impose leave upon a staff member.

53. The Tribunal concurs with and adopts the *Kamunyi* findings that the phrase in former staff rule 105.2 “in 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 former Staff Rules on disciplinary measures.

54. 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 below in this Judgment. The reasons for placing the Applicant on SLWFP did not fall under the rubrics of advanced study, research, extended illness, and child care of former staff rule 105.2(a).

55. 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).

56. 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).

57. 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.

58. 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.

59. 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).

60. Moreover, the 16 January 2006 letter from Mr. Malloch Brown to the Applicant placing him 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.

61. The Tribunal finds that former staff rule 105.2(a)(i) was not properly relied upon to place the Applicant on SLWFP and that the Organization did not properly apply its regulations, rules and administrative issuances, when placing the Applicant on SLWFP; this legal determination, in and of itself, would form a sufficient basis for awarding compensation to the Applicant in this case.

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

62. 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 under ST/AI/371, sec. 2, or whether it, in fact, had the purpose 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.

63. 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 (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. 9(a)); and
- h. Where it appears that misconduct has occurred, referral to the Joint Disciplinary Committee (sec. 9(b)).

64. 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/OHRM. 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 (see also *Ibrahim* UNDT/2011/115, paras. 55-58).

65. 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

...

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 [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*.

...

66. 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).

67. 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 (in his 30 January 2006 email to staff). The eight staff members had been identified under the 2005 Final Report (of 20 January 2006) as possibly having committed wrongdoing and had been specifically identified by name and position in the

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 for the Southern District of New York.

68. 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.

69. The 14 December 2006 memorandum from the ASG/DPKO to DPKO staff—issued *after* the OIOS/PTF had concluded its work (on 13 September 2006)—provides the definitive answer to whether the OIOS/PTF acted as a preliminary or a formal investigation mechanism under ST/AI/371. In this memorandum, it is stated that, as a result of the OIOS/PTF investigation, the Applicant had been “specifically cleared” of any instance of “fraud or criminal wrong-doing”. To be cleared of wrongdoing means that the Applicant had been (a) suspected of wrongdoing when he was placed on SLWFP, and (b) investigated for wrongdoing during the course of the OIOS/PTF investigation. To be “cleared of wrong-doing” is the result that follows an investigation under ST/AI/371, sec. 6 (a formal investigation), rather than the outcome that follows to determine whether a belief about misconduct is “well-founded” under ST/AI/ 371, sec. 2 (a preliminary investigation).

70. Further support for the notion that the work of the OIOS/PTF constituted a formal investigation under ST/AI/371, sec. 6, is the fact that, following his return to duty, the Applicant was (a) reprimanded as a result of the 2006 Report findings (Case 2), and (b) advised that he would not be permitted to resume his duties as Chief Administrative Officer, UNMIS, or to return to his post at Headquarters as Chief, LSD/LOGOPS. The Respondent’s representatives informed the Applicant that he could not return to duty anywhere within LSD, but no explanation was given for this restriction. If the OIOS/PTF was a preliminary investigation only, why was the Applicant prevented from resuming his previous duties? Having been “cleared of

wrong-doing”, the Applicant should not have been reprimanded and should have been returned to his former position within the Organization.

71. 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.

72. The Applicant’s case is fundamentally different from *Zerezghi*: in that case, 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.

73. 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.

74. 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. 2, but rather constituted a formal investigation under ST/AI/371, sec. 6, and the Organization should have implemented the due process protections of ST/AI/371 when placing the Applicant on SLWFP; this legal determination forms a second basis for awarding compensation to the Applicant in this case.

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

75. 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.

76. In addition to being a formal investigation under ST/AI/371 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.

77. 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.

78. 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.

79. 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) a statement of its probable duration.

80. 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”.

81. Under ST/AI/371 sec. 2, the acts for which disciplinary measures may be imposed include, but are not limited to: acts or omissions in conflict with the general

obligations of staff members; unlawful acts (for instance, 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.

82. 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 three months) pending completion of an investigation into possible grave wrongdoing, 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 should also be given reasons for the suspension.

