Before: Judge Marilyn J. Kaman

Registry: New York

Registrar: Santiago Villalpando

CABRERA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
George Irving

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

Introduction

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

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

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

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

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

Facts

The Applicant's employment history with the United Nations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> FOX News: So far there's been in the procurement department one guilty plea, there's been a charge of another official who has plead [sic] not guilty, but still indicted, and there could be more indictments. Is the U.N. willing to go as far as to see some of its officials go to jail to get this place get cleaned up?
>
> Burnham: The secretary-general very swiftly lifted immunity in one case we already have a guilty plea or, for that matter, for any potential future conviction. Certainly the secretary-general is committed that should *federal authorities or local authorities* request that *immunity be lifted*, I would expect the United Nations to move swiftly do to so. *We want any perpetrator of waste, of fraud and abuse, to be accounted for and if they are a perpetrator of corruption, we want them to be brought to justice as swiftly as possible.*

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

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

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

Creation of OIOS Procurement Task Force

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

> Jay,
>
> I have asked the Procurement investigation taskforce led by Paul Roberts to include in their scope the cases involving Thunderbird that have already been investigated previously. In fact I did give that message already some time ago in an e-mail to Mr. Burnham.
>
> *Regardless of the investigation process however, I believe management has a responsibility to act decisively to protect the organization whenever there is adequate reason to believe the organization is at risk. Nothing should stop your action to suspend any vendor or staff member that violates the procurement rules or staff rules...*
>
> Best Regards,
>
> Inga-Britt Ahlenius

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

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

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

> procurement, either in whole or in part, shall be transferred to the Task Force....
>
> 2. that the *ID recommendation for a longer (6 months)* and expanded (18+ investigators*) task force on Procurement matters* should be approved...
>
> ...
>
> 6. that the task force is mandated to investigate or reinvestigate all closed, existing and new cases, items or allegations concerning procurement. For avoidance of doubt, this is not confined to [Headquarters] UNPS.

The decision to place the Applicant on SLWFP

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

34. A memorandum dated 16 January 2006 from Mr. Mark Malloch Brown, then-Chef 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.

> 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.

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

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

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

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

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

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

43. The Applicant's comments were not forwarded to OIOS until June 2006.

44. The Applicant was interviewed by the OIOS/PTF in mid-June 2006.

45. On 19 July 2006, the OIOS/PTF issued a report regarding the Applicant ("the 2006 Report"). The report dealt with the allegations made in the 2005 Final Report in relation to Thunderbird and TCIL contracts. The OIOS/PTF found that there was insufficient evidence to support a finding that the Applicant had violated the United Nations regulations and rules and that there was insufficient evidence of favouritism on his part.

46. With the 2006 Report, it was the third time that the Applicant had been the A37cant (ssued a

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46.

> 65. In light of the foregoing, the Panel *unanimously concludes* that the respondent's actions constitute a fundamentally serious and damaging violation of the Applicant's due process rights as well as his reputation. It therefore *unanimously recommends* that he be compensated in the amount of 2 years net base salary at the time the decision was implemented on 16 January 2006.
>
> 66. The Panel *also unanimously recommends* that, as the application of Special Leave with full Pay (SLWFP) under the provisions of Staff Rule 105.2 (a)(i) in the context of an investigation concerning a staff member poses an inherent risk of violating that staff member's right to due process, the administration should:
>
> i. conduct a careful review of existing administrative policies to determine whether they are sufficient to meet the needs of the organization in this context;
>
> ii. ensure that, irrespective of the outcome of the review, instructions or guidelines are developed to clarify the rights, duties and obligations of staff in such cases and the recourse available to them."

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

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

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

Relevant legal provisions

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

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

> (a) No disciplinary proceedings may be instituted against a staff member unless he or she has been notified of the allegations against him or her, as well as of the right to seek the assistance in his or her defence of another staff member or retired staff member, and has been given a reasonable opportunity to respond to those allegations.
>
> (b) No staff member shall be subject to disciplinary measures until the matter has been referred to a Joint Disciplinary Committee for advice as to what measures, if any, are appropriate, except that no such advice shall be required:
>
> > (i) If referral to the Joint Disciplinary Committee is waived by mutual agreement of the staff member concerned and the Secretary-General;
> >
> > (ii) In respect of summary dismissal imposed by the Secretary-General in cases where the seriousness of the misconduct warrants immediate separation from service.
>
> …

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

> 2. Where there is reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed, the head of office or responsible officer shall undertake a preliminary investigation. Misconduct is defined in staff rule 110.1 as 'failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other administrative issuances, or to observe the standards of conduct expected of an international civil servant.' Conduct for which disciplinary measures may be imposed includes, but is not limited to:
>
> > (a) Acts or omissions in conflict with the general obligations of staff members set forth in article 1 of the Staff Regulations and the rules and instructions implementing it;
> >
> > (b) Unlawful acts (e.g., theft, fraud, possession or sale of illegal substances, smuggling) on or off United Nations premises, and whether or not the staff member was officially on duty at the time;

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

Consideration

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. f u r e

> *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, *in the processu*.

78. Certainly, the OIOS/IAD audit reports spanning a three-year period of time (the 2003, 2004 and 2005 Draft Reports—all in draft form) provide

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

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

83. The Applicant’s case is fundamentally different from *Zerezghi*: at the time the applicant (Zerezghi) was interviewed by OIOS, the respondent had not formed any opinion one way or the other (for 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 2

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

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

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

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

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

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

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

92. Under ST/AI/371, sec. 4, a suspension may be imposed upon a staff member

b. The findings of the OIOS/PTF cleared the Applicant of having violated the regulations and rules of

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

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

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

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

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

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

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

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

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

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

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

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

c. In a 2 February 2007 memorandum to OHRM, the then-USG/OIOS, Ms. Ahlenius, conceded that a "mistake" occurred in linking the Applicant in Case No. 2, but she minimized the gravity of this mistake by stating that auditors are only required to

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

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

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

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

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

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

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

114. The Respondent through its witnesses has

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

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

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

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

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

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

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

123.

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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

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

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

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

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

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

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

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

(Signed)

Judge Marilyn J. Kaman

Dated this 6th day of May 2011

Entered in the Register on this 6th day of May 2011

(Signed)

Santiago Villalpando, Registrar, New York