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Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1023

Case No. 1071: SERGIENKO Against: The Secretary-General of the United Nations

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Julio Barboza, Vice-President, presiding; Ms. Marsha A. Echols; Mr. Spyridon Flogaitis;

Whereas at the request of Olga Sergienko, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 31 May 1999 the time limit for the filing of an application with the Tribunal;

Whereas, on 28 April 1999, the Applicant filed an Application requesting the Tribunal as follows:

"**SECTION II: PLEAS**

…

(c) *To decide* to hold oral proceedings on the present Application …;

(d) *To order* the production of the report of the Joint Disciplinary Committee in the case of Mr. Amer Araim.

8. On the merits, the Applicant respectfully requests the Tribunal:

(a) *To rescind* the decision of the Secretary-General finding that misconduct had occurred and imposing the disciplinary measure of demotion with no

possibility of promotion for three years;

(b) *To order* that the Applicant be immediately reinstated to the P-4 level with full salary and benefits from the date her demotion was effected;

(c) *To find and rule* that the manner in which the Respondent conducted the disciplinary review was procedurally flawed, tainted by prejudice and other extraneous considerations and violated the Applicant's rights to due process;

(d) *To find and rule* that the Joint Disciplinary Committee committed errors of fact and law in reaching its conclusions;

(e) *To find and rule* that the lengthy delays in and the procedural irregularities of the … Joint Disciplinary Committee proceedings violated the Applicant's right to a timely and fair hearing;

(f) *To order* that in addition to rescission of the Secretary-General's decision, the Applicant be awarded damages in the amount of three years' net base pay for the violation of her rights and for the resulting financial and emotional harm to herself, and to her professional reputation;

(g) *To award* costs to the Applicant in the amount of $10,500.00."

Whereas, at the request of the Respondent, the President of the Tribunal granted an extension of the time limits for filing a Respondent's answer until 30 June 1999 and periodically thereafter until 31 March 2001;

Whereas the Respondent filed his Answer on 28 March 2001;

Whereas the Applicant filed Written Observations on 18 May 2001;

Whereas the Tribunal decided on 30 October 2001 that there would be no oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant joined the United Nations as a Political Affairs Officer with the Decolonization Branch, Department of Political Affairs, Trusteeship and Decolonization (now Department of Political Affairs (DPA)) at the P-4 level, on a two-year fixed-term appointment, on 1 March 1986. She was given a permanent appointment on 1 October 1991. Effective 15 July 1997, she was transferred to the newly established Department of General Assembly Affairs

and Conference Services (DGAACS) where, at the material time, she was serving at the P-4 level.

In a letter dated 17 March 1997 to the President of the General Assembly, the Secretary-General stated his intention to "establish a Department of General Assembly Affairs and Conference Services integrating the major technical support services for the General Assembly, the Economic and Social Council and their subsidiary bodies currently provided by [DPA]" and others, as part of his efforts to reform the Organization. As a result, "the technical support services of [DPA]" were integrated into DGAACS.

On 6 June 1997, however, the members of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (Committee of 24 or C-24) urged the Secretary-General to maintain the Decolonization Branch, and all its functions pertaining to the Committee of 24, within DPA.

On 11 September 1997, the Secretary-General submitted a report to the General Assembly regarding the proposed reforms, including the proposal that the Decolonization Branch be transferred to DGAACS (A/52/303). On 18 September 1997, the Chairman of the Committee of 24 wrote to the Secretary-General, claiming that he had no other option but to bring the issue to the attention of the General Assembly. On 8 October 1997, draft resolution A/C.4/52/L.4/Rev.1 was introduced in the Special Political and Decolonization Committee (Fourth Committee), urging the Secretary-General to maintain the Decolonization Branch and its functions within DPA. Following informal consultations between the Secretary-General and the co-sponsors of the draft resolution, on 15 October 1997, the draft resolution was withdrawn in favour of a proposal by the Secretary-General to establish a "stand alone Decolonization Unit" in DPA (A/52/303/Add.1).