83. 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, Mr. Malloch Brown, informed the Applicant that an “investigation” was already ongoing; presumably, the wording 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 14 December 2006 email to DPKO staff stated that, following the the 2006 Report, the Secretary-General had decided that “disciplinary action was not appropriate” and the Applicant was “specifically cleared of wrong-

doing”, mirroring the assessment contained in ST/AI/317, sec. 9, following a formal investigation that the ASG/OHRM should make an assessment whether misconduct has occurred (the Secretary-General would not be involved in making an assessment on a preliminary investigation);

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 a 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 19 January 2006 Associated Press press release identified the OIOS/PTF against the backdrop of “an ongoing criminal investigation”, and quoted a senior UN spokesman for saying that the draft audit reports (assumedly, the 2003, 2004 and 2005 Draft Reports) identified “potential cases of fraud”—conduct that clearly requires the procedural protections of ST/AI/371;

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;

k. 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.

84. 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.

85. 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 the 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, including the Applicant.

86. 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.

87. The Tribunal also 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, following which the Organization should have implemented the due process procedures and protections of ST/AI/371, sec. 6.

88. These legal determinations form additional bases for awarding compensation to the Applicant in this case.

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

89. Having determined that that the Organization erred in placing the Applicant on SLWFP under former staff rule 105.2(a)(i), that the Applicant was being formally investigated under former staff rule 110.2 and sec. 6 of ST/AI/371, 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 properly afforded under ST/AI/371.

What procedural rights were accorded to the Applicant?

90. 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 on 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 address that the charges will be dropped and that no action will be taken.

91. The Tribunal finds that the Applicant’s due process guarantees required under ST/AI/371 were violated when the Applicant was placed on SLWFP. This legal determination forms additional basis for awarding compensation to the Applicant in this case.

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

92. The Respondent offers a number of reasons for placing the Applicant on SLWFP (even though, as found by the Tribunal in the above, this constituted a *de facto* suspension), including the necessity of preventing “accusations that key personnel involved in procurement influences the outcome of the [OIOS/PTF] investigations” (15 April 2006 letter of Ms. Grant to the Applicant).

93. In response, the Applicant observed that “there is nothing about the nature of my duties or those allegations ... that would suggest I could, or would, interfere with on-going investigations”.

94. The Tribunal is not convinced that the reasons proffered by the Organization formed a sufficient basis for placing the Applicant on SLWFP. 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. Further, the Respondent has not provided any objective evidence to show that the Applicant would, or could, have tainted the OIOS/PTF investigation. Therefore, the rationale advanced by the Respondent for placing the Applicant on SWLFP is not supported by the facts in this case.

95. Most problematic, however, is the following explanation proffered by the Respondent in his closing statement, para. 15 (emphasis added):

... In concluding what is in the interests of the Organization, the Respondent considered how such a sensitive investigation would be perceived and the risks of accusations against those involved. A concern that, due to the sensitivity of the investigation, accusations of interference may be made was entirely legitimate and to act on the basis of such concern was reasonable. It may be that additional evidence that the Applicant would have actually interfered in the investigation would have strengthened the conclusion that his placement on SLWFP was in the interests of the Organization, but the decision cannot be dependent on such evidence. To require such evidence would restrict the Respondent’s discretionary authority to an excessive degree.

96. The Tribunal construes this as an admission by the Respondent that the rationale for placing the Applicant on SLWFP was not based on any demonstrated fact that would present potential harm to the Organization, but that the Applicant was placed on SLWFP solely to guard against perceptions that might occur. The decision to place the Applicant on SLWFP was solely “due to the sensitivity of the investigation” and out of concern that “accusations of interference may be made”.

The Respondent did not have any factual basis for believing that the Applicant would interfere with the OIOS/PTF investigation.

97. The Tribunal notes the striking similarities in circumstance and language to the cases of the former United Nations Administrative Tribunal in Judgments No. 925, *Kamoun* (1999) and No. 1009, *Makil* (2001). Both cases addressed the issue of placing a staff member on SLWFP, both cases found violations of the staff member's rights, and both cases awarded compensation.

98. In *Kamoun*, the former Administrative Tribunal stated that SLWFP may amount to a "sanction" against the staff member subjected to it, when used in cases where it is not justified. Further, under *Kamoun*, SLWFP "must never be adopted without ensuring that the rights of the staff member are guaranteed and should never amount to a veiled attempt to discipline a staff member without due process" (see para. IX). In the present case, the Tribunal concludes that the placement of the Applicant on SLWFP on 16 January 2006 constituted a "veiled attempt to discipline" the Applicant without due process.

99. In *Makil*, the former Administrative Tribunal stated that the manner in which a staff member is placed on SLWFP might itself constitute a fundamental violation of an applicant's due process rights. Such a circumstance is not merely a technical violation of the staff member's rights (see para. XV):

The Tribunal considers that ... to have expelled [*Makil*] from the premises in the manner in which it was done, when combined with the decision not to give a reason was likely to cause people to believe that his honesty was being impugned or that he was being excluded from his office so as to prevent him from altering or destroying evidence. The Tribunal accepts that rumours very hurtful to the Applicant were likely to have circulated and that the act of expelling him from his office in the manner in which it was done added fuel to the flames. The Tribunal considers that nominal damages may be an appropriate measure of compensation when there has been a mere technical breach of a right but where no actual damage has been inflicted. The Tribunal considers that a more appropriate measure of compensation in relation to the Applicant's claim under this heading is necessary.

100. The Applicant's situation in this case was similar to *Makil*, as the Applicant himself pointed out in his 8 May 2006 letter to Ms. Grant. Just as in *Makil*, the Applicant was correctly concerned that his honesty was being impugned or that he was being excluded from the United Nations premises to prevent him from altering or destroying evidence. The Applicant stated (emphasis added):

There is nothing about the nature of my duties or those allegations concerning me, as are set forth in the 22 December 2005 Office of Internal Oversight Services (OIOS) draft report that would suggest I could, or would, interfere with on-going investigations. This is particularly true given the independent nature of the investigations. Any reasonable third party must therefore conclude that I am an untrustworthy person who has so much influence of others within the Organization that by my mere presence at my duty station, the results of any ongoing investigations would be tainted, or, at a minimum, the Secretary-General has also so concluded.

This potential injury to my integrity compounds the obvious injury to my reputation that is caused by the extraordinary nature of the decision to place me on special leave. There is no telling when the investigation may be completed and, therefore, we may be well past the point where the damage to my standing within the Organization has become irreparable. I, therefore, renew my request that the Secretary-General permit me to resume my normal duties pending the outcome of the investigation.

101. The JAB's conclusions are ones that this Tribunal agrees with: "[t]he basis for those perceptions is by definition ambiguous and unverifiable, leaving a staff member vulnerable to arbitrariness unless the perception is tied to credible evidence identifying a specific threat a staff member poses" (see JAB Report No. 1916, para. 36).

102. There was no evidence that the Applicant had acted in any way to arouse legitimate suspicion or concern that he might interfere or compromise the integrity of the process (see JAB Report No. 1916, para. 31). The Respondent's stated reasons for placing the Applicant on SLWFP appear to have been pretextual, in order to create the perception among Member States that the Organization was taking appropriate action in the face of adverse audit findings.

103. The Tribunal finds that the reasons proffered by the Organization for placing the Applicant on SLWFP were not grounded on facts, making this action against the Applicant improper; this legal determination forms an additional basis for awarding compensation to the Applicant in this case.

Were the Applicant's due process rights violated during the interrogations of the Applicant subsequent to his being put on SLWFP?

104. The Applicant, by his 17 May 2006 email to the OIOS/PTF Investigator, specifically requested that he be informed of certain particular due process rights in the context of the specially-constituted OIOS/PTF investigation that were to look into possible wrongdoing by eight procurement staff members.

105. On 1 June 2006, Mr. Paul Lachal Roberts, Chairman, OIOS/PTF, responded to the Applicant:

I refer to the exchange of emails between yourself and Mrs. Covill [the OIOS/PTF Investigator], as well as those between you and I in relation to the proposed interview. For ease of responding to the several requests you make, I list them hereunder.

1. to know the questions in advance of the interview:

You will not be given questions in advance of the interview. If you need to consult any document or file before answering a question, you will be afforded this opportunity.