On 8 December 1997, while reviewing a copy of draft resolution A/52/L.64, the Chief, General Assembly Secretariat Servicing Branch, noticed that the text contained an operative paragraph 15 which had not been there when the text was sent for translation. Under this new paragraph, the General Assembly welcomed the decision of the Secretary-General to maintain the Decolonization Unit in DPA. In order to meet the deadline for submission of the draft resolution to delegations, the document was issued without further changes. On 9 December 1997, the Under-Secretary-General for General Assembly Affairs and Conference Services

convened a meeting with the co-sponsors, which resulted in a revision of the draft resolution. On 10 December 1997, draft resolution A/52/L.64, reflecting the Secretary-General's proposal, was adopted.

Also on 9 and 10 December 1997, Mr. Cherniavsky, a junior colleague of the Applicant's, sent the Director, General Assembly and ECOSOC Affairs Division, some speakers' notes that he claimed to have obtained from the computer of the Applicant's supervisor, Mr. Araim, after seeing the Applicant and Mr. Araim in the latter's office. Mr. Cherniavsky claimed to have accessed this document from his own computer via their unit's "shared drive". Later that month, the Security and Safety Service impounded the Applicant's computer.

Between 9 January and 30 April 1998, the Office of Internal Oversight Services (OIOS) conducted an investigation which confirmed that the Applicant, together with Mr. Araim, had

> "acted jointly to create, possess or otherwise deal with documents, the contents of which they had had reason to know were contrary to the Secretary-General's plan of reform with respect to the Decolonization Branch … and that they had so acted with the aim of disrupting the transfer … and preventing the abolition of [the Applicant's] P-4 post".

Specifically, the report alleged that the Applicant and Mr. Araim,

> "created, possessed or distributed and otherwise dealt with [three forged documents, two draft documents, operative paragraph 15 of draft resolution A/52/L.64, and additional documents prepared on Mr. Araim's computer], the contents of which were inconsistent with their duties and contrary to the Secretary-General's decisions in respect of the [de]colonization programme; that the staff members' actions impacted negatively on the Secretary-General's planning and decisions in respect to the [de]colonization programme; that these actions aimed at advancing the staff members' careers; that the staff members conspired to undermine the Secretary-General's decisions; that they misused their official positions; and that, in furtherance of their scheme, the staff members exploited documents which had been forged to undermine the Secretary-General's decisions in respect [of] the decolonization programme and which the staff members had reason … to know were forged … documents".

On 1 May 1998, the Under-Secretary-General for Internal Oversight Services submitted the investigation report to the Under-Secretary-General for General Assembly Affairs and Conference Services.

On 15 May 1998, the Under-Secretary-General for General Assembly Affairs and Conference Services transmitted the OIOS report to the Assistant Secretary-General, Office of Human Resources Management (OHRM), stating that DGAACS "fully [concurred] with the characterization of the events investigated … and … strongly [supported] its recommendations for action".

On 19 May 1998, the Assistant Secretary-General, OHRM, presented the Applicant with allegations of misconduct, charging her with violating the standards of conduct expected of an international civil servant. In addition, the Assistant Secretary-General, OHRM, informed the Applicant that the Secretary-General had decided to suspend her from duty with pay, with immediate effect, pending disciplinary proceedings. On 17 June 1998, the Applicant replied to the allegations.

On 23 July 1998, the Assistant Secretary-General, OHRM, transmitted the case to the Joint Disciplinary Committee (JDC).

In the Report of the Secretary-General on the Activities of OIOS, dated 23 September 1998 (A/53/428) the results of the OIOS investigation into this matter, as well as identifying characteristics of the staff members involved, were revealed.

The JDC adopted its report on 1 December 1998. Its considerations, conclusions and recommendations read as follows:

> " **VII. Considerations**
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> …
>
> 70. The Panel … felt that the due process requirements … had been complied with by the Administration in the present case.
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> …
>
> 71. … In the Panel's opinion, [the Under-Secretary-General for General Assembly Affairs and Conference Services] should have recused himself from the case … Nevertheless, that did not affect the outcome of the case, as the OIOS preliminary investigation appeared to indicate that the report of misconduct was well founded, and any official other than [the Under-Secretary-General for General Assembly Affairs and Conference Services] would have taken the same course of action by reporting the matter to [OHRM].

…

76. … the Panel believed that the Administration was not required to produce 'strong and convincing evidence'…; adequate evidence was the standard. Moreover, it believed that once the Administration had presented adequate evidence in support of the charge made against her, the burden of proof shifted to Ms. Sergienko, who needed to come up with satisfactory exculpatory evidence to justify her conduct in question.

77. … [the Appellant] questioned the legality of the clandestine manner in which Mr. Cherniavsky had monitored [Mr. Araim's] office computer.

…

81. While agreeing with [the Administration's position] that staff members did not have exclusive right of access to the computers allocated to them, or to any material generated through, or stored in, such computers, as they were installed in offices to benefit the delivery of the Organization's work programme, the Panel nevertheless felt that those computers assigned to particular staff members were not and should not be freely accessible to everyone in the same way as the files on a shared drive or the computers in a public library. …

…

83. … in the absence of any regulations or rules on the issue of access to the computer of another staff member, the Panel was not in a position to say that what Mr. Cherniavsky had done was illegal, and that whatever came from his search was therefore inadmissible, though it found the clandestine monitoring by Mr. Cherniavsky of Mr. Araim's computer highly intrusive and disturbing. The Panel believed that there was a real need for rules and guidelines to regulate the use of, and access to, office computers.

…

85. The Panel … could not find any language in ST/A1/371 that would prohibit the OIOS investigators from appearing before a JDC panel to explain the methodology of their investigations and clarify the questions that the panel members may have on the findings and conclusions of their investigations.

…

88. … [with regard to] the OIOS annual report to the General Assembly … [t]he Panel was surprised and dismayed by the OIOS decision to make public the result of its preliminary investigation of the present case, when it knew full well that the case was under active consideration by the Joint Disciplinary Committee.

…

95. The Panel noted that the … draft letter [from the Chairman of the Committee of 24 to the Secretary-General] was discovered … in February 1998 during [an] examination of Ms. Sergienko's computer …, and that [it was] certified that the day and time stamp of 11.11 a.m., 18 September 1997, for that draft letter … [was] accurate … The Panel also noted that the draft letter and the official letter by [the Chairman of the Committee of 24] delivered to the Office of the Secretary-General at 5.27 p.m. on 18 September 1997 were so similar in content that it felt certain that the two letters had come from the same source. It again noted that, despite Ms. Sergienko's claim that she was with her dentist in Brooklyn from 10.30 a.m. to 11.30 a.m. [on] 18 September 1997, both the monthly attendance record kept by [the General Assembly Affairs Division] and her own attendance record showed no leave for 18 September 1997.

…

98. [With respect to paragraph 15 of draft resolution A/52/L.64,] [t]he Panel had the opportunity to examine the document … in its original form, which contained … handwriting [of the secretary of the Director, General Assembly and ECOSOC Affairs Division] on both the first and third page, Mr. Araim's handwriting along the left bottom margin of the second page and a stapled slip of paper with the text of a paragraph at the end of the third page. It noted [the secretary's] statement that she had typed that additional paragraph into draft resolution A/52/L.64 and entered it as new operative paragraph 15 at the request of Ms. Sergienko and Mr. Araim and with Ms. Sergienko standing behind her …

99. Ms. Sergienko had offered no other explanation, except to say that neither she nor Mr. Araim would have requested [the secretary] for assistance in something outside her authority, and that [the secretary] had been mistaken or had been induced by [the Director, General Assembly and ECOSOC Affairs Division] to make the statement …

102. … the Panel … was not in a position to say that the Administration had presented adequate evidence to link Ms. Sergienko to the … speakers' notes [for use by delegates before the General Assembly and the Fifth Committee].

…

103. The Panel observed that the Administration had presented no evidence whatsoever to substantiate the allegation that Ms. Sergienko had created, distributed and/or exploited the three forged documents. …

….

105. Since it found that Ms. Sergienko had possessed, or dealt with two documents, … the Panel needed to determine whether those acts constituted misconduct. In its view, the answer was in the affirmative.

106. … [Ms. Sergienko's] duty required [her], as an experienced staff member in decolonization matters, to continuously inform the leadership in DPA through Mr. Araim of any new development… However, the Panel found that she had done little, if anything, in that regard.

…

108. The Panel found that … Ms. Sergienko, together with Mr. Araim, had consistently failed in her duty to assist their supervisors in helping the Secretary-General to better understand the real wishes and concerns of Member States of the C-24 and help the latter to better understand the extent of the commitment that the Secretary-General had pledged to the cause of decolonization. It also found that Ms. Sergienko, in conspiracy with Mr. Araim, had conveniently taken advantage of the differences in understanding between members of the C-24 and the Secretary-General, as exacerbated by the forged documents, and exploited the situation to the detriment of the interests of the Organization …

109. The Panel did not think that those acts on the part of Ms. Sergienko were merely an indication of poor performance. In its view, … Ms. Sergienko had violated the standards expected of her as an international civil servant, particularly Staff Regulations 1.1, 1.4 and 1.5. The Panel believed that such conduct amounted to misconduct within the meaning of Staff Rule 110.1, for which disciplinary measures were warranted.

VIII. Conclusions and recommendation

110. In light of the foregoing, the Panel *unanimously agreed* that the Administration had presented adequate evidence to show that Ms. Sergienko had possessed, distributed or dealt with the letter from [the Chairman of the Committee of 24] to the Secretary-General of 18 September 1997, and, in conspiracy with Mr. Arairn, operative paragraph 15 of draft resolution A/52AL.64, though it was not convinced that she had created them.

111. The Panel also unanimously agreed that the Administration had failed to prove with adequate evidence that Ms. Sergienko had been involved in the creation, possession, distribution of, or dealing with, the speakers' notes and the three forged documents.

112. In light of the foregoing and in view of the serious nature of the misconduct, the Panel unanimously recommends that Ms. Sergienko be demoted to the P-3 level, with immediate effect and with no possibility for promotion for three years, after which

time she would be entitled to the same consideration for promotion as other staff members in accordance with the relevant Staff Regulations and Rules."

On 11 January 1999, the Under-Secretary-General for Management transmitted a copy of the JDC report to the Applicant and informed her as follows:

"…

The Secretary-General … is in agreement with [the] findings …[and] … conclusion [of the JDC]. … The Secretary-General further agrees with the Committee that your conduct amounted to misconduct within the meaning of staff rule 110.1.

Based on the above findings and conclusions, and in accordance with the recommendation of the Committee, the Secretary-General has decided that you be demoted to the P-3 level, with effect from close of business on the day you receive this letter, and with no possibility for promotion for three years, after which time you would be entitled to the same consideration for promotion as other staff members in accordance with the relevant Staff Regulations and Rules and administrative issuances.

…"

On 28 April 1999, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The discretionary authority of the Secretary-General is not absolute but must function within the requirements of due process and the pertinent rules and regulations. Furthermore, discretionary authority may be subject to review if it is shown to be based on lack of due process or mistake of fact, or if it is arbitrary or motivated by prejudice or other extraneous factors.

2. The JDC erred as a matter of law in its interpretation of the burden of proof in disciplinary proceedings.

3. The JDC erred on matters of fact which were crucial to the Respondent's case.

4. The outcome of the disciplinary proceedings was tainted by procedural irregularities.

5. OIOS and the JDC derogated from their responsibility to conduct a full and fair examination of all the evidence thereby depriving the Applicant of her rights of due process. Furthermore, the JDC allowed the intrusion of hostile and prejudicial material into its proceedings.

Whereas the Respondent's principal contentions are:

1. The Secretary-General's decision to demote the Applicant to the P-3 level with no possibility for promotion for three years was a valid exercise of his discretionary authority, and was not vitiated by substantive irregularity, procedural irregularity, improper motive, abuse of discretion or any other extraneous factors.

2. The Applicant failed to meet the standards of conduct required of staff members and international civil servants, and the established facts legally amounted to misconduct.

3. The Applicant's rights of due process were fully respected.

4. The sanction imposed against the Applicant is a disciplinary measure provided for under the Staff Rules and is proportionate to the offence.

The Tribunal, having deliberated from 31 October to 21 November 2001, now pronounces the following Judgement:

I. The Applicant joined the Organization on 1 March 1986, as a Political Affairs Officer at the P-4 level with the then Department of Political Affairs, Trusteeship and Decolonization (now Department of Political Affairs (DPA)) on a two-year fixed-term appointment. This appointment was extended and, on 1 October 1991, she was granted a permanent appointment. Effective 15 July 1997, she was transferred to DGAACS. On 19 May 1998 she was suspended from duty with pay, pending the outcome of the investigation into allegations of misconduct against her.

During the relevant period, the Applicant was working under the supervision of Mr. Araim, in the Decolonization Branch, DGAACS.

II. On 23 July 1998, the Administration, based on an OIOS report of investigation, submitted a memorandum to the Chairperson, JDC, in which it brought allegations of misconduct against the Applicant. The Administration claimed that the Applicant had, alone or in conspiracy with her supervisor, Mr. Araim, created, possessed, distributed or otherwise dealt with a series of documents. It also claimed that the Applicant was doing so with the goal of disrupting the transfer of the Decolonization Branch, in order to advance her career and to prevent the abolition of her P-4 post at the Decolonization Branch.

The documents referred to were the following:

(i) A letter from the Chairman of the Committee of 24 to the Secretary-General, allegedly prepared by the Applicant (the Chairman's letter). According to the Administration, the Applicant had drafted this letter on 18 September 1997, at 11.11 a.m. In the letter, the Chairman states that as a result of the proposed transfer, "the Decolonization Unit has suffered a set-back and has been downgraded" and that therefore he would have "no other alternative but to bring [the issue] to the attention of the General Assembly". The letter was delivered on the same day at 5.27 p.m.

The draft of the letter was indeed found in the Applicant's computer files when OIOS examined her computer, which had been impounded by the Security and Safety Service in December 1997. The computer stamp indicated that the draft was dated 18 September 1997 and timed 11.11 a.m.

(ii) Operative paragraph 15 of draft resolution A/52/L.64. The Administration alleges that the Applicant, together with Mr. Araim, asked their supervisor's secretary to add this paragraph to the draft resolution. The secretary testified that she had typed some changes to the draft resolution on the basis of handwritten notes of Mr. Araim, and that she had inserted the new operative paragraph 15, which was stapled to the notes. This operative paragraph did not reflect the Secretary-General's position on the issue of decolonization.

(iii) Speakers' notes for use by delegates at the General Assembly and the Fifth Committee. The speakers' notes were discovered by Mr. Cherniavsky, another employee in the same unit, also a subordinate of Mr. Araim. According to the Administration, Mr. Cherniavsky, having seen the Applicant and Mr. Araim working together, logged on to the shared drive on the DPA network server and observed, in real time, what they were working on. It turned out to be

speakers' notes opposing the Secretary-General's initiatives, particularly with respect to the abolition of the P-4 post. The following day, during the plenary session of the General Assembly, and two days later, in the informal meeting of the Fifth Committee, Mr. Cherniavsky and the Director, General Assembly and ECOSOC Affairs Division, recognized the texts they had found on the computer being used in several of the delegates' remarks.

(iv) Three forged documents. During the fall of 1997, three forged documents were circulating among delegations of the Fourth Committee. The Administration acknowledged that it possessed no direct evidence linking the Applicant to the three forged documents. Nevertheless, it concluded that these documents could have originated only from the Applicant and Mr. Araim, as they were the only ones who could have benefited from the derailing of the Secretary-General's reform plan.

III. In her comments of 17 June and 7 August 1998, the Applicant denied all the allegations contained in the OIOS report:

(i) She denied ever having written the Chairman's letter. She stated that at the crucial time, 11.11 a.m. of that day, she was at her dentist's office. In support of her claim she produced a written statement from the dentist confirming this.

(ii) With regard to operative paragraph 15, the Applicant denied ever asking the secretary to insert it into the text of the draft resolution, stating that she would never have trusted her supervisor's secretary.

(iii) As for the speakers' notes, the Applicant denied having prepared them. She provided written statements, confirming that at the relevant times she was either at home with her decorator or at a reception given by the Permanent Mission of the Socialist Peoples Libyan Arab Jamahiriya to the United Nations.

(iv) Regarding the three forged documents, the Applicant claimed that she had nothing to do with the preparation or dissemination of them. She also noted that OIOS did not present any evidence linking her to them.

IV. The Applicant's case was considered by the JDC, which adopted its report on 1 December 1998. The JDC considered three issues: i) whether the Applicant had been accorded

due process by the Administration; ii) whether the Administration had presented adequate evidence to substantiate the charges and whether the Applicant had submitted satisfactory evidence to explain and/or justify her questioned conduct; and, iii) whether the misconduct as alleged had occurred and, if so, what disciplinary measures, if any, would be appropriate.

The JDC determined that the Applicant was accorded due process by the Respondent. It concluded that the requirements of due process were not compromised by the fact that it was the Under-Secretary-General for General Assembly Affairs and Conference Services who had reported the matter to the Assistant Secretary-General, OHRM, because "any official other than [the Under-Secretary-General for General Assembly Affairs and Conference Services] would have taken the same course of action by reporting the matter to OHRM". Consequently, this "technical error" did not affect the outcome of the case.

Concerning the speakers' notes, the JDC, having reviewed the evidence produced by Mr. Cherniavsky's intrusions into others' computers, concluded that "it was not in a position to say that the Administration had presented adequate evidence to link [the Applicant] to the so-called speakers' notes". Also, according to the JDC "the Administration had presented no evidence whatsoever to substantiate the allegation that [the Applicant] had created, distributed and/or exploited the three forged documents".

In its conclusions, the JDC determined that the Applicant's misconduct was restricted to only two of the charges: that she had possessed, distributed or dealt with the Chairman's letter and with operative paragraph 15. It was not convinced that she had created them.

The JDC unanimously concluded that the Applicant

> "had consistently failed in her duty to assist, together with Mr. Araim, their supervisors in helping the Secretary-General to better understand the real wishes and concerns of Member States of the C-24 and help the latter to better understand the extent of the commitment that the Secretary-General had pledged to the cause of decolonization".

It also considered that this was not merely an indication of poor performance, and that the Applicant had violated the standards expected of her as an international civil servant, particularly staff regulations 1.1, 1.4 and 1.5.

V. On 11 January 1999, the Under-Secretary-General for Management informed the Applicant that the Secretary-General had decided to adopt the JDC's recommendation to demote her to the P-3 level and to deprive her of the possibility of promotion for three years. The Secretary-General gave reason to his decision as follows:

> "By concealing, in conspiracy with another staff member, information concerning the significant developments within the Committee of 24 from your supervisors, you had failed in your duty to assist your supervisors in helping the Secretary-General to better understand the real wishes and concerns of Member States of the Committee of 24 and help the latter to better understand the extent of the commitment that the Secretary-General had pledged to the cause of decolonization".

This behaviour is what the Secretary-General determined to have constituted misconduct.

VI. The Tribunal has repeatedly stated, that disciplinary proceedings are not of a criminal nature, but rather they are administrative proceedings, regulated by the internal law of the Organization. (See Judgement No. 850, *Patel* (1997).) As correctly stated by the JDC in its report, the Administration is not required to prove its case beyond reasonable doubt. It has only to present adequate evidence in support of its conclusions and recommendations. Adequate means "reasonably sufficient for legal action". (The Random House College Dictionary Revised edition 1982.) In other words, sufficient facts to permit a reasonable inference that a violation of law had occurred. In Judgement No. 897, *Jhuthi* (1998), the Tribunal stated that the burden of proof rests with the Respondent to produce evidence that raises a reasonable inference that misconduct has occurred. Once a *prima facie* case of misconduct is established, the staff member must provide satisfactory evidence to justify the conduct in question. (See Judgement No. 484, *Omosola* (1990) and *Patel, ibid.*)

It is clear from the facts that Mr. Cherniavsky had access to his colleagues' computers. He, himself, went into Mr. Araim's computer files and extracted some documents. Mr. Cherniavsky's proven access to others' computers raises substantial doubts as to which of the documents found in the Applicant's computer can truly be linked to her and which can not.

The Tribunal wishes to express its concern regarding the conducting of investigations by way of private intrusions into others' computers. It cannot accept that investigations could be

conducted without rules and guarantees of due process, and without giving due respect to inalienable rights as proclaimed by the Organization itself in the Declaration on Human Rights. This is regardless of what the internal regulations of the Organization say as to its rights to the contents of staff members' computers. This is even more troubling when considering that even OIOS, in its guidelines, is required to at least have the staff member present when retrieving evidence from their immediate vicinity, such as his or her desk.

VII. As for the possibility that the Applicant prepared the draft letter for the Chairman of the Committee of 24, the Applicant testified that at the relevant time she had no control over her computer, as she was out of the office on an emergency visit to her dentist. Thus, the Applicant could not have created that draft letter. The fact that in the attendance records there is no indication that she was out of the office can, at most, be seen as conclusive proof that attendance records do not always accurately reflect the attendance. The problem is further demonstrated by the fact that annual leave of almost a month in August 1997, during which time the Applicant went to Russia, does not appear to have been properly recorded. Regrettably, this proves that records of absence are not well kept. Worse, it is disturbing that there are officials confirming that during that time she was in the office, when it has been clearly demonstrated that she was not.

In addition, there is also the statement of the Deputy Permanent Representative of the Permanent Mission of Papua New Guinea, dated 23 February 1999. In it he reiterates the main points of his testimony before the JDC and states that he, together with the Chairman of the Committee of 24, had drafted that letter and the Applicant had nothing to do with it. Unfortunately, his testimony is not cited in the evidence section of the JDC report.

VIII Regarding operative paragraph 15 of draft resolution A/52/L.64, the secretary of the Director, General Assembly and ECOSOC Affairs Division, asserted that the Applicant, together with Mr. Araim, asked her to add this paragraph. According to her, she typed the document with the Applicant standing behind her, on the basis of Mr. Araim's handwritten notes, and added a

new operative paragraph 15, which was stapled to these notes. The evidence clearly indicates that the stapled paragraph 15 was not handwritten but was already typed and only needed to be inserted in the correct place within the text of the resolution.

The Applicant denies that this ever happened, stating that she would never have trusted the secretary.

The Tribunal regrets that the records of the evidence taken during the JDC proceedings were destroyed. Had the transcripts of the evidence been kept, the Tribunal would have been in a better position to form its own opinion as to the factual elements of a case such as this, which is characterized by contradicting or worse, confusing evidence.

It is difficult to understand how from the initial accusation (based on the secretary's statement) the Panel shifted to considering that what amounted to misconduct was the Applicant's failure in her duty to assist her supervisors "to help the Secretary-General to better understand the real wishes and concerns of Member States of the C-24". Ultimately, the Applicant's conduct amounted to misconduct not because she dealt with the document, but because she knew about it and did not report it through her supervisors.

It is the Tribunal's opinion, that, based on the secretary's testimony which is the sole evidence linking the Applicant to paragraph 15, the only charge that could have been brought against the Applicant with regard to this document is that she knew about it and should have immediately taken steps to inform her supervisors. However, the Applicant's supervisor was Mr. Araim.

In the JDC's words: "that duty required [the Applicant] … to continuously inform the leadership in DPA *through Mr. Araim* of any new developments". (Emphasis added.)

IX. It should also be pointed out, that the JDC, despite its conclusions concerning the three forged documents, stated:

> "[The JDC] also found that [the Applicant], in conspiracy with Mr. Araim, had conveniently taken advantage of the differences in understanding between the members of the C-24 and the Secretary-General, as exacerbated by the forged documents, and exploited the situation to the detriment of the interests of the Organization …"

In so doing, the JDC shifted from the initial charge of "creating, possessing, distributing or otherwise dealing" with the three forged documents.

X. Lastly, the Tribunal considered whether in this disciplinary case the Administration had truly presented a *prima facie* case. The Tribunal finds that this requirement is not met when the Administration presents contradicting or confusing evidence, i.e. not reasonably sufficient evidence for legal action.

XI. For the foregoing reasons, the Tribunal:

(i) Orders the rescission of the decision of the Secretary-General dated 11 January 1999 to demote the Applicant to the P-3 level with no possibility of promotion for three years;

(ii) Orders the Respondent to place the Applicant on a P-4 post at the earliest opportunity. Until such post has been identified, the Applicant is to be paid her salary and benefits at the appropriate P-4 level;

(iii) Orders the Respondent to restore the Applicant to the position she would have been in had she not been demoted, by retroactively paying her the difference in salary and related allowances between her P-3 and P-4 levels, with the appropriate within-grade increments, from 11 January 1999 to the date of this Judgement;

(iv) Orders that the Applicant's right to be considered for promotion be restored; or,

(v) Should the Secretary-General, within 30 days of the notification of this Judgement decide, in the interest of the United Nations, that the Applicant shall be compensated without further action being taken in her case, the Tribunal fixes the compensation to be paid to the Applicant at two years of her net base salary at the rate in effect at the date of this Judgement.

XII. In addition, the Tribunal orders the Respondent to pay the Applicant compensation of US$30,000 for the harm she sustained.

XIII. All other pleas are rejected.

(Signatures)

Julio BARBOZA
Vice-President, presiding

Marsha A. ECHOLS
Member

Spyridon FLOGAITIS
Member

New York, 21 November 2001

Maritza STRUYVENBERG
Executive Secretary