2. to have the assistance of counsel during the interview:

You may not be assisted by legal counsel. The attendees at the meeting will be yourself and the investigators, no one else.

3. to know the scope of the allegations against you:

The audit conducted by the IAD/OIOS has raised a number of issues concerning procurement contracts. Your role, if any, in the negotiation, implementation and execution of contracts is under consideration by the Procurement Task Force. I should point out that the findings of an audit report or the action of the Department of Management in placing you on administrative leave have not in any way influenced our view on issues of possible wrongdoing. I decline to elaborate further on this issue of allegations.

4. to know the evidence in relation to the allegations:

I decline to provide any evidence, assuming such exists, in relation to any matter currently under investigation. As you will know, the Procurement Task Force follows the same practice as the Investigation Division of OIOS in the Mandate and Manual of Procedure. Consequently, such matters are confidential.

An Investigator with the conduct of this matter will be in contact at the earliest opportunity to fix a date for the interview.

106. Taking the Respondent's and the Applicant's statement of facts at their highest, when the Applicant was placed on SLWFP, he was not informed as to the existence of any due process rights to which he was entitled. In the Respondent's reply to Order No. 121 (NY/2011), para. 7, it is acknowledged that the Applicant was only "informed that he was being placed on SLWFP in the interests of the Organization, in light of the ongoing audit and investigation into the Organization's procurement activities" and that, by this time, the Applicant had already received a copy of the 2005 Draft Report "and assisted in drafting comments from DPKO in response".

107. After the Applicant was placed on SLWFP, the Applicant was never advised of due process rights, but was specifically refused those rights during the course of the OIOS/PTF investigation (the Applicant was not given questions in advance of the OIOS/PTF interview, could not be assisted by counsel, could not know the scope of the allegations against him).

108. The Tribunal agrees with the Applicant that by requiring the Applicant (and the other seven staff members) to be interviewed by the OIOS/PTF without any understanding of what was being investigated, the Applicant was placed in a precarious situation: either he could participate in a process that was moving against his interests without being afforded due process (which is what happened, for the Respondent ultimately attempted to reprimand the Applicant based on the OIOS/PTF findings) or the Applicant could refuse to participate in the OIOS/PTF investigation and thereby risk disciplinary action for presumptive violation of staff regulation 1.2(r).

109. The Tribunal finds that the Applicant's due process rights were violated during the OIOS/PTF interrogations of the Applicant subsequent to his being put on SLWFP. This legal determination forms an additional basis for awarding compensation to the Applicant in this case

Compensation

110. Under the judgment of the United Nations Appeals Tribunal in *Antaki* 2010-UNAT-096, the Dispute Tribunal has the unquestioned discretion and authority to quantify and order compensation under art. 10.5 of its Statute for violation of the legal rights of a staff member, as provided under the Staff Regulations, Staff Rules, and administrative issuances.

111. Compensation may be awarded for actual pecuniary or economic loss, non-pecuniary damage, procedural violations, stress, and moral injury (see *Wu* 2010-UNAT-042).

112. The very purpose of compensation is to place the staff member in the same position s/he would have been in, had the Organization complied with its contractual obligations (*Warren* 2010-UNAT-059, *Iannelli* 2010-UNAT-093).

113. The Appeals Tribunal has specifically determined that under art. 10.5(a) of the Statute, an award of compensation for non-pecuniary damage does not amount to an award of punitive or exemplary damages designed to punish the Organization, which is prohibited under art. 10.7 of the Statute of the Dispute Tribunal (see *Wu* 2010-UNAT-042).

114. The Tribunal emphasizes that the nature of the compensation being awarded in this case may be placed either under the head of pecuniary damages (to place the Applicant in the position he would have been in, had the Organization complied with its obligations), or under the head of moral damages.

Pecuniary, or economic, damages

115. The Tribunal determines that the compensation award made in this case reflects a tangible economic loss to the Applicant, in that the act of placing him on SLWFP and under the circumstances caused harm to the Applicant's reputation, which in turn have adversely affected the Applicant's earning potential and his ability to secure a promotion. This is well illustrated by the fact that a reprimand was issued against the Applicant (Case 2), that since 2006 the Organization has limited the Applicant's job opportunities within the Organization, and has refused to permit the Applicant to return to his former functions within procurement.

Moral damages

116. The United Nations Appeals Tribunal has held in *Wu* that, "It is not disputed that compensation may be awarded for non-pecuniary damage" and that while not every violation of due process rights will necessarily lead to an award of compensation, damage in the form of "neglect and emotional stress" may be compensated and does not amount to an award of punitive or exemplary damages (see *Wu*, para. 33).

117. The Tribunal observes that, under well-established case-law from the former United Nations Administrative Tribunal, moral damages were awarded "where a subjective right that affects the victim's sensitivity and feelings is infringed" (see Judgment No. 920, *Lefebvre* (1999), para. IV).

118. *Lefebvre*, in turn, referred to several judgments of the Administrative Tribunal that delineated the type of moral injury that could be compensated: Judgment No. 215, *Ogley* (1976) (moral injury compensation for the "uncertainties" to which the applicant had been subjected); Judgment No. 442 *Motamedi* (1989) (moral injury compensation for the applicant having been treated "inequitably"); Judgment No. 289 *Talan* (1982) (moral injury compensation for the Organization's

conduct that had been the direct cause of a “real disturbance” in a difficult moment of the staff member’s life).

119. In a long line of cases, the former Administrative Tribunal granted compensation for moral injury without exact proof of the moral injury being required. Under *Mmata* 2010-UNAT-092, the Appeals Tribunal awarded compensation 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”).

120. The Applicant’s case is strikingly similar to *Makil*, a case which also involved placing the staff member on special leave with full pay. In *Makil*, the former Administrative Tribunal presumed the injury was from the circumstances of the breach of rights which included: (a) placing the staff member on special leave with full pay; (b) expelling him from the premises in a precipitous manner; and (c) refusing to give fellow staff a reason for the applicant’s placement on special leave with full pay, which likely caused people to believe that his honesty was being impugned or that he was being excluded from his office so as to prevent him from altering or destroying evidence. In *Makil*, the former Administrative Tribunal observed that nominal damages might be an appropriate measure of compensation where a “mere technical breach of a right” has occurred and where no actual damage has been inflicted, but held that “a more appropriate measure of compensation in relation to the Applicant’s claim under this heading [was] necessary”.

121. The Applicant’s case is also strikingly similar to that of the former Administrative Tribunal in Judgment No. 1029, *Bangoura* (2001), which involved the dissemination of information by a UN spokesperson that had not been verified or corroborated and which caused injury to the staff member’s reputation (see para. XXI):

The Tribunal is concerned that the Spokesman for the executive head of the United Nations should thus disseminate information that has not been verified and that, moreover, is later not corroborated, about a

staff member of the United Nations whose reputation is permanently affected as a result, with all the serious consequences that this entails.

122. In the former Administrative Tribunal's Judgment No. 997, *Van Der Graaf* (2001), moral damages were granted for the humiliation brought upon the Applicant, which was considered disproportionate and unnecessary, especially where a press release contained the Applicant's name. The judgment, *inter alia*, found as follows (see para VIII):

...

A letter informing the Applicant of his suspension without pay was delivered by four staff members, and he was escorted from the Vienna International Center by four UN security officers. Additionally, an official statement was issued to the major Austrian daily newspaper on the Applicant's suspension, identifying characteristics and details of the case, including allegations of homosexuality and sexual harassment. This was followed by a press release containing the Applicant's name, nationality and status, and details regarding the allegations against him.

The Tribunal finds this conduct unreasonably insensitive and public. Both the humiliation that resulted from the manner in which the Applicant was escorted from his office and the publication of the allegations against him were unnecessary and inappropriate.

Overall compensation findings

123. The Tribunal finds that the Applicant is entitled to compensation in this case, whether considered as pecuniary damages, or as moral damages. The reasons for the Tribunal's award are based on the cumulative factors and legal determinations made in this case:

- a. Former staff rule 105.2(a)(i) was not properly relied upon;
- b. The OIOS/PTF investigation constituted a formal investigation under ST/AI/371, sec. 6, and the Organization should have implemented the due process protections of ST/AI/371;

c. 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;

d. The decision to place the Applicant on SLWFP under former staff rule 105.2(a)(i) constituted a *de facto* disciplinary suspension, following which the Organization should have implemented the due process protections of ST/AI/371;

e. The Applicant's due process guarantees required under ST/AI/371 were violated when the Applicant was placed on SLWFP;

f. The reasons proffered by the Organization for placing the Applicant on SLWFP were not grounded on facts, making the decision to place the Applicant on SLWFP improper;

g. The Applicant's due process rights were violated during the OIOS/PTF interrogations of the Applicant; and

h. The Organization assisted in allowing the Applicant's situation to be aired in the public arena (see the former United Nations Administrative Tribunal in *Bangoura* (dissemination of information that had not been verified, not corroborated, and regarding a staff member whose reputation was "permanently affected")).

124. For all of the foregoing reasons, the Tribunal will award the Applicant the sum of two years' net base salary in effect as of January 2006.

125. The Tribunal makes the finding that the clarifying rationale regarding its award for damages in this case also applies, *mutatis mutandis*, to *Cabrera* UNDT/2011/081.

Conclusion

126. The Tribunal makes the overall conclusion 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. In particular:

a. The Tribunal finds that former staff rule 105.2(a)(i) was not properly relied upon to place the Applicant on SLWFP and that the Organization did not properly apply its regulations, rules and administrative issuances, when placing the Applicant on SLWFP;

b. The Tribunal finds that the OIOS/PTF investigation constituted a formal investigation under ST/AI/371, sec. 6, and the Organization should have implemented the due process protections of ST/AI/371 when placing the Applicant on SLWFP;

c. 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. The Tribunal finds also that that the decision to place the Applicant on SLWFP under former staff rule 105.2(a)(i) constituted a *de facto* disciplinary suspension, following which the Organization should have implemented the due process protections of ST/AI/371.

127. The Tribunal further 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(a)(i) effective 16 January 2006.

a. The Tribunal finds that the Applicant's due process guarantees required under ST/AI/371 were violated when he was placed on SLWFP;

b. The Tribunal finds that that the reasons proffered by the Organization for placing the Applicant on SLWFP were not grounded on facts, making the decision to place the Applicant on SLWFP improper.

128. The Tribunal finds that that the Applicant's due process rights were violated during the OIOS/PTF interrogations of the Applicant subsequent to his being put on SLWFP. This legal determination forms an additional basis for awarding compensation to the Applicant in this case.

129. The Tribunal awards to the Applicant the sum of two years' net base salary in effect in January 2006 as for the substantial and unwarranted irregularities when the Applicant was placed on SLWFP and during the OIOS/PTF investigation thereafter.

130. Under art. 10.5 of the Statute of the Dispute Tribunal, the total sum of compensation, as detailed in paragraph 129 above is to be paid to the Applicant within 60 days of the date that this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the total 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.

Observations

131. This case concerns the circumstances existing when the Organization placed the Applicant (and seven other staff members) on SLWFP on 16 January 2006. The Tribunal fully acknowledges the problems in procurement that needed to be addressed following the Independent Inquiry Committee into the Oil for Food Programme, and the subsequent arrest and conviction of a United Nations Procurement Officer. To be sure, the Organization must be a good steward of Member States' resources and must take steps to ensure that these are not wrongfully dissipated through violation of the Organization's procedures and regulations.

132. The Tribunal is troubled, however, by the manner in which the Applicant (and other staff members) were treated when they were placed on SWFLP and thereafter

(as discussed within this Judgment). The way that the Organization handled the Applicant's case creates the impression that the Organization's actions were a rushed response for purposes of preserving its relations with Member States, rather than for the purpose of initiating an impartial inquiry founded the Organization's regulations and accompanying due process principles. 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 members their rights and while relying on the ultimate assurance that legal processes will provide a just outcome.

(Signed)

Judge Marilyn J. Kaman

Dated this 30th day of June 2011

Entered in the Register on this 30th day of June 2011

(Signed)

Santiago Villalpando, Registrar, New